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Psychosexuality and the Criminal Law

Ralph Slovenko

Cyril Phillips

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All states have laws dealing with sexual conduct. All too often, the authors feel, these laws aggravate rather than resolve the problem of sexual misbehavior; furthermore, the freedom of the individual is ofttimes unnecessarily limited. Consequently, a rethinking of the policy behind our sex laws is imperative in order to determine precisely what restrictions are necessary and how best to accomplish them.

I. Introduction

It is common knowledge that sexual mores vary in every culture. Sexual ethic and social structure are interrelated.[1] Sexual morality is not the same in an industrially advanced society as it is in a primitive agriculture regime (the industrial revolution's influence upon sexual morals will so attest).[2] Sexual mores vary in different parts of the same country (Puritan Massachusetts and pioneer Wyoming could not be expected to develop the same set of rules), and indeed between different social strata in the same one locality.

Every society imposes regulations and codes upon sexual relations,[3] and

*Tulane University School of Law.
**Tulane University School of Medicine, Department of Psychiatry and Neurology.

1. See Ford, *A Brief Description of Human Sexual Behavior in Cross-Cultural Perspective,* in Psychosexual Development in Health and Disease (Hoch & Zubin, eds. 1949). Ovid, the Roman poet, in his *Art of Love* tells the story of the Sabine women and proves the respectable antiquity of the art of picking up a girl in the theatre. "All praise to Romulus, founder of Rome—You, Romulus, knew how your men to pay. Grant me such wage and I'll enlist today." Freud in his essay, "The Taboo of Virginity," tells us that in the Philippines there were certain men whose profession it was to deflower brides. And he tells us of the *jus primae noctis* (right of the first night) of mediaeval feudal lords. See 4 Freud, Collected Papers 217, 229-230. In Japan public kissing is taboo, while the nude bathing of men and women together is accepted. See Guttmacher, Sex Offenses (1951).

2. Life insurance and other forms of private saving would practically cease to exist if children were not reared by their biological parents. See Russell, Marriage and Morals (1929); Politin & Philtine, Marriage in the Modern World (1956).

3. Attitudes toward perversions have always varied widely from culture to culture. Ancient culture permitted a relatively free expression of sexual impulses. As Freud stated: "The most striking distinction between the erotic life of antiquity and our own no doubt lies in the fact that the ancients laid the stress upon the instinct itself, whereas we emphasize its object. The ancients glorified the instinct and were prepared on its account to honour even an inferior object; while we despise the instinctual activity in itself, and find excuses for it only in the merits of the object." Freud, Three Contributions to the Theory of Sex (1905). See also Friedman, *Sexual*

quite rightly.[4] However, the striking fact is that Americans, permissive in most other areas of behavior, are more restrictive than others in their laws about sex. As Max Lerner describes it, the American female has wide freedom of movement, and the American male is expected to be inventive and adventurous about his work, but they come up against strong taboos in sexual behavior. Sex is separated from the rest of life, surrounded with

Deviations, in 1 AMERICAN HANDBOOK OF PSYCHIATRY 589 (1959); COLE, SEX IN CHRISTIANITY AND PSYCHOANALYSIS (1955); KARDINER, SEX AND MORALITY (1954).

Sexual restrictions, for the purpose of determining heirship, apparently began in Persia with man's first accumulation of property. The restrictions passed into Jewish law, then into Christianity, the basis of our present legal codes.

4. "It is true we have lost much through these restrictions, but on the other hand we have gained a good deal. First we are able to live together and—what means very much—to work together. Let us suppose that all our women colleagues here were not only attractive, but unrestrictedly sexually exciting, and we males unrestrictedly susceptible to their stimulation, no scientific meeting could take place under such conditions. In fact no meeting, whether social, for entertainment, or industrial, for work, would be possible at all. That means that there could be no social collaboration; in short, without sexual restrictions there would be no civilization. . . . [T]he sexual restrictions which hamper our happiness so painfully are in principle fairly sensible institutions, as was pointed out by Freud in his *Totem and Taboo*. They protect the structure of society against the onslaught of sexually highly excited individuals, i.e. people 'on heat.' At the same time they protect the individual and allow him to enjoy a modicum of sexual pleasure in comparative peace and security." Address by Michael Balint on "Sex and Society," read before the Universities of Heidelberg and Frankfurt during the Freud Centenary Celebrations in 1956. See BALINT, PROBLEMS OF HUMAN PLEASURE AND BEHAVIOUR 20, 30 (1957).

Percival M. Symonds writes: "Some writers have thought that the ego is an antagonist to the basic needs of an individual because one of the functions of the ego is to postpone action in favor of deliberation. However, the ego is not necessarily hostile to the basic drives. As a matter of fact, the ego develops originally to serve the basic drives and to help toward reducing their strength in the interests of satisfaction. If the ego appears to be hostile to the basic drives and to dampen the possibility of pleasure, this is a result of special learning. Part of this learning may be thought of as the result of natural consequences, as when an individual learns that impulsive action will frequently result in pain as well as in pleasure. Equally important as the learning from natural consequences is the learning that takes place through education, that is, the restrictions imposed by parents and society, and the punishment that follows breaking rules. If the ego appears to be forgetful of the individual's basic desires it may indicate that there is an abandonment of immediate pleasure in favor of more comprehensive satisfactions in the long run. . . .

"The ability to wait and tolerate tension is a function of the normal person. Some neurotics hold to the belief that to postpone gratification is a sign of weakness and damages their self-respect. They believe that the strong individual is the one who tolerates no hindrance to his pleasures. Actually, however, it is normal to be able to repress impulses in the interests of a more thoughtful solution to problems. To be able to control ourselves is as important a need for building and maintaining self-respect as is self-expression. