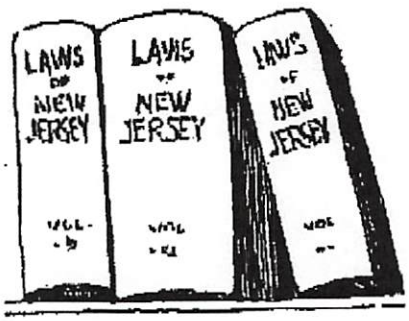
"In a free society, illegal acts should be limited to those which threaten the peace, safety, and/or stability of the society, including those which so outrage its citizens' sense of justice or propriety that they may reasonably demand protection from being exposed to them. A free society should not attempt to impose the notions of sin held by any one segment of its population upon the entire body politic."

SIN and the



by Alan J. Cornblatt

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Scientific and technological advances are changing human existence. Men have explored the moon and transplanted human organs by applying rational, empirical methods to the solution of both concrete and theoretical problems. Computers and machines are releasing men from traditional patterns of labor. Inevitably, the individual will find himself with increased leisure time, and will use a portion of that time to engage in activities which, through the years, have been termed "sin."

Sinful acts are those which involve "the wilful breaking of religious or moral law."[1] They are acts which threaten the immortal soul of the actor. What is thought to be sinful will, of necessity, vary from individual to individual within a society, depending on such factors as differing religious orientation, ethnic customs or traditions, environmental training and personal experiences.

Sinful acts and illegal acts are not synonymous. Illegal acts are, by simple definition, those prohibited by law. "The term does not imply that the act spoken of is immoral or wicked, it implies only a breach of the law."[2]

In a free society, illegal acts should be limited to those which threaten the peace, safety and/or stability of the society, including those which so outrage its citizens' sense of justice or propriety that they may reasonably demand protection from being exposed to them. A free society should not attempt to impose the notions of sin held by any one segment of its population upon the entire body politic.

Illegal acts are between man and man; sinful acts are between man and God. Some acts may be both illegal and sinful. They may harm the actor's fellow man in ways which justify restraint of the actor by the society. But acts which are merely sin — which perhaps threaten the soul of the actor, but do no temporal harm to others — ought not be punished by man.

We stand, in this Nation, for the proposition that the best government is the least government. Our laws are based upon the consent, or at least the acquiescence, of the governed. A society may be greatly weakened by the enactment of even a single statute which is substantially ignored by its populace. Successful, large-scale flouting of a single law may lead to general contempt for all laws and legal processes.

Citizens will reject attempts to prevent them from engaging in what they believe is justifiable private conduct. Prohibition should have taught us that where criminal sanctions are employed in the attempt to regulate personal conduct, many citizens will become reluctant law breakers, rather than curtail their private activities. Creation of law breakers in this manner is counter productive to the society.

New Jersey has numerous statutes which purport to regulate the conduct of competent, consenting adults in private. This article deals with fornication, gambling, sodomy and prostitution statutes. Such statutes have been part of our criminal jurisprudence for many years. It is submitted that they should be abolished. They are unnecessary. They reflect neither the beliefs nor the actual practices of large numbers of our citizens. Greater harm results from their continuance than would result from their abolition. Finally, they are antithetical to the concept of a constitutionally protected right of privacy.

FORNICATION

N.J.S. 2A:110-1 provides: "Any person who commits fornication is guilty of

a misdemeanor and shall be punished by a fine of not more than $50.00 or by imprisonment for not more than six months or both."

The Bible scorns fornicators[3] and condemns them to eternal fire.

In State v. Catalano,[4] the defendant was convicted in Municipal Court and, on Appeal, in County Court, of failing to give a good account of himself (N.J.S. 2A:170-1). He was sentenced to six months in the county jail and fined $50.00. The defendant had been apprehended wandering about the streets of Paterson in the early hours of the morning. The state contended and the defendant, by fair implication, admitted, that his purpose had been to find a woman with whom he might have sexual intercourse. The Appellate Division held that the proofs were such that a trial Court could reasonably find that the defendant's purpose was to have unlawful sexual intercourse and that a finding of such a purpose, together with the other prerequisites set forth in N.J.S. 2A:170-1, would justify a conviction. Thus, in New Jersey you not only can go to jail for sex out of wedlock, you can go to jail for looking for the opportunity to have such sex.

