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SEX MORES AND THE ENFORCEMENT OF THE LAW ON SEX CRIMES: A STUDY OF THE STATUS QUO*

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INTRODUCTION

For a long time the law on sexual behavior has been called archaic and obsolete, and in recent years there has allegedly occurred a "sexual revolution," which if true compounds the lag of the law. But what is the sexual revolution, and what is the legal lag?[1]

Reflecting the tempo of the time, Heraclitus in 500 B.C. came forward with a philosophy of change. The universe, he said, is a concourse of ceaseless change—everything that we know about fluxes if it exists. The present time, too, is not a serene period, but today the talk is of revolution, not simply change. There is the "technological revolution," the "political revolution," the "art revolution," the "ideological revolution," and the "sexual revolution."[2] But what actually has taken place in regard to the sexual behavior of man?

In the Bible sex was regarded as a noble activity that "begot" offspring. "Be fruitful and multiply"[3] was the command. With later religious development, flesh along with other material aspects of life was considered evil incarnate as contrasted with the good or spiritual life.[4] Man was taught to be beholden to the world of the beyond, not to the world of the here and now. He became

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[1] In another place, with Cyril Phillips, I have attempted to relate the psychodynamics of sexual behavior and the formal law on sex. Slovenko & Phillips, *Psychosexuality and the Criminal Law*, 15 VAND. L. REV. 797 (1962). Here I attempt to relate sex mores, sex crimes, and the actual enforcement of the criminal law.

[2] "Of all the revolutions sweeping the world today, political, economic, social, scientific, and moral, the last may prove to be the most far-reaching, the most deep-going of all. Usually referred to as the Sexual Revolution, it could more accurately be called the Erotic Revolution." LIPTON, THE EROTIC REVOLUTION xiii (1965).

[3] Moses ordered the Hebrew people to multiply like the sands on the seashore. However, any Hebrew found with a member of another tribe was speared. Moreover, while God's chosen people were commanded to have children, those born of an adulterous union were often troubled because of it.

[4] The great seventh century teacher Maimonides, a rabbi and the most celebrated physician of his day, asserted in his *Guide for the Perplexed* that sexual intercourse should be held in contempt and desired only rarely, for it is too base to be performed except when needed. See generally GITTLESOHM, CONSECRATED UNTO ME: A JEWISH VIEW OF LOVE AND MARRIAGE (1966). But man has been ambivalent about sex. One psychoanalyst offers the following explanation:

> Because sexual activity outside the sacred grove and away from the recesses of the sanctuary demonstrates that man can renew *himself*, and that all living creatures are fertile in their own right, without benefit of holy sprinklings, lighted torches, sacrifices, incantations, or other extrinsic means . . . there is the danger . . . that sex, if unrepressed as a fact of profane existence, will bring into being the blasphemous thought that man might be his own creator. . . . [T]he central dilemma of the ritualist: How to convince himself that fertility—which is what primitive religion is all about—is good, but sex is bad, being an affront to the gods and a standing threat to turn men into gods by disclosing that men can be as creative as the invisible Others.

Schneiderman, *A Theory of Repression in the Light of Archaic Religion*, 53 PSYCHOANALYTIC REV. 220 (1966).

imbued with a burden of original sin, a sense of guilt, and eternal inadequacy.[5]

Today, it is said, the world of the here and now is not to be negated but "enjoyed in its fullness."[6] Among others, Norman O. Brown says that sexual repression is the greatest enemy of human happiness and freedom.[7] He proposes the healing of the split between the mind and the body. We are nothing but body, he says; all values are bodily values. For Brown, the core of human neurosis is man's inability to live in the body—to live (*i.e.*, to be sexual) and to die. The contemporary "sexual revolution," which may not fulfill Brown's demands, is described variously as (1) the separation of the pleasure aspects of sex from its procreative aspects through wider access to birth control, (2) more emphasis on fidelity and less of a taboo against forsaking virginity, and (3) increased pursuit of sex for pleasure alone.[8]

[5] Bettelheim, *Art: A Personal Vision*, in ART 41, 50 (1964). Consider the following prayer of confession: "Eternal Father, guardian of our lives: we confess that we are children of dust, unworthy of Thy gracious care. We have not loved as we ought to love, nor have we lived as Thou hast commanded, and our years are soon past. Lord God, have mercy upon us."

Compare, though, contemporary thought on the importance of self-esteem and feeling of adequacy: A greater love of oneself indeed leads to a greater capacity for love of one's fellows. This is illustrated by the fact that we experience increased love towards others when we complete successfully a constructive and difficult task and therefore feel worthy of being loved, or more precisely, we already love ourselves more. . . . Love for oneself will also be the basis for the differentiation between what is good or bad for another person. This fact is reflected in the well-known maxim: "Do not do unto others what you do not want done to yourself"; which becomes transformed into "Love they neighbor as thyself."

Racker, *Ethics and Psycho-Analysis and the Psycho-Analysis of Ethics*, 47 INTERNATIONAL J. PSYCHO-ANALYSIS 63 (1966).

[6] See REICH, THE SEXUAL REVOLUTION (1945). Even in the Bible belt it is now said, "the highest ethic of man is his happiness on earth." Farrell, *Minister and Medic*, Topeka Daily Capital, Oct. 29, 1966, p. 10. col. 8.

[7] BROWN, LIFE AGAINST DEATH *passim* (1959). See also SONTAG, AGAINST INTERPRETATION 256 (1966). But all human societies apparently have, and have had, codes of sexual morality. As humans we are very susceptible to rules in the sexual sphere. These rules are often prescribed with greater restrictiveness than in our society. It may be surprising to note that in traditional Africa, morality is strict, and one of its precepts teaches its young that "the maiden will know no man before marriage, and when married no other man but her husband." All the tribe of the fetishists (Naadians with piercing eyes, ferocious guardians mounted on stilts, actual mobile watchtowers, and rapacious "Wonouleaguis" or Bird Fen with blood-curdling cries and agile feet, Fire-eaters, "Niamous," etc.) unite to defend this morality.

The rule against incest is fundamental, and apparently our starting point in learning about right and wrong in sexual behavior. See Roheim, *The Anthropological Evidence and the Oedipus Complex*, 21 PSYCHOANALYTIC Q. 537 (1952).

Stanley A. Leavy, psychoanalyst, observes:

The first loves of human beings are formed within the families in which they are born. They are loves of unconditioned strength, and they are all doomed to disappointment. . . . [T]he family or a close equivalent of the family [is] the setting in which attachments to other people first take place and are given the form that they maintain later, at least unconsciously. Since their objects are members of the family in which the child is born or raised, they are incestuous ties, and bound to come under the ban of the incest taboo. Even . . . radicals . . . do not hope for the abolition of the incest taboo, which is not the result of any priestly legislation, but a universal cultural form having survival value, because it makes for genetic variation. The effect of the rule against incest is to institute from early childhood a fundamental distinction between right and wrong in sexual behavior. This distinction and the legislation and the proprieties that flow from it are by no means uniform in different societies. Nor can [we] forget that distortions of the meaning of right and wrong, especially in their sexual dimensions, are among the primary causes of emotional disorder. All the same, there is and is bound to remain a predisposition to sexual morality which will fit into the code given by a society, and limit freedom.

Leavy, *Psychoanalysis and Moral Change*, Psychiatric Opinion, Oct. 1966, p. 33.

Notwithstanding the so-called "new morality," man usually still aspires to have a virgin for a bride. Every marriage involves a transference of feelings from parent to spouse, and psychologically speaking, a man is not committing incest when he has sex with a virgin; a woman who has had sex may be mother.

[8] See generally GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, SEX AND THE COLLEGE STUDENT (1966): Louisiana Psychiatric Association, Newsletter, March 1966, p. 1.

The breakdown of the "double standard" is sometimes called the "sexual revolution." William H. Masters and Virginia E. Johnson say:

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Is this, though, a "sexual revolution"? A revolution represents a bouleversement, a quick rate of change; but it is usually also regarded as a means (of last resort) to achieve a better and more noble life. The contemporary state of affairs, however, is instead a frenetic pursuit of pleasure by alienated individuals and a perverted sense of human relationships, which results more often in despair than in happiness. Lack of control results not in freedom but in catastrophe, and those who are permissive soon discover that "intimacy without emotion" is disappointing and does not produce pleasure or fulfillment. Sexual restrictions may produce personality disorders, but complete sexual freedom may produce even more disabling conflicts.

Physical change or development external to man is not the same as subjective change or development within himself. Actually, we all begin emotionally in the state of Adam. The theological doctrine of original sin rests on the premise that every person emotionally begins at the beginning. But guideposts for human development, bringing out the best (as well as the worst) of the human spirit, may be found in the past. The Renaissance man like the Greek man long ago came to feel that the present world is a good world to live in. The Renaissance period tried to show man a vision of the world of the here and now along with a vision of how to live in the world with dignity and fulfillment.[9]

At a recent annual meeting of the American Orthopsychiatric Association, which was devoted to the subject of the contemporary "sexual revolution," newspaper reporters appeared dissatisfied with the usual definitions of the sexual revolution. The importance of the here and now is not a novel idea. So, after the meeting, the reporters corralled the speakers and sought to pin them down on a precise definition of the sexual revolution. What totems have been overthrown? The speakers concluded that the contemporary sexual revolution consists mainly in freer discussion of sexual matters. It is not the lifting of some taboo or other that has suddenly taken place, they said, but rather the admission of sex to general discussion. It is, they said, more out in the open.

In fact, though, to go back a period, even this is an old story. The current preoccupation with sexuality is really no different from preoccupations with

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The double standard has always dishonored sexuality within the marriage relationship—or before it or outside it. The concept, bolstered by ancient laws, that sex is a husband's right and a wife's duty has made and continues to make for marriages in which sexuality is exploited and dishonored. And the double standard as it applies to young people is destructive of the real integrity of both sexes. The boy is allowed to "go as far as he can." Sex, apart from any other values, is considered all right for him. The entire responsibility for the limitation of sexual experimentation, under the double standard, rests with the girl. The implication is that the girl, being non-sexual or less sexual, is better able to control sexual conduct.

The so-called sexual revolution we see among young people today consists in the very understandable revolt among young women against the double standard and against the implication that they are asexual beings until their wedding night. But that revolt has left a complete vacuum in responsibility. The boys—with society's blessings, on the whole—have never been expected to take any responsibility except perhaps some regard for the prevention of pregnancy. Now that the more efficient means for prevention are controlled by girls, even that shred of responsibility has vanished. The girls are now saying, in effect, "If sex, just plain sex, is all right for boys, why not for girls?" Masters & Johnson, *A Defense of Love and Morality*, McCall's, Nov. 1966, p. 102, 173.

[9] Bettelheim, *supra* note 5, at 50. See also MEERLOO & NELSON, TRANSFERENCE AND TRIAL ADAPTATION (1965); Arrau, *A Performer Looks at Psychoanalysis*, High Fidelity, Feb. 1967, p. 50.

it in the past. What has happened is that Freud lifted a century and a half of Victorian suppression.

During the nineteenth century, two subjects were taboo: sex and money. People talked as if they did not exist. In this way Victorian morality and what was supposed to be good taste made hypocrisy a virtue. Owners of industry called themselves philanthropists, and parents told children that they were brought by the stork. Although no one talked about sex or money, everyone thought about them, but in a confused and shameful way as if they were incongruous subjects that could not be fitted into either morality or the accepted image of the world. Marx and Freud punctured that scheme of things. Marx said that we must recognize and realistically talk about money. Shortly thereafter, Freud said that we must likewise talk about sex.[10] This double revelation caused upheaval, and today sex and money are dominant themes of discussion.[11]

One might also say that the sexual revolution lies in the apparent fact that boys are becoming girls, and girls are becoming boys. But, in some measure, this is another aspect of the freer discussion of sexual matters. By long hair and dress style, these adolescents are bringing to the fore the inner turmoil and struggle over sexual identity that has always reigned within persons of that age. By showing their difficulty, they are asking for a moratorium on being considered adults and having demands of adulthood put upon them.[12]

But talk and revelation aside, there is very little evidence that human nature has altered in the short span of recorded history. Some things change most slowly. Sex is an elemental drive that has a variety of physiological and psychological manifestations at every age level. To be sure, the methods of sublimating instinctual drives may change, but the drives themselves remain

[10] Freud pointed out that children as well as adults have a sexual life (although of a different sort), but even this is regarded not as a discovery but as a disclosure. See Chadoff, *A Critique of Freud's Theory of Infantile Sexuality*, 123 AMERICAN J. PSYCHIATRY 507, 508 (1966).

[11] De Rougemont, *The End of Darkness*, Realites, Aug. 1957, p. 5. See also May, *Antidotes for the New Puritanism*, Saturday Review, March 26, 1966, p. 19. In 1965, the Bishop of Cuernavaca, Mexico, said that the time had come for the church humbly to recognize the world's debt to Sigmund Freud. N.Y. Times, Sept. 9, 1966, p. 46M, col. 4.

[12] John Gonzalez, psychiatrist, says:

> [W]hy should the hair on the head be chosen as a vehicle of expression at all? Considering this entire matter . . . from an intrapsychic instead of from a social or interpersonal point of view, I think it must be conceded that intrapsychically, preoccupation with the head on a conscious level is an expression of preoccupation with the penis on an unconscious level. The head and the penis are probably the two most highly valued areas of the body. They are at opposite (mirror image) ends of the trunk. Both are associated anatomically with intense concentrations of hair growth that are absent from most other areas of the body surface. And all the orifices of the body are either in the head or in the perineal region. The word "haircut" is used in English slang to mean a venereal lesion on the glands. It has been known for years that both in dreams and in other conscious manifestations of unconscious life, that the head is an upwardly displaced phallic symbol. What a man does with his hair, how he wears it, the manner in which he presents it to himself and to the public most of the time is probably expressive of unconscious wishes to exhibit his genitals and to communicate both to himself and to his fellows the meaning of his genitals to him and what he would like them to mean to those around him.
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> Is not the celibate monk who devalues his hair and shaves it off saying something about the devaluation of his penis and his status as a psychological castrate?

Gonzalez, *Long Hair and Adolescence*, Louisiana Psychiatric Association, Newsletter, Jan. 1967, p. 4.

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essentially the same.[13] Styles in civilization are unstable, Freud said, like styles in women's clothing, and a person clothes the desires of his libido in the approved habiliments of the time.

As always, there is an ideal which may or may not represent what people actually think or do privately. Research data here is very inadequate. To a considerable degree, it is not possible to say what our attitudes about sex really are today and whether the way of expression of the sexual instinct in sexual behavior is really changing.

Surveys leave much to be desired. Many social scientists question the reliability of the Kinsey technique of interviewing, and surveys such as the Kinsey Report are incomplete because they do not include material on fantasies and dreams. Patients in long-term psychotherapy find it most difficult to report accurately on their sexual feelings and behavior, and even today, they still employ much innuendo or denial and self-deception, so it cannot be said that a superficial survey is very accurate. One's sex life is basically one's own secret. One might say that a good motto for any investigator of sex is that he ought to expect to be told lies.[14] But whatever the shortcomings of the Kinsey survey, it

[13] Victorian and other programs of sexual purity did not subdue the sexual aspect of man. Robert Waelder, psychoanalyst, observes:

> In the ages now past, the attack against sexuality did not really obliterate or totally subdue the sexual aspect of man. It came out in other ways: in hypocritical behavior, in actions in which the right hand did not know what the left hand was doing, in perversions—including, in particular, sadistic attitudes whose sexual implications were not seen, in hysterical symptoms so frequent at the time, and in other forms as well.

He also states:

> The moralists of yesterday tried to purge man of sexual lust: they refused to believe that, with most people, sexuality cannot be suppressed except at enormous cost in terms of other human values. The moralists of today try to purge man of all selfishness and personal aggressiveness; they refuse to believe that, in most cases, self-concern and a measure of aggressiveness cannot be completely suppressed except at enormous cost in terms of other human values. The attempt to make all people chaste has failed; the attempt to establish complete equality will eventually fail as well.

Waelder, *The Concept of Justice and the Quest for a Perfectly Just Society*, 115 U. PA. L. REV. 1, 10 (1966).

Freud lived through the Victorian era, and in his first sociological paper, *Civilized Sexual Morality and Modern Nervousness* (1908), he sharply criticized the prevailing sexual arrangements and was evidently in favor of revolutionary changes in this sphere, although he did not consider it within his province to specify the details. His main misgiving was lest the social restrictions in the sexual sphere, which had previously released so much energy for the purposes of civilization, were now reaching their limits in this direction and actually thwarting those purposes through the amount of neurotic incapacity they produce. Freud also expressed the opinion repeatedly that much of our lack of freedom in thinking proceeds from the restrictions imposed by our education in the fields of religion and sexuality. See 3 JONES, THE LIFE AND WORK OF SIGMUND FREUD 336, 347 (1957).

[14] See WINNICOTT, THE FAMILY AND INDIVIDUAL DEVELOPMENT 79 (1965). Max Levin, Clinical Professor of Neurology at New York Medical College observes:

> Social psychologists have gone overboard in their dependence on the questionnaire. Their studies look so scientific with all those charts and sophisticated mathematical correlations, but they lack substantial value because they are based on data which are crude and unreliable. The information given by a respondent about his marriage is often worthless. He may give false answers willfully, or out of shame or ignorance. In the practice of psychiatry it is a commonplace that a wife will say, for example, that she has orgasms and that her sex life is satisfying, when further inquiry reveals that she doesn't know the meaning of orgasm and that her sex life is quite the opposite of what she thinks. The truth in the field of sex is not easily reached by way of the questionnaire. The investigator with the best chance to arrive at the truth is the psychiatrist or therapist who sees the patient often and who, in the course of therapy, wins his confidence and enables him to come out from behind his defenses. It is no accident that the adverse criticism of Kinsey's work has come mainly from psychiatrists, for it is they who have the clearest insight into the limitations of the questionnaire in the study of human sexuality.

Levin, *Scientism and Humanism*, 33 CURRENT MEDICAL DIGEST 1748 (1966). See also Louisiana Psychiatric Association, Newsletter, March 1966, p. 3. A summary on sex research appears in Krich, *Before Kinsey: Continuity in American Sex Research*, 53 PSYCHOANALYTIC REV. 233 (1966). See also MASTERS & JOHNSON, HUMAN SEXUAL RESPONSE (1966); Krupp, *Sex in the Laboratory*, Saturday Review, Nov. 19, 1966, p. 38.

gives substantial support to the contention that there is a big gap between the formal law on sex and actual practices.

THE LAW ON SEX

The law on sex covers non-perverse as well as perverse behavior. Scientific knowledge about the psychodynamics underlying perversions and other sexual behavior has advanced enormously since the advent of Freud, and the law in this area is called obsolete because it does not formulate its policy in the light of scientific findings and contemporary morality, however disguised it may be.[15]

Judging from a perusal of the statutes on sex, the criticism may seem to make sense, but actually, what is obsolete? Does the obsolescence lie in the laws or the behavior that brings arrest and trial, as many vocal critics would have us believe? Or have the critics clouded the main problem? It would seem that true obsolescence lies not in arrest and prosecution but in the disposition of sex offenders.

True, the vestiges of yesteryear remain on the books. But while the law on the books may not keep pace with scientific knowledge or community mores, the law as enforced or interpreted by the police, the district attorney, and the court, in fact, corresponds with an apparently high degree of fidelity to the wishes of the public, even when the public may not have committed itself to any codification of these wishes.

The law as it exists on the statute books resembles only distantly the law as it is put into force. Laws are often altered in their interpretation, or they may fall into disuse or be entirely disregarded (as, for example, a law which provides that a man may not on Sunday kiss his wife on the street). Thus many laws are changed or rendered ineffective without any legislative action. Indeed, it is the exception to find a law abrogated by repeal. Legislators seem to have a passion for framing laws but little interest in repealing them.

Some laws may remain on the books as a salve to the public conscience. The public may want to be on record as opposing sin. This attitude is reflected in

[15] Professor Rodell says:

> Although laws do vary from state to state, throughout most of the nation the only kinds of sexual gratification that are not potentially subject to police interference, arrest, even conviction, are three: petting or necking short of intercourse; solitary masturbation in private; and intercourse (in the orthodox manner) between husband and wife. . . .
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> Merely to state these facts illumines their absurdity. It is almost a certainty that most of the people who read these words have committed—perhaps yesterday, perhaps years ago—sex crimes of one sort or another: maybe fornication (intercourse between two unmarried people of different sexes); maybe adultery (the same where one or both are married but not to each other); maybe some mild and youthful homosexual experience; maybe an unorthodox form of sex behavior, probably oral or anal, with one's own spouse. Not one in a million such episodes is likely to be discovered, not one in a hundred million prosecuted. While thousands of divorces are granted every year in New York, where the sole ground for divorce is adultery, prosecution for adultery, a crime in New York, will not occur once in a generation. Yet so long as laws against widespread sex practices remain on the books, however rarely and gingerly enforced, police retain the right to spy and reveal, political or personal enemies hold a handy wedge for blackmail, and respect for all law sinks lower, as during Prohibition days, due to the hypocrisy of such unenforced and unenforceable bans on basically harmless sexual behavior.

Rodell, *Our Unlovable Sex Laws*, Trans-Action, May-June 1965, p. 36.

the common expression, "There ought to be a law against it," but there may be little enthusiasm for wiping out "sinful" acts. Even the confirmed adulterer may be a strong advocate of laws prohibiting adultery.[16]

There is a wide gap between principle and practice in many aspects of human behavior, not only in the area of sex. But especially in the area of sex there is a reluctance among legislators to repeal existing enactments (whatever their merit). They feel it would be politically unwise to tamper with sex laws which traditionally are associated with religion and morality. Therefore one might expect to find an unusually wide gap between the formal law on sex and the actual operation of the law.

SEX LAWS AND PUBLIC COMPLAINT

Large numbers of people habitually violate sex laws, as Kinsey pointed out, but few people are arrested, and criminal proceedings are rarely instituted. This is due, in large measure, to the fact that sexual behavior is usually a private matter. In cases of abortion, fornication, adultery, incest, and much homosexual activity, a complaint is seldom filed, and without a complaint the police do not investigate.[17]

Prostitution, a less private matter and indeed a commercial undertaking, has been considered an offense through the ages, but it too is feebly prosecuted. The objection to prostitution stems from its indiscretion and public offensiveness rather than its sexual nature. There are in fact many hints that the public would wish to preserve prostitution. One New Orleans mayor frankly said, "You can make prostitution illegal—but you can't make it unpopular." Prostitution may also have social usefulness by reducing the incidence of rape.

Selling pornography is another activity which, while illegal, is rarely prosecuted.[18] It has always been obvious that the sex instinct in the young and impressionable can be distorted or excited by pictures or the printed word. Many people give their assent to some kind of control, but prosecution is lax here, mainly due to our abhorrence of censorship.[19]

[16] A cynic might say that criminal laws "are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."

[17] Statutes on fornication have been defended on the ground that they allow the police to arrest or threaten the male customer of a prostitute, but such statutes are rarely if ever enforced. In the case of juveniles, however, sexual intercourse is a basis for a delinquency proceeding.

[18] Throughout history, there has been a tremendous need to prove that the world is not as it appears. Plato's *The Cave* is best noted for the statement of the superiority of abstract ideas over concrete things. Like abstract idealism, pornography is a turning away from the world. Pornographers too de-realize the world. They do not take into their fantasies very much of the reality of the external world. Pornography is merely the representation of the fantasies of infantile sexual life as those fantasies are edited and organized in the masturbatory daydreams of adolescence. See Brophy, *Victorian Pornography*, 73 NEW STATESMAN 81 (1967); Jacobsen, *An End to Pornography?*, Commentary, Nov. 1966, p. 76, 78. Pornography is a functional alternative to prostitution. Both provide for the discharge of impersonal, non-marital sex; prostitution provides it via real intercourse with a real sex object, and pornography provides it via masturbatory imagined intercourse with a fantasy object. Paper presented by Samuel Polsky at Annual Meeting of the American Sociological Association, Miami, Fla., Sept. 1, 1966.

[19] As Justice Douglas said, "[J]udges cannot gear the literary diet of an entire nation to whatever tepid stuff is incapable of triggering the most demented mind." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 432 (1966). (Concurring opinion.) Earlier, he said, "I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field." Roth v. United States, 354 U.S. 476, 514 (1957). (Dissenting opinion.)

Perhaps purposefully, the legal definition of pornography or obscenity is left ambiguous. The United States Supreme Court said in the 1957 *Roth* case that a work may be judged obscene only if its dominant theme appeals to the prurient interest of the average person applying contemporary community standards, and if the work is devoid of redeeming social value.[20] No one can delineate "an average person," "contemporary community standards," "dominant theme," "prurient interest," and "redeeming social value."[21] A further difficulty in prosecution is that most pornography appears in magazines or periodicals. Even if a court were to outlaw a particular issue of a magazine, the next issue of the same magazine would not fall under the ban, as its contents would be different. An injunction or decree that operates prospectively would violate the prohibition against prior restraint censorship. Furthermore, any ban that is imposed applies only within the jurisdiction of the court.

We must not assume that everyone would agree to ban pornography, even if to do so were an easy matter. Pornography has its proponents among a large segment of the public and also among social scientists. Some reputable psychiatrists and psychologists consider that it may even be desirable to have prurient material to satisfy the prurient-minded. It may fill a need which would otherwise be manifested in more undesirable or shocking ways; it may gratify a pervert and render him socially innocuous.[22] But whatever the spokesmen say, for or against pornography, the people themselves decide if it is to

[20] Roth v. United States, 354 U.S. 476 (1957). It is interesting to observe that decisions which ended up liberalizing the law on pornography resulted in conviction of the defendant involved. In the *Roth* case, for example, the Supreme Court sustained Roth's conviction for mailing an obscene book and circulars. Other persons subsequently derived the benefit of standards set down in the decision. Ginzburg v. United States, 383 U.S. 463 (1966), by adding another standard, may likewise result in fewer successful prosecutions in subsequent cases.

[21] See Ginzburg v. United States, 383 U.S. 463 (1966), in which the Supreme Court applied the *Roth* criteria, but additionally considered the setting in which the publications were presented. The decision might be regarded in future cases as a softening of the definition of obscenity. Disposition of cases presently before the Court will provide a better idea of what it had in mind when it decided *Ginzburg*. See American Civil Liberties Union, Newsletter, Oct. 1966, p. 3; Magrath, *The Obscenity Cases: Grapes of Roth*, in 1966 SUPREME COURT REVIEW 7. For a critical view of the *Ginzburg* case, see generally REITMAN, FREEDOM ON TRIAL (1966).

[22] An emotionally healthy person has no need for artificial aid to boost his libido. An individual is disposed to pornography when he is unable to achieve closeness to other human beings. He is at least interested in people, although limited to looking and imagining. To the extent that society, in attempting to confine legitimate sex to the family, cannot count fully on the mechanism of repression and suppression, many authorities believe that it must provide stigmatized safety valves such as pornography and prostitution. Thomas Aquinas observed, "A cesspool is necessary to a palace if the whole palace is not to smell." See Polsky, *supra* note 18; Rogers, *Pornography—A Misplaced Emphasis*, 12 CORRECTIVE PSYCHIATRY & J. SOCIAL THERAPY 461 (1966).