It is submitted that this smacks of "thought-crime." Catalano committed no overt act. He harmed no one. He was, admittedly, seeking the opportunity to commit an illegal act, for "unlawful sexual intercourse . . . is, a crime."[5] Leaving the question of whether Catalano's action in searching for the chance to commit fornication was criminal, per se, it is proper to inquire whether fornication should be proscribed conduct under our criminal code.

Simple fornication was not criminal in the early days of the Republic, except where the fornication was followed by the birth of an illegitimate child.[6]

We know, from the work of Dr. Kinsey and his successors, that 75% of the adult males in the United States have committed fornication by age 20.[7] We know that 35% of the adult females in the United State have committed fornication by age 25.[8] These figures are not a product of the "New Morality," for Dr. Kinsey's interviews included our grandparents' generation. (It is reasonable to assume that New Jerseymen, being neither better nor worse than citizens of any other state, have conformed in their conduct to these figures).

Here, then, is a statute which has been extensively ignored for three generations. No harm has occurred to the State from this, except that the general disregard of this one law may be a factor in the widespread contempt for all laws which prevails in some segments of our society.

How many prosecutors can, in good conscience, prosecute violators of this statute? How many judges are honestly entitled to judge such violators? Conduct proscribed by this law is so universally practiced that virtually none may cast the first stone without hypocrisy. This cannot be good law.

GAMBLING

In 1957, Justice Jacobs, in a well-documented and scholarly opinion,[10] pointed out that gambling at common law was not indictable unless it was tainted with fraud, accompanied by a breach of the peace, or was contrary to public policy for some special reason. Lotteries, especially, were common in colonial New Jersey and financed numerous educational and religious institutions. It was not until 1748 that the Legislature found it useful to regulate gambling, declaring, in the preamble to the Act, inter alia, that lotteries and other gaming might be ". . . a great temptation to vice, idleness, and immorality."[11] The restrictive gambling statutes of 1970 are the Act of the 1748, updated, but based upon the same moral considerations.

N.J.S. 2A:40-1 et seq. makes all wagers, bets and gaming by chance unlawful in New Jersey. A loser may recover his loss from a winner or stakeholder by civil action.[12] Gaming with cards, dice, billiards, slot machines, or other games or devices is a misdemeanor, as is bookmaking or buying or selling and interest in a pool.[13] A mere stakeholder is a misdemeanant,[14] as is a landowner who permits a horse race upon his land, apparently even if there is no wager upon the outcome.[15] Selling, or even giving, your neighbor a share in your Irish Sweepstakes ticket also violates the statute.[16]

There is a tinge of hysteria in the gambling laws of New Jersey. Gambling is prohibited in the most sweeping language by the Constitution of 1947.[17] There is a vigorous official public policy against all forms of gambling, which policy has been approved by our highest Courts.[18] Yet gambling flourishes in New Jersey. Numerous public officials have decried the volume of gambling which goes on in the State. The sums of money which go to organized crime from this activity are immense.

There is a clear desire by large numbers of citizens to, from time to time, wager in some way. Football and baseball pools proliferate in virtually every office, shop, and factory. Individuals who cannot find time to go to a licensed race track place bets with impunity. Bookmakers are all too easy to find. Lawyers and legislators play golf for small sums of money; and sometimes, for large sums of money. The numbers "business" flourishes.

Consider these factors:

A. In 1969, when given the opportunity to choose, the electorate overwhelmingly mandated a State lottery.

B. A grossly disproportionate number of our police officers are engaged in enforcing the gambling laws, at a time when our police forces are both understaffed and overworked.

C. The "public policy" is that no citizen may be lawfully permitted to do that which has a tendency to be injurious to the public or against the public good.[19] Which policy would be less injurious to the public today? — to impose a restriction which is largely unwanted and

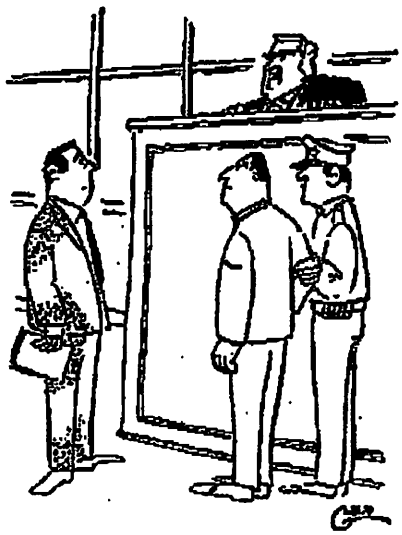
ignored by the citizenry, thrusts government into the private activities of individuals, and permits organized criminals to reap large, untaxed profits from meeting people's wants; or to license and tax the professional bookmaker and gambling operation, imposing such regulations as may be necessary to prevent abuses?