Expert opinion on the effects of obscenity is divided. Is pornography a release or a stimulus? *Compare* Gilliland, *Pornography*, in SEXUAL BEHAVIOR AND THE LAW 829 (Slovenko ed. 1965) *with* Wertham, *Mass Media and Sex Deviation*, in *id.* at 850. The New Jersey Committee for the Right to Read recently reported to the Governor its findings of a three-month study that sexually oriented publications do not "cause" anti-social behavior among the young. 934 psychiatrists and psychologists in New Jersey were included in the survey. To the question whether they had had normal patients who were provoked to anti-social acts by exposure to sexually oriented literature, 95.3% answered no; 66.8% replied affirmatively to the question whether sexually oriented materials might serve as a vicarious outlet for some individuals and thus minimize anti-social behavior. ACLU Feature Press Service Bull. No. 2285, Dec. 26, 1966, p. 1. Others contend that there is a connection between obscenity and anti-social behavior. Relying on "common sense," one author points out that obscenity does not operate with the immediacy of a cyanide pellet, but with the imperceptible slowness of leukemia. KILPATRICK, THE SMUT PEDDLERS (1960). See also LeShan, *At War with Batman*, N.Y. Times, May 15, 1966, § 6 (Magazine), p. 112; Spock, *How Can We Protect Our Children From Obscenity?*, Redbook Magazine, April 1965, p. 18; *Symposium—Should We Censor What Adolescents Read*, The PTA Magazine, March 1965, p. 10.

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flourish or perish. A news vendor sells what people buy, economics being closest to his heart. If the people (even a handful) were to boycott a newsstand which sells pornography, the obscene literature would vanish overnight. But, law or no law, a boycott rarely happens.

Thus, when the public prefers to let certain crimes go unpunished, law-enforcement officials follow suit. On the other hand, other sex crimes are investigated and prosecuted with vigor. Rapists, sex-slayers, and child molesters are spared no penalty. To be sure, to avoid newspaper publicity, the victim here either fails to complain or does not wish to testify. But these crimes are not private consensual acts, nor are they purely sexual. They are crimes of violence in which the offender inflicts sex upon a passive victim. The enforcement of laws against these crimes does not, therefore, reflect antisexual attitudes of the community, but instead reflects the community's wish to protect its more helpless members from attack.[23]

SEX LAWS AND OBSCURE PUBLIC ATTITUDES

It is clear, then, that the community tolerates certain so-called sex offenses and vehemently condemns others. But certain offenses fall somewhere in between. Among those clouded in the most obscurity are abortion and "crimes against nature."

Abortion

Should easier abortion accompany the sexual revolution? Ideally, pregnancy should be the happy prelude to the birth of a wanted child, but the facts often seem to be otherwise. It is estimated that twenty per cent of all pregnancies terminate in spontaneous or induced abortions, half of which are criminal.[24] There has been much controversy even over the purely medical question of whether an abortion is therapeutic, and many physicians in their opinions have not kept to medical considerations but have involved social and economic considerations as well. It has been argued that abortion is justified under numerous and varied conditions. Among such conditions are danger to the health of the mother or fetus, known major defects of the fetus, addictions of the mother which would prevent proper child-rearing, conception of the fetus as a result of a sex crime, out-of-wedlock pregnancy in a girl under eighteen, or inability of the family to support another child.[25]

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[23] The deeply disturbed criminal may have sexual problems but he has a lot of other problems too, and as in the case of Texas sniper Charles Whitman, it is thanatos (hostility), not eros, from which society must protect itself. Time, Aug. 12, 1966, p. 18.

[24] WILLIAMS, OBSTETRICS 503, 509 (13th ed. 1966).

[25] See R. v. Bourne, [1938] 3 All E.R. 615, 618-19.

In 1966 England enacted an abortion act which provides that an abortion may be performed if two physicians certify in writing that: (a) the mother's physical or mental health may be in danger; (b) the child is likely to suffer from physical or mental abnormalities "that would deprive it of any prospect of reasonable enjoyment of life"; (c) the woman is or will be physically or mentally inadequate to be the mother of the child; or (d) the woman is "a defective" or became pregnant when under the age of sixteen as a result of rape or incest. See Subcommittee of the Medical Women's Federation, *Memorandum on Abortion Law Reform*, British Medical Journal, Dec. 31, 1966, p. 1697, 1649, discussed in Gould, *The Abortion Controversy*, 72 NEW STATESMAN 934 (1966). It is noted that doctors, like laymen, are far from unanimous on the points at issue.

Even these suggested justifications are contested, mainly by religious groups. But if they were enacted into law, the demand for criminal abortion would continue as ever for the vast majority of abortions are not therapeutically justified. Law or no law, many physicians and nurses are not interested in performing an abortion simply because a girl wants one. Even an appendectomy would not be performed simply because a person wants one, but only when medically justified.[26]

In America, it has been suggested that abortions performed in licensed hospitals be legalized if at least two physicians agree that there is substantial risk of grave damage to the mother's physical or mental health or of the child's being born with a grave physical or mental defect, or when the pregnancy results from rape or incest. Bills to amend the law along these lines were introduced, but failed, in New York and California.

During the summer of 1966 several prominent physicians in California were charged by the state's Board of Medical Examiners with unprofessional conduct after it was learned, and they freely admitted, that they had performed therapeutic abortions on women who had had German measles early in their pregnancies. California law prohibits abortion unless the life of the mother is in imminent danger. Eight states (Alabama, Colorado, Massachusetts, Maryland, New Jersey, New Mexico, Oregon, and Pennsylvania) and the District of Columbia now permit abortions for other reasons. In November 1966 the California State Bar Association endorsed proposals to permit therapeutic abortions in cases involving rape, incest, and the potential birth of a malformed child. See Medical World News, July 8, 1966, p. 36; Medical Tribune, Dec. 19, 1966, p. 1.

For extensive discussion of the abortion problem see generally, CALDERONE, ABORTION IN THE UNITED STATES (1958); GEBHARD, POMEROY, MARTIN & CHRISTENSON, PREGNANCY, BIRTH AND ABORTION, 159-214 (1958); LOWE, ABORTION AND THE LAW (1966); ROSEN, THERAPEUTIC ABORTION (1954); TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED (1936); WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957); Anderson, *Psychiatric Indications for the Termination of Pregnancy*, 10 J. PSYCHOSOMATIC RES. 127 (1966); Bolter, *The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice*, 119 AMERICAN J. PSYCHIATRY 312 (1962); Boulas, Preucel & Moore, *Therapeutic Abortion*, 19 OBSTETRICS & GYNECOLOGY 222 (1962); Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 (1964); Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 So. CAL. L. REV. 125 (1962); Kummer & Leavy, *Criminal Abortion—A Consideration of Ways to Reduce Incidence*, 95 CAL. MEDICINE 170 (1961); Martin, *Abortion*, Saturday Evening Post, May 20, 1961, p. 19; Williams, *The Law of Abortion*, 5 CURRENT LEGAL PROBLEMS 128 (1952).

[26] However, there is recent literature advocating abortion on demand: LADER, ABORTION (1966); Hardin, *Blueprints, DNA, and Abortion: A Scientific and Ethical Analysis*, Medical Opinion & Review, Feb. 1967, p. 74; Ober, *We Should Legalize Abortions*, Saturday Evening Post, Oct. 8, 1966, p. 14; Rossi, *Abortion Laws and Their Victims*, Trans-action, Sept.-Oct. 1966, p. 7; Schur, *The Abortion Racket: Product of Laggard Law*, The Nation, March 5, 1955, p. 199; Shapiro and Himmelfarb, *Church v. State*, Commentary, Dec. 1966, p. 79; Szasz, *The Ethics of Birth Control Or: Who Owns Your Body?*, 20 THE HUMANIST 332 (1960).

One commentator observes:

> While the American Law Institute's proposed model law would widen the indications for abortion, it does not reach the basic issue. It is not for the police, or the doctors, or indeed for the state, to decide which women qualify for abortions. It is a woman's right to determine whether or not she wants to bear children. The best proposal for a law comes from the New York Civil Liberties Union. It simply reads: "A person is guilty of abortion if he is not a duly licensed physician and intentionally terminates the pregnancy of another otherwise than by live birth." This frees the doctor from any criminal liability for performing abortions in any situation, and places responsibility for having the operation with the woman.

Ridgeway, *Birth and Non-Birth*, The New Republic, Nov. 26, 1966, p. 38, 39-40.

To express a personal viewpoint, I must say that with some exceptions I feel prejudiced against abortions, yet at the same time I do not feel justified in saying that a woman, unknown to me, must go through with her pregnancy, unless I and other members of the public are prepared to provide for the child in some care-taking institution. The unwanted child develops into the neurotic, psychotic, or criminal. I requested a secretary at The Menninger Foundation to obtain the opinion of her close women friends on abortion. Frank, intimate opinions were sought. See text accompanying note 14 *supra*. On the whole, the observations follow the current recommendations for a therapeutic abortion law. They would allow abortion only if the life of the mother is in imminent danger, or in cases involving rape, incest, and potential birth of a malformed child. They would not allow the mother to make the decision, but would require it to be made by some omnipotent figure.

To speculate, we might say that to some extent we identify with the embryo, and if we had been aborted, we would have been deprived of the beauty of life. "There but for the grace of God go I." Hence, perhaps selfishly, we feel that every possible effort must be made to keep an embryo or new-born child alive. Exceptions are justified only when "therapeutic." In those cases life would not be worth living. See Medawar, *Science and the Sanctity of Life*, Encounter, Dec. 1966, p. 96.