The JOURNAL recognizes the controversial nature of this article, and we invite the commentary of our readers.

SODOMY

Sodomy, and its penalty, are defined by N.J.S. 2A:143-1 as follows: "Sodomy, or the infamous crime against nature, committed with man or beast, is a high misdemeanor, and shall be punished by a fine of not more than $5,000.00 or by imprisonment for not more than twenty years, or both."

The acts prohibited by the statute



"Now only do I find your client guilty young man — I'm also going to have a word with the people at the law school about passing you in jurisprudence!"

have been spelled out in detail by our Courts. Primarily the cases decided under the statute have involved anal intercourse between humans.[20] Such intercourse has, traditionally, been repugnant to most of our citizens and the statute has impressive moral precedents.[21] Nevertheless, this practice, properly termed "buggery," is believed to be the most widely practiced form of sexual expression between male homosexuals.[22]

The Wolfenden Committee made a careful analysis of the English and Scottish law relating to this subject. Following extensive testimony, the committee found "no convincing case for attaching a heavier penalty to buggery on the ground that it may result in greater physical, emotional, or moral harm to the victim, than other forms of homosexual behavior."[23]

Sodomy is a basic, male homosexual act. Experts greatly disagree as to whether the homosexual is sick or well, whether he should be treated or left alone in his subculture.[24]

Albert Ellis, commenting on criminal sanctions against homosexuals, wrote recently:

> "It is my contention that a fixed or exclusively homosexual in our contemporary society is wrong — meaning inefficient, self-defeating and emotionally disturbed — but that he has an inalienable right, as a human being, to be wrong, and should never be persecuted or punished for his errors."[25]

The penalty of the above-cited statute is unusually harsh, yet no authority has suggested that sodomites constitute a threat to our society. N.J.S. 2A:143-1 restrains conduct which is highly offensive, but in no way dangerous, to our majority. That the conduct regulated by the statute is distasteful justifies neither the existence of the statute nor the severity of its penalty when applied to the acts of competent consenting adults in private.

PROSTITUTION

Prostitution is defined by N.J.S. 2A:133-1 as the giving or receiving of the body for sexual intercourse for hire, or for indiscriminate sexual intercourse without hire. No case of prosecution of male prostitutes has been found — the statute is directed at women.

The "oldest profession" has been the subject of the most ancient prohibitions,[26] yet it has flourished in every society; "for every man cries, woe, alas — and every man goes in."[27]

A responsible researcher recently suggested that prostitution might be biologically advantageous because it can help to prevent sexual frustration which can lead to social disharmony in various ways.[28] The continuing existence of prostitution clearly shows that it serves some purposes for some people. Without a demand for her services, the prostitute could not exist.

There are definite evils associated with prostitution which are proper subjects for regulation by criminal statutes. Solicitation, by words or behavior, in any public place, is offensive to public order and affronts the sense of decency of most citizens. Procuring, living on the earnings of another's prostitution or maintaining premises as a brothel are properly illegal. It is clearly wrong that pimps, parasites, or unscrupulous landlords, should profit by preying upon the women involved.

But ought it be illegal for an adult woman, who is in full possession of her faculties, to offer her body for indiscriminate sexual activity for hire? So long as she conducts her activities in private, it is difficult to find justification for imposing criminal sanctions upon her.

This is not to say that society does not have a legitimate interest in discouraging prostitution. Society has such an interest, but it ought not be expressed through the criminal law. The point was made by the Wolfenden Committee:

> "It follows that there are limits to the degree of discouragement which the criminal law can properly exercise towards a woman who has deliberately decided to live her life in this way, or a man who has deliberately chosen to use her services. The criminal law, as the Street Offences Committee plainly pointed out 'is not concerned with private morals or with ethical sanctions.' This does not mean that society itself can be indifferent to these matters, for prostitution is an evil of which any society which claims to be civilized should seek to rid itself; but this end could be achieved only through measures directed to a better understanding of the nature and obligation of sexual relationships and to a raising of the social and moral outlook of society as a whole. In these matters, the work of the churches and of organizations concerned with mental health, moral welfare, family welfare, child and marriage guidance and similar matters should be given all possible encouragement. But until education and the moral sense of the community bring about a change of attitude towards the fact of prostitution, the law by itself cannot do so."[29]

What are the foregoing illustrations intended to prove? Where does any of this lead?