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It must be recognized that an abortion does not erase the experience of having been pregnant. A girl may seek an abortion, but afterwards she may feel a great sense of hurt and loss and be deeply resentful about having had the abortion. The Group for the Advancement of Psychiatry in its report on *Sex and the College Student* points out:

> Much has been written about the possible emotional effects of the furtive and sordid atmosphere in which illegal abortions are performed; in practice, we observe that the traumatic results of a legal abortion are not necessarily less severe than those of a criminal one. We suspect, in fact, that there may be more unresolved conflict in feelings when the abortion is legal, simply because this type of abortion is usually arranged for the student by someone else (parent, family doctor), while the young woman herself usually takes the active responsibility in arranging for criminal abortion. As a result, legal, or therapeutic, abortions may be performed in many cases where the wish for them is ambivalent and where they might not have been performed at all without the active involvement of others.[27]

Generally speaking, whenever an abortion is therapeutically justified a physician will perform it, and he will not be prosecuted (though to be sure, in some states, the law hangs over the physician's head).[28] Even under existing, rigid laws there are well over one million abortions performed annually in the United States, most of them by reputable physicians.[29] There is virtually no risk of criminal prosecution, for no physician after consulting with competent colleagues has been convicted for criminal abortion in the United States.[30] Abortions (and sterilizations) are performed, but recorded usually as something else, in offices and in many private hospitals, but often not in charity hospitals which are governed by a politically appointed board (where the poor seek assistance). Intrauterine devices are frequently used. A New York physician observes:

> To the best of my knowledge reputable hospitals in New York are subjected to no inquiry, regulation or supervision on their abortion practices by law enforcement

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[27] GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *op. cit. supra* note 8, at 63. A review of the literature, 1955-64, on psychiatric sequelae of abortion, concludes:

> It is sobering to observe the ease with which reports can be embedded in the literature, quoted, and requoted many times without consideration for the data in the original paper. Deeply held personal convictions frequently seem to outweigh the importance of data, especially when conclusions are drawn. In the papers reviewed the findings and conclusions range from the suggestion that psychiatric illness almost always is the outcome of therapeutic abortion to its virtual absence as a postabortion complication. . . . There is some agreement that women with diagnosed psychiatric illness prior to abortion continue to have difficulty following abortion. There is lack of information regarding the effect of passage of time on the responses of women who have been aborted. . . . There appears to be a lack of conclusive data about the effects of therapeutic abortion.

Simon & Senturia, *Psychiatric Sequelae of Abortion*, 15 ARCHIVES OF GENERAL PSYCHIATRY 378, 387-88 (1966).

[28] There are a few exceptions, which have occurred in cases where the physician has specialized in abortions, charging high fees. See People v. Cohen, 18 N.Y.2d 650, 219 N.E.2d 427, 273 N.Y.S.2d 75 (1966) (physician held not entitled to suppression of telephone conversations obtained as a result of a court-authorized wiretap on his office). As long ago as 1924 Professor Francis H. Bohlen of the University of Pennsylvania Law School wrote: "[L]egal and professional penalties are rarely imposed. . . . [T]he social taboo against such operations is weakening, unless they imply immorality." Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819, 832 (1924).

[29] Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 W. RES. L. REV. 439 (1965).

[30] Foster, *Lawmen, Medicine Men and Good Samaritans*, 52 A.B.A.J. 223, 226 (1966).

> agencies beyond what is considered usual for any hospital function. Doctors regulate what they will do through their own committees, boards and medical societies, and their practices vary widely between institutions and communities. The fear of getting a reputation for being a hospital where abortions are easy is one of the main deterrents to a liberal policy. The oldest, most respectable Protestant medical school hospitals appear to be the most liberal. Their security allows them a freedom to act according to their own best judgment, which an institution with a less secure reputation feels it cannot afford. At present a rational humanitarian attitude about abortions appears to be up to physicians.[31]

Thus, the police do not carry on a surveillance of the physician's office or hospital, and in the case of a complaint, the physician can always say that the abortion was necessary to save the woman's life, the usual legal ground for therapeutic abortion, or that it was a spontaneous abortion. Members of the medical profession invariably will not testify against a colleague. It is usually the non-medical abortionist who is prosecuted, and even then, usually only in case of death of the mother.[32]

The entire abortion problem will be radically changed by the development of a sure, simple chemical abortifacient (a pill that may be taken during the "cold light of morning," after passion has subsided), but in the meantime, hospitals, which are largely self-regulating should administer the law for rich and poor alike. People on the right side of the tracks know their way around the community, but the poor do not.[33]

Crimes Against Nature

When we come to "crimes against nature," the antiquity of the law is noted in the very title of the law and in the quaintly medieval language of the statutes.[34] The sphere in which the legal lag has been most criticized is in regard to sex practices outlawed under the "crimes against nature" statute. Some critics, making a dramatic interpretation of the law, say that even hus-

[31] Dahlberg, *Abortion*, in SEXUAL BEHAVIOR AND THE LAW 379, 392-93 (Slovenko ed. 1965). See also LADER, ABORTION (1966), which summarizes studies showing that hospitals are in fact performing abortions which—if the letter of the law were strictly applied—would have to be acknowledged as illegal.

[32] Moreover, other acts of abortion are usually deemed necessary to establish the required specific criminal intent. See State v. Sharp, 182 So. 2d 517 (La. 1966).

[33] The impact of the U.S. Supreme Court's decision in Griswold v. Connecticut, 381 U.S. 479 (1965), is that the poor are to have the same information as the rich about contraceptives. But contraceptive devices do not allow for passion.

[34] For example, statutes in the past ordered the death penalty for persons committing a crime against nature, describing the crime with such language as "the abominable and detestable crime against nature, not to be named among Christians, with either mankind or beast." Louisiana, in a more recent enactment, adopted in 1942 when it revised its criminal code, provides: "Crime against nature is the unnatural carnal copulation by a human being with another of the same or opposite sex or with an animal. Emission is not necessary, and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime." LA. REV. STAT. § 14:89 (1950).

Philosopher A. J. Ayer, criticising the "unnatural" concept, says that if "unnatural" means "uninstinctive," this is biologically false, and if "unnatural" means "uncommon," it is again false, but if "unnatural" just means "wrong," there is no argument. Ayer, *Homosexuals and The Law*, 56 NEW STATESMAN 717 (1958). Judging from the hew and cry, some persons have assumed that crime against nature means a crime against the great outdoors—a forest fire or scenic spoilation—but this law has nothing to do with that. The crime against nature law has its origin in an English statute of 1533 and early Christian writing. The English statute, assented to by Henry VIII, made it a felony to commit "the vice of buggery." In the early writings of the Christian religion, homosexuality was called "a crime not fit to be mentioned by Christians."

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59 NEW STATESMAN 941 (1960).

bands and wives may be sent to jail for engaging—in the privacy of their bedrooms—in mouth-genital or anal contacts.

But who is actually prosecuted under the "crimes against nature" law? The scope of the statute depends on the definition which is given to the term "crime against nature," or the term "unnatural carnal copulation" which appears in some statutes. It is news-catching to say that husband and wife can be prosecuted, for example, for practicing "perverse" variants of foreplay, but the jurisprudence is apparently void of such cases. In husband-wife matters, there is no complaint, and the state cannot compel one spouse to testify against the other. The statute might be used to charge a male customer caught in a deviant sex act in a house of prostitution, but when a house is raided only the woman is apprehended, and she is charged with prostitution, not usually with a crime against nature, which is legally more serious and more difficult to prove. Likewise, in practice, the law on crimes against nature is not applied to one who copulates with an animal, provided it is done in private.

This leaves under the statute the homosexual—more specifically, the male homosexual. Lesbian practices are usually not included within the law on crimes against nature because, by definition in many states, "copulation" is required, or because, in practice, law-enforcement officials are lenient toward women or are unable to make a case against them.[35] This leaves, subject to prosecution under the statute, males who engage in fellatio, anal intercourse, or mutual masturbation.

On the whole, as noted, there appears to be little popular support for a change in the law on homosexuality.[36] Illinois and New York are perhaps the only American states to change the law on their books to remove consenting varied sex expression, including that of homosexuality, from the status of crime when conducted in private and without duress. This was done recently as part of an overall revision of the criminal code. Apart from an overall revision,

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[35] It may also be noted that women are less promiscuous than men. As one writer put it:

> There is little or none of the "trolling," the picking up of partners on the streets, in pubile lavatories, bars and so on. There is little or no prostitution. There is not the same widespread interest in very young sexual partners. Most of the women seem to want to settle down and make a home with one person. Their idea of pleasure is then more to stay at home, and less to go out drinking or looking for company. They are not, on the whole, joiners. They are not moved by public causes, even their own. (For all these reasons there is much less of a homosexual "world" for women than for men.)

Magee, *The Facts About Lesbianism—A Special Inquiry into a Neglected Problem*, 69 NEW STATESMAN 491 (1965).

[36] In an essay on homosexuality in America, *Time* commented:

> It used to be "the abominable crime not to be mentioned." Today it is not only mentioned; it is freely discussed and widely analyzed. Yet the general attitude toward homosexuality is, if anything, more uncertain than before. Beset by inner conflicts, the homosexual is unsure of his position in society, ambivalent about his attitudes and identity—but he gains a certain amount of security through the fact that society is equally ambivalent about him. A vast majority of people retain a deep loathing toward him, but there is a growing mixture of tolerance, empathy or apathy. Society is torn between condemnation and compassion, fear and curiosity, between attempts to turn the problem into a joke and the knowledge that it is anything but funny, between the deviate's plea to be treated just like everybody else and the knowledge that he simply is not like everybody else.