Gibbon wrote of Constantine's legal reforms, "There are many of his laws which, as far as they concern the rights . . . of individuals . . . . are more properly referred to the private than the public jurisprudence of the empire."[30] As demonstrated, Gibbon's criticism of Constantine may be applied to some of the statutes of New Jersey.

It has been shown that the statutes cited are based upon concepts of "sin". Yet, sin does not mean the same thing to all people. There are large segments of our population who believe that sin is fated and inevitable.[31] There are those who hold that sin is a matter of free choice.[32] Some would agree with Heinlein that, "sin is cruelty and injustice, all else is peccadillo"[33] There are also those among us who refuse to accept any notions of sin whatsoever.

The cited statutes reflect the individual notions of the lawmakers. They are fallacious in that they are not grounded in the acquiescence of the governed. Indeed, these statutes are those which are probably most commonly broken by otherwise law-abiding citizens.

There is a popular, though undocumented, belief held by many laymen and lawyers that our criminal statutes are so all-embracing in their scope that most men must eventually be violators. That such a belief exists should trouble every thoughtful person who is involved with the legislative or judicial processes. That such a belief may be grounded in fact may threaten the fundamental roots of our legal system. Laws which habitual-

ly are not, or cannot, be obeyed by those who are to be governed by them are at best a mockery. Where laws are widely mocked, ridiculed or ignored, the political structure which is based upon them must ultimately collapse.

We pride ourselves in being a pragmatic people. Our strength has been our willingness to accept and utilize honest fact, uncontaminated by preconceived dogma. Our laws are derived, as Justice Holmes postulated, not from logic, but from experience.[34]

It is inappropriate that a pragmatic people should permit laws which are, demonstratively, observed more in the breach than in the observance.

The calm and rational approach of the Wolfenden Committee is more in keeping with our traditions. Outlining its approach, the committee said:

> It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior . . . .
>
> Certain forms of sexual behavior are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition; and such actions may be reprobated on these grounds.

We appreciate that opinions will differ as to what is offensive, injurious or inimical to the common good, and also as to what constitutes exploitation or corruption; and that these opinions will be based on moral, social or cultural standards. We have been guided by our estimate of the standards of the community in general, recognizing that they will not be accepted by all citizens, and that our estimate of them may be mistaken.

We have had to consider the relationship between the law and public opinion. It seems to us that there are two over-definite views about this. On the one hand, it is held that the law ought to follow behind public opinion, so that the law can count on the support of the community as a whole. On the other hand, it is held that a necessary purpose of the law is to lead or fortify public opinion. Certainly it is clear that if any legal enactment is markedly out of tune with public opinion, it will quickly fall into disrepute.[35]

The problems discussed in this article were recently considered by the then Attorney General of New Jersey. In a carefully reasoned, thought-provoking

"Is there any kind of money-back arrangement on this retainer if I decide to elope with this guy before I sue him for breach of promise?"

article, the Honorable Arthur J. Sills wrote:

> We should . . . study the question as to whether particular acts should be designated as crimes. Indeed, it is extremely important in these troubled times — when the demands placed on law enforcement seemingly exceed its ability to respond effectively — for us to take a hard, objective look at the type of behavior we wish to proscribe by criminal sanctions. We must face up to the difficult question raised by the President's Crime Commission over 20 months ago — how much of the present difficulty confronting law enforcement is derived from the traditional assignment to it of controlling behavior, which in the light of contemporary mores and advanced medical knowledge may not be a criminal problem?
>
> In elaborating on this concept the commission said the time has come to reappraise the concept that passing a law cures social ailments. According to its report, many laws which deal, for example with: . . . (Inter alia) . . . gambling and irregular sexual behavior, 'have complicated the duties of the police, prosecutor and court and have hindered the attainment of a rational and just penal system.'
>
> * * *
>
> The only reason organized crime reaps huge profits from gambling is because the public seems to want to buy its product.
>
> These are major problems for law enforcement, but how often are they considered in the context of the cry for law and order today? The public . . . isn't afraid of the neighbor who makes a 50-cent bet every day, but the police officer must be concerned, because he is entrusted with enforcing the law.
>
> The real point is that law should represent justice. If the laws are unjust, they should be changed. If they are based on justice, order will follow.[36]

There is an additional aspect of the problems set forth above which should be discussed. We live in a densely populated, urban society. It is increasingly difficult for our citizens to find times or places where they may have privacy. In response to these difficulties, the idea of a constitutionally guaranteed right of privacy has evolved in our jurisprudence.

Irving Brant, in 1965, postulated that the right of privacy is a social right of every person, which is protected under the concept of procedural due process.[37] He added, "it is to guard the privacy and other social rights of every individual, as much as to prevent compulsory self-incrimination, that search warrants are required and the indiscriminate seizure of private papers is forbidden."[38]

Unconstitutional restriction of the right was the basis upon which the Supreme Court of the United States, in 1965, found the Connecticut statute prohibiting the prescription and use of contraceptive devices to be unenforceable.[39]

More recently, the same Court held that the right of privacy invalidated a statute making private, knowing possession of admittedly "hard core" pornographic films a crime.[40] The opinion drew careful distinctions between the commercial distribution of such material and its private use, then went on to point out: "fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[41] Justice Brandeis' dissent in Olmstead v. United States, was cited with approval: That the makers of the Constitution conferred upon the people, as against the government, "the right to be let alone — the most comprehensive of rights and the right most valued by civilized man."[42]

The Supreme Court appears to be moving consistently towards protecting the privacy of all citizens from unnecessary government intrusion. How valid then, is any criminal statute regulating morality which, for its enforcement, requires police officers to invade the privacy of the individual while with his friends, at his shop, or even in his bedroom?

It is submitted that the actions of competent, consenting adults in private are not the legitimate concern of the criminal laws of New Jersey. Conduct which is "sinful" should not, for that reason alone, be "unlawful." Restrictive legislation over many years had not — and cannot — prevent such conduct. The harm caused by the body politic in trying to enforce such legislation far outweighs any value that such legislation might have. The nature of our society mandates that each citizen must be left alone, to wrestle with his individual moral decisions, free from governmental coercion.

FOOTNOTES

1. Webster, New World Dictionary, 399 (Compact ed., 1967).
2. Black, Law Dictionary, 872 (4th ed. 1951).
3. Ezekiel 16:15, 26, 29.
4. Acts 15:20.
5. 30 N.J. Super. 343 The conviction was reversed but the principle was affirmed.
6. Id. at 346-47.
7. Smith v. Mayor, 1 N.J.L. 19 (Sup. Ct., 1790).
8. Kinsey, Sexual Behavior in the Human Male, figure 145 (1948).
9. Kinsey, Sexual Behavior in the Human Female, figure 44 (1953).
10. Card & Ramagosa, Inc. v. Ash, 22 N.J. 436 (1957).
11. Allinson, Acts of the General Assembly, 187 (1776).
12. N.J.S. 2A:90-5.
13. N.J.S. 2A:112-1.
14. N.J.S. 2A:112-7.
15. N.J.S. 2A:122-8.
16. N.J.S. 2A:121-1.
17. N.J. Const. art. 4, Sec. 7, para. 3 (1947).
18. See, e.g., State v. Hoyer, 19 N.J. 301, 308 (1955).
19. Black, Law Dictionary 1317 (4th ed. 1951).
20. State v. Morrison, 25 N.J. Super. 534 (Essex County Court 1953).
21. See, e.g., Genesis 19:20.
22. Report of the Committee on Homosexual Offenses and Prostitution (The Wolfenden Report) Sections 78-94 (1963).
23. Id., Section 87.
24. See, e.g., Ideology as a Factor in the Consideration of Deviance, 4 Journal of Sex Research 84-94 (1968) and the articles by Harry Benjamin, M.D. and Albert Ellis Ph.D. which follow.
25. Id., 96.
26. See, e.g., Deuteronomy 23:17.
27. "The Sisters of the House of Shame" (old poem, anonymous).
28. Morris, The Naked Ape 93, 95 (1967).
29. The Wolfenden Report, ob. cit. supra note 27, Section 226.
30. Gibbon, The Decline and Fall of the Roman Empire 141 (one vol. abridgement by D.M. Low 1960).
31. 1 John 1:9; Romans 3:23.
32. Deuteronomy 30:15.
33. Hoislain, Glory Road 135 (1963).
34. Holmes, The Common Law (1888).
35. The Wolfenden Report, ob. cit. supra note 27, at 22-24, 26-27.
36. Sills, League of N.J. Municipalities Magazine 26-27 (April 1969).
37. Brant, The Bill of Rights 77 (1965).
38. Ibid.
39. Griswold v. Connecticut 381 U.S. 479 (1965).
40. Stanley v. Georgia, 394 U.S. 557 (1969).
41. Id. at 568.
42. Olmstead v. United States 277 U.S. 438, 478 (1928).

"Are you kidding? I was with you the night of June 18th."