Time, Jan. 21, 1966, p. 40. See also Wolfenden, *The Homosexual and the Law—Ahead of Public Opinion?*, 59 NEW STATESMAN 941 (1960).

it is highly unlikely that there will be changes just in the law on sex.[37] Such a controversial provision has a considerably better chance of passage when it appears as part of an overall revision of a code than when it is presented as an isolated proposal. However, overall revisions of codes apparently are not in prospect in other states (major revisions of codes are extremely infrequent—the Illinois revision was its first in 88 years).

The most stable citizens may be able to afford treating deviants with tolerance in a live-and-let-live policy, but men who are themselves precariously balanced may find the very thought of effeminacy in other males unsettling—the more so in a culture like that of the United States where a fetish is made of maleness. Still others may object to the homosexual not out of fear but out of impatience with paranoid trends of these often "angry young men." Homosexuality and paranoia have a high incidence of correlation.[38] Sexual behavior which overtly violates established modes and customs is always a vehicle for unconscious aggressive impulses, but homosexuality especially involves destructive or self-destructive behavior. Many homosexuals drink quite heavily.[39] Psychotherapy is usually ineffective.[40] Hence, it is not surprising that there is little popular support for a change in the law dealing with homosexuals. Actually, popular opinion tends to support the enactment of more rigid laws on homosexual behavior. If the district attorney's office should hesitate to prosecute, or should charge the offender with a non-infaming crime such as battery or public disturbance, various citizens' committees on decent behavior would complain to the news media that the law is not being enforced.

Moreover, not too many members of the criminal bar are likely to support or push for a change in the law. The ordinary practice of criminal law is not lucrative, but crimes against nature pay—at least for the defense lawyer. Often, the accused is a person of position in the community. Shamed by the charge, which is usually backed up by incontrovertible police testimony, the accused

[37] The American Law Institute and the Group for the Advancement of Psychiatry alike recommend that sex law be confined to: (1) cases where force or threat of force was employed, (2) cases involving sexual activity between an adult and a child, or (3) cases of sexual activity or solicitation so open as to constitute a public nuisance. See MODEL PENAL CODE § 207.5, comment (Tent. Draft No. 4, 1955). It has been asserted by members of the Institute for Sex Research founded by Kinsey that our society may solve many of its sexual problems by following the above suggestions. See Gebhard, Gagnon, Pomeroy, & Christenson, SEX OFFENDERS (1965).

[38] See Freud, *Psychoanalytic Notes on an Autobiographical Account of a Case of Paranoia*, in 12 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3 (Strachey ed. 1958); Bullard, *Psychotherapy of Paranoid Patients*, 2 A.M.A. ARCHIVES OF GENERAL PSYCHIATRY 137 (1960); Klein & Horwitz, *Psychosexual Factors in the Paranoid Phenomena*, 105 AMERICAN J. OF PSYCHIATRY 697 (1949); Ovesey, *Pseudohomosexuality, the Paranoid Mechanism and Paranoia—An Adaptational Revision of the Classical Freudian Theory*, 18 PSYCHIATRY 163 (1955); Salzman, *Paranoid State—Theory and Therapy*, 2 A.M.A. ARCHIVES OF GENERAL PSYCHIATRY 679 (1960).

[39] Entrapments, when they occur, usually arise when the homosexual has been drinking excessively.

[40] Bernard Glueck, Jr., Director of the New York State Sex Delinquency Research Project, 1952-55, observes:

> [M]ost therapeutic efforts with homosexual offenders have in the past been relatively unsuccessful. This has been the experience in prisons, as well as in private psychiatric practice with patients who seek help, of their own accord, with these problems. Most psychotherapeutic approaches, including psychoanalytic, fail to change the patterns of sexual expression, although they may help to relieve some of the anxiety about this type of sexual adjustment.

Glueck, *An Evaluation of the Homosexual Offender*, 41 MINN. L. REV. 187, 209 (1957). See also Leavitt, *The Ordinariness of Sodomy*, The Nation, Jan. 9, 1967, p. 54.

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wants to dispose of the case as quickly and quietly as possible. He does not quibble over the fee. Fees of one thousand, two thousand, even three thousand dollars are not atypical. Moreover, in these cases, the defense lawyer has comparatively little to do. He does not have to prepare for trial or go to trial. If he is unable to persuade the district attorney to dismiss the charge or let it lie dormant, the defendant almost without exception will plead guilty. Because he does so there is no contest, and the attorney is saved the time of a trial.

In a deplorable manner, the police sometimes entice or entrap a homosexual into a perverse act. However this practice appears to be on the decline, primarily as a result of court decisions throwing out cases where there has been entrapment. Police affidavits which reveal entrapment are now generally refused as the basis for a prosecution.[41]

Out of clarity, it may be noted that homosexuality per se is not unlawful. The criminal law punishes "doing," not "being." The doing, not being, gets the homosexual in trouble, and it is usually the doing in a public place.[42] The typical case of a crime against nature nowadays does not involve entrapment or a search into a private home. Rather, it involves a person who shows lack of judgment by committing homosexual acts in a public restroom. This type of conduct is as offensive and against public decency as would be the performance of a heterosexual act in public.[43] Sexual activity that is not private is likely to be disturbing to others. The words "in public," in effect, are read into the statute on crimes against nature. Likewise, exhibitionism and voyeurism are usually dealt with as public disorders. Those who engage in these acts do not observe the ordinary amenities of decent conduct, and while the acts are without force, they involve the involuntary participation of other persons. Transvestites, too, are more tolerated, perhaps as freaks (female impersonator shows are invariably attractions on tourist night club tours), and they usually get arrested only when they undress on the streets or window peep.

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[41] The following memorandum to the New Orleans Police Department represents a growing nationwide policy:

> In certain instances, a homosexual may be enticed to commit an unnatural act by the presence and actions of law enforcement personnel. . . . In those cases where the criminal act would not have occurred but for the extra effort—the imaginative enterprise—the enticement of the law enforcement personnel, it would appear unfair to proceed with a prosecution of the accused. . . .
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> We will enthusiastically prosecute for activity of two homosexuals, when they have been observed by police officers. We will further prosecute, when a police officer, without enticement or provocation, is approached by an active homosexual who commits an overt act. We cannot in good conscience prosecute those homosexuals who have been enticed and tempted beyond their endurance to commit a crime.

Memorandum from Charles Ward, District Attorney's Office, Orleans Parish, March 1965.

[42] In a two-hundred page empirical study on the enforcement of laws aimed at homosexual behavior in Los Angeles County, a research group analyzed available data on large samples of felony and misdemeanor cases, traced out what happened to these defendants as they went through the various enforcement stages, and conducted many interviews with enforcement officials, judges, attorneys, psychiatrists, and homosexuals themselves. The study found enforcement largely limited to controlling blatant public displays and to general measures of harassment. Although severe sentences can be imposed under California's sex statutes, the usual sentence for public homo-exuality was found to be not more than sixty days in the county jail and a $200 fine. Judges were found to view public displays of adult homosexual behavior primarily as a nuisance. 13 U.C.L.A.L. REV. 644 (1966).

[43] "Private homosexual, like heterosexual, behavior need not become the direct concern of the administration. Indiscretion, however, places behavior beyond the domain of individual privacy." GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *op. cit. supra* note 8, at 137.

It is the public—not private—manifestation of homosexuality which the ordinary citizen finds unpleasant and annoying. When it is out of sight the ordinary citizen does not mind much. Those who insist that homosexuality be treated as a problem even when it is perpetrated in private are still split in their opinions as to what sort of problem it must be considered to be. Some worry about it as a health problem (homosexuality is an "illness"), others as a moral or legal problem. But, as far as the law is concerned, whether or not the homosexual is "sick" is a moot point. Even if he is sick, why should sick behavior be condoned? One may take the view that the most therapeutic course is to deter the homosexual from sick behavior.

Even if one considers homosexuality as a health or psychological problem, the law, by providing some external control, may help in its resolution—at least to the extent of deterring the behavior—by encouraging thought rather than action. The law may force the person to "act in" (*i.e.*, in thought) rather than to "act out."[44] Admittedly, nothing is gained by sending the homosexual to prison. The issue more properly is not whether homosexual behavior should be deterred (as clearly a public display of it should be deterred), but what is the most effective deterrent.

In practice, the offender of the "crime against nature" statute is usually not sent to jail. While the typical statute provides a stiff penalty (usually a maximum fine of two thousand dollars or imprisonment of five years), the penalty most often imposed is a fine of one hundred and fifty to two hundred dollars; or if the penalty is imprisonment, the sentence is usually suspended on condition of good behavior. The criminal proceeding apparently deters a repetition of public acting out of homosexuality. While they may continue to "act out" their impulses, they act more discreetly and perform in private. The law at least has taught them a lesson in etiquette. The Group for the Advancement of Psychiatry observes:

> For many individuals, particularly those going through phases of sexual experimentation, the experience of a confrontation with one's own behavior by a person in authority will act as a deterrent and may have an educational effect. Getting caught sometimes has the salutary effect of enabling the individual to recognize the mean-

[44] Karl Menninger observes:
> We psychiatrists have not made it sufficiently clear that attempting to understand an individual whom we treat is not necessarily to condone all the behavior of such an individual, or even to expect inevitable penalties for such behavior to be waived merely because he is in treatment. Not all my colleagues agree with me about this. But I think we psychiatrists have sometimes put ourselves in a bad light by giving the impression that if a man is taking treatment, he should be permitted some offensiveness without penalty. For example, I personally will not accept for outpatient psychotherapy a man subject to homosexual tendencies who will not agree to eschew homosexual *activities* during the treatment period. Many normal people in the world, for one reason or another, manage to remain continent in spite of temptation, and I see nothing unjust in expecting a person afflicted with a temptation toward an illegal type of gratification to control his behavior and remain continent during the period of treatment in which we attempt to relieve him of his pathological propensities. I am willing to try to help him with his *temptations*; but not with his *crimes*. I am willing to try to help a man who is *tempted* to commit murder or arson, but I am not willing to treat a man—as an outpatient—who can't resist doing so. I grant that homosexual seductions, etc. are less serious than arson or murder, but the principle is the same.
Hall and Menninger, *"Psychiatry and the Law"—A Dual Review*, 38 IOWA L. REV. 687, 703 (1953). See also Eissler, *Some Problems of Delinquency*, in SEARCHLIGHTS ON DELINQUENCY 3 (Eissler ed. 1949).

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[47] See, e.g., MINN. STAT. ANN. § 526.

ing and consequences of what he has done, and therefore serves as a step toward recognizing and assuming responsibility for his own behavior.[45]

The homosexual who is found in prison is usually there not because he has committed a crime against nature but because of some other crime such as burglary, forgery, or narcotics. Thus the lag which is supposed to exist between sex mores and the law, at least as enforced, is more imaginary than real.

SEXUAL PSYCHOPATH LEGISLATION

Apart from sex mores, a lag is claimed to exist as regards legal proceedings and modern-day psychiatric knowledge of behavior. The law has been criticized for looking at a symptom—a bit of behavior—rather than at the person's psychodynamics or what he is likely to do in the future. To remedy this deficit, over half of the jurisdictions in the United States during the past twenty-five years have enacted some kind of umbrella-type legislation regarding sex offenders. The legislation usually provides for the indeterminate commitment of the so-called sexual psychopath. The statutes vary as to the definition of a sexual psychopath and as to the time of initiation of the special proceedings. In general, a sexual psychopath is defined as one lacking the power to control his sexual impulses or having criminal propensities toward the commission of sex offenses.[46] The definition involves prognosis as well as diagnosis.

Sexual psychopath statutes providing pre-conviction proceedings extend to persons who may not be charged with the commission of a specific sexual offense but solely with being a sexual psychopath. Here, the law has taken the novel position of dealing with "being" rather than actual "doing." The innovation is allegedly an attempt to bridge a legal lag by legislative enactment, but is it a legal advance? How helpful is it?

A law based on "being" rather than "doing" must inevitably resort to medicine or psychology in order to be carried out. One might assume that sexual deviates are people with much in common, a class apart. Such homogeneity of illness, however, assuredly does not exist. Among the deviates are neurotics, schizophrenics, schizoid personalities, alcoholics, persons with chronic brain damage, mental defectives—the entire gamut of mental disorders. All that they share is a single trait, one that psychiatrists must consider a symptom. From a psychiatric point of view the category "sexual deviation" is therefore meaningful only descriptively, not psychodynamically—even as the grouping of the jaundices brings together strange bedfellows. As a result, the carrying out of sexual psychopath laws has resulted in a roundup mostly of the vagrant and nuisance-type offender and has left untouched the dangerous, aggressive offender.

Why is anyone at all rounded up under sexual psychopath legislation? The law has not been implemented with staff and facilities for treatment, one of

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[45] GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *op. cit. supra* note 5, at 133.

[46] See, *e.g.*, MINN. STAT. ANN. § 526.09 (1947).

the major purposes of the legislation. It does little more than detain some persons who are regarded as freaks, stigmatize them, and forever render them social outcasts. Nevertheless, it has been suggested under sexual psychopath legislation that the concept of sex crime be made even broader to include any criminal act in which some type of sexual satisfaction is the motivating force of the crime.[47]

It may be true that some persons with sex problems may obtain "sexual" stimulation by committing arson, by stealing women's undergarments, or by plunging a knife into a woman's back. A boy with a fetish for motorcycles may steal them to get "sexual" satisfaction out of driving them away at high speed. Beatings of prisoners in the German concentration camps were aimed especially at the sexual organs. Menninger observes: "[S]exual impulses are frequently involved in compulsive behavior. This is true. Sexual elements are often transparent in fire-setting, kleptomania, addictive gambling, reckless car driving, and various kinds of physical violence. Sometimes, rather than being merely transparently present, the sexual factor is barely conspicuous."[48] In such cases, however, the victim has not been sexually offended, there has been no use of the sex organs, and it can only be inferred that the act might have some sexual significance. If courts employing sexual psychopath legislation operated on the basis of such an inference, they would soon get in trouble, for then practically any activity, at some level, could be labelled sexual in nature.

On the other hand, behavior that involves the sexual apparatus, and which may involve some sexual gratification or overt expression of sexual activity, is not necessarily motivated initially by a desire for sexual satisfaction.[49] There may be sexual motivations in non-sexual offenses and non-sexual motivations

[47] Under the Wisconsin sex crimes law, it is mandatory for the courts to request an evaluation, to be made and reported upon within sixty days, of all persons convicted of rape, attempted rape, sexual intercourse without consent (involving defective or mentally ill persons), or indecent behavior with a child. WIS. STAT. ANN. §§ 959.15(1), (4), (6) (1966). The permissive section of the law provides for evaluation and treatment of a person convicted of any crime that probably was directly motivated by a desire for sexual excitement. WIS. STAT. ANN. §§ 959.15(2), (4), (6) (1966). The statute states:

> "Sex crime" as used in this subsection includes any crime except homicide or attempted homicide if the court finds that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime; and for that purpose the court may in its discretion take testimony after conviction if necessary to determine that issue.

WIS. STAT. ANN. § 959.15(2) (1966). However, because of shortage of staff and lack of facilities, the program has been unable to accept persons under the permissive section of the law. See generally Kobler, *The Sex Criminal—"I Don't Know Why I Did It,"* Saturday Evening Post, Jan. 28, 1967, p. 23; Pacht, Halleck & Ehrmann, *Diagnosis and Treatment of the Sexual Offender: A Nine Year Study*, 118 AMERICAN J. PSYCHIATRY 802 (1962); Pacht, Halleck & Ehrmann, *Psychiatric Treatment of the Sex Offender*, in 2 CURRENT PSYCHIATRIC THERAPIES 173 (Masserman ed. 1962).

[48] MENNINGER, THE VITAL BALANCE 191 (1963).

[49] According to Glueck:

> An example of this sort of situation is seen in the older man who feels grossly inadequate in his adjustment with other adults, but who does feel relatively comfortable and happy when he is with children. Very often this individual may find himself in a situation that initially has no sexual motivation, but is entirely motivated by a desire for some sort of interpersonal satisfaction. However, in the course of his contact with children, or when the control and judgment faculties are weakened by alcohol, sexual excitement and arousal may develop as an additional pattern frequently viewed by the individual as an unwanted complication, with the result that some type of prohibited sexual act occurs.

Glueck, *An Evaluation of the Homosexual Offender*, 41 MINN. L. REV. 187, 196 (1957). And "seduction [may represent] a kind of theft, adultery a con-man's craft, rape a rehearsal of a murder. Yet it is better to marry, as St. Paul should have said, than to burn down a city. Sodomy is less destructive than arson." Brien, *Venus or Mars?*, 72 NEW STATESMAN 903, 904 (1966).

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in sexual offenses. For example, hatred and resentment, not sex, predominates in most acts of rape.[50]

Sexual psychopath legislation conceptually does not overcome the criticism that the law looks only at a symptom. Sexual difficulties are, after all, symptoms of general relating difficulties and personality problems. Sex is a human-relating experience, potentially the closest one of all; hence, it nearly always reflects personality problems, but these problems are also reflected in other behavior. The symptom of deviant sexual behavior prompted sexual psychopath legislation, but to overcome the shortcomings and limitations of the statutes by interpreting all behavior as sexual in origin is not the way to deal with people who have severe problems with other people.

THE ACTUAL PROBLEM

All truly criminal activity ought to be examined, but to attempt to achieve this goal by trying to find "sexual" motivation in ordinary offenses under sexual psychopath legislation would be woefully awkward. Likewise, to tamper with the laws on criminal offenses is to miss the crucial issue. The difficulty lies in attempting to use the law's typology on crimes, which justifies action on the part of the district attorney, to affix the type of disposition. Should we have a separate facility for armed robbers? Clearly not, yet we have a separate facility for the so-called sex offender. The lag that prevails in the legal system is not restricted to sex offenders. It is in the disposition of all offenders, not simply the sex offender, that the system is archaic.

The United States has developed an elaborate and expensive court system, made more elaborate by recent right-to-counsel decisions, but little or no attention is paid to what comes afterwards. Many lawyers indeed wonder whether they have any useful function to serve in the criminal law process. It has been suggested, perhaps apocryphally, that the function of the jury (and judge) is not to find who is guilty—that is too easy a task—but to determine which guilty persons should be acquitted. Because it is realized that just locking up the defendant for awhile will not do him or society much good, except to keep him off the streets for a time, he is often simply acquitted.[51]

In 1917 the *Wichersham Report* of the New York State Prison Survey Committee recommended the abolition of jails, the establishment of diagnostic clearing houses or classification centers, the development of a diversified institutional system and treatment program, and the use of indeterminate sentences.[52] In 1933, The American Bar Association, American Medical Association, and American Psychiatric Association jointly recommended psychiatric service for every criminal and juvenile court to assist the court, prison, and

[50] Generally speaking, a rapist might be said to be acting out of hostile or destructive impulses rather than "sexual" impulses, and a homosexual might be said to be acting out of dependency rather than sexual needs.

[51] Actually, sex offenders may be made worse by incarceration in a restricted, homosexual milieu.

[52] See Menninger, *Verdict Guilty—Now What?*, Harper's Magazine, Aug. 1959, p. 60.

parole officers with all offenders.[53] Little or nothing, however, has come of these recommendations.[54] The crucial need now is not more study, but implementation of such studies and recommendations.

The major problem is that the broad discretion any judge may now have in sentencing does not carry over to the treatment of the offender after sentencing. Personnel and other resources are insufficient to carry through recommendations.[55]

CONCLUSION

It is not the formal law, but rather its actual enforcement, which reflects the mores of a society. It is not the purpose of this article to defend hypocrisy in the enforcement of the law, but rather to point out the actual enforcement of the law.

The needs of the public vary; hence we must remain ambivalent about rules. It is a general principle, however, that rules are useful as a protection or limit against one's own impulses, and that too much freedom evokes anxiety. It is comforting to have rules. In some degree or other, every man seeks an escape from freedom.[56] Towns and cities traditionally have been built around the courthouse, representing the key role that laws and regulation have in the life of the community.

In the best personality development, external controls change over into self-control. Good conditions in early life lead to a sense of security, and a sense of security leads on to self-control. When self-control is a fact, then security that is imposed from the outside is an insult.[57] But others—especially adolescents—wish to know that external controls are still there.[58] Some persons are satisfied

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[53] *Ibid.*

[54] *Ibid.*

[55] Today, the criminal law espouses rehabilitation of the offender and protection of society as its aims, but the practice essentially remains, as of old, that of punishment. But in criticizing the law, the cart must not be put before the horse. To compare, laws on commitment to a mental hospital diminish in importance as hospitals and therapeutic methods improve. The rigidity of legal commitment procedures is inversely proportional to the degree of public confidence in the mental health programs. The use of commitment laws is the exception rather than the rule. Likewise, the legal system will adjust to changes which are effected in dealing with offenders. It is not a matter of "passing the buck," but rather of putting first things first. Improvements in post-trial techniques and facilities will soon result in changes in the criminal law. In the immediate future, however, that appears unlikely. In all jurisdictions emphasis is placed not on rehabilitation of offenders but on prevention of crime—by slum clearance and development of playgrounds and child guidance centers. Social scientists especially appreciate that prevention is better than cure, particularly when the cure is so inadequate. We often hear about the cure, "work with offenders is grimy," and, "the work is of no use—the fundamentals of life are completed in the first six years." The challenge is more up to the social scientist than it is to the lawyer to develop methods to handle the criminal offender.

[56] It may be noted that the word *fear* is derived from *fahren* and *fare*, which means leaving our safe parental nest; the old Saxon word *far* meant ambush. In *Escape from Freedom*, Erich Fromm analyzes man's escape from himself and his freedom. Albert DeSalvo, the confessed Boston strangler, "seems to behave best in a rigorously structured environment, and he has repeatedly said he did not want to be freed anyway." Time, Jan. 27, 1967, p. 40.

[57] WINNICOTT, THE FAMILY AND INDIVIDUAL DEVELOPMENT 30 (1965); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *op. cit. supra* note 8, at 43-49.

[58] The morality of authoritative restraint enforced by parental control, religious dictum, and the economic dependency of women has given way in large measure to a code of sexual behavior developed by the adolescent within his peer group. Morton S. Eisenberg, psychoanalyst on the faculty of the Columbia University School of Social Work, recently observed:

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Sex offenses in fact co in every jurisdiction. Ful force is used, where the o violation of the public sen

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While sex is a source of sorrow and pain. For this Group for the Advanceme students, increased experie search in a vital area of l fortably."[61]

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To some young people, external dependency on his parents and to hand, if the authority of the peer growth. This fact is behind the fe will replace standards of authori done to date do support existence college students. However, these the thesis that this change is in th the direction of a more autonom sexual intercourse within the confin Medical Tribune, Nov. 26-27, 1966, p.

[60] MENNINGER, *op. cit. supra* note 45.

[60] The two oldest themes in the hi "Smoking-room" jokes are mainly co remainder concern defecation, infreq Thurber said, is emotional chaos rem proliferates in Anglo-Saxon and not in One theory is that the sex or scatologic in the Anglo-Saxon countries. Americ defined as the place where the Germa and the Americans the lovers. *The Psy*

[61] GROUP FOR THE ADVANCEMENT OF

by a law on the books, even though it may be a dead letter. Other persons, though, need to see a vigorous enforcement of the law, or at least a token display of it. In any event, mechanical controls are of no use, and fear is a poor motive for compliance.

Sex offenses in fact constitute a very small percentage of the criminal docket in every jurisdiction. Full enforcement of the law occurs only in crimes where force is used, where the offense is directed against children, or where there is a violation of the public sense of decency.

Sex laws, while called obsolete and archaic, are for the most part enforced in a manner that is in keeping with the community's needs and wishes. Laxity of law enforcement results from the lack of public pressure, and this may be due to the fact that by and large the public, perhaps unconsciously, has empathy for the inner turmoil in the emotional life of the individual with a sexual problem (unless he resorts to physical violence or unduly violates public decency). Empathy may stem from the ubiquitous nature of sexual problems. As Freud said, no one is completely satisfied with his sexual life; or to put it another way, no one's sexual life can be said to be fully mature.[59]

While sex is a source of great pleasure, it is also often a source of the greatest sorrow and pain. For this reason, we joke and jest so much about it.[60] The Group for the Advancement of Psychiatry observes that "for the majority of students, increased experience with their heterosexuality is a lonely and painful search in a vital area of life which many adults are unable to discuss comfortably."[61]

The punishment of the law usually adds very little to the sex offender's self-inflicted pain and privation. Generally speaking, the sexual deviate is himself in pain, feeling himself to be worthless and blameworthy, whereas the non-sexual offender directs his hostility mainly onto others. Many sexual deviates may be said to have a "mental disease" if by "disease" we mean *dis*-ease, lack

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To some young people, external authority has remained so coercive as to encourage continuing dependency on his parents and to inhibit formation of an independent value system. On the other hand, if the authority of the peer group takes over completely again little may be gained in moral growth. This fact is behind the fear of the older generation that external standards of sexual licence will replace standards of authoritative restraint. . . . The few sociologic studies that have been done to date do support existence of a change in the direction of greater sexual freedom among college students. However, these studies in this rather narrow segment of youth do not support the thesis that this change is in the direction of amorality. They do suggest that the change is in the direction of a more autonomous regulation of sexual behavior which sanctions premarital sexual intercourse within the confines of a serious and exclusive relationship.
Medical Tribune, Nov. 26-27, 1966, p. 17.

[59] MENNINGER, *op. cit. supra* note 48, at 192.

[60] The two oldest themes in the history of humor are the functions of reproduction and elimination. "Smoking-room" jokes are mainly concerned with some situation centered around sexual intercourse; the remainder concern defecation, infrequently urination. We joke about our concerns. Humor, James Thurber said, is emotional chaos remembered in tranquility. It has been noted that the "dirty" joke proliferates in Anglo-Saxon and not in Latin countries (Latin humor prefers puns and a play on words). One theory is that the sex or scatologic joke is a reaction against the restrictions of Puritanic social customs in the Anglo-Saxon countries. Americans especially are noted for their jesting about sex. "Hell" has been defined as the place where the Germans are the police, the French the engineers, the English the cooks, and the Americans the lovers. *The Psychology of Humor*, MD, Dec. 1966, p. 141.

[61] GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *op. cit. supra* note 5, at 47.

of ease, or discomfort. As studies show, sex offenders are frightened, guilty, woefully inadequate, commonly harmless people.[62]

The method of enforcement of the law on sex in large measure is not inhumane; rather it is the disposition of those persons who are prosecuted and convicted that is primitive. Perhaps this too is the way our society wants it, but if it is, there is need for education as to what is in our best interest.

[62] GEBHARD, GAGNON, POMEROY & CHRISTENSON, SEX OFFENDERS (1965), reviewed in Coles, *Anatomy of Perversion*, The New Republic, Oct. 16, 1965, p. 25, 27. See also Gebhard, *The 1965 Kinsey Report*, Ladies' Home J., May 1965, p. 66.

1967]

THE RIGHT TO
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THE ORIGINAL

*Alfred Avins**

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* Professor of Law, Mem
LL.M. 1957, New York Uni
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[1] Bond v. Floyd, 87 Sup. C
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[2] See N.Y. Times, Jan. 10,
col. 1-4; *id.*, Jan. 14, 1966, p.
id., Jan. 25, 1966, p. 34, col.

[3] Avins, *Weapons Against*

[4] Morgan v. Katzenbach, 2

[5] CONG. GLOBE, 35th Con
Congress, session, page, and y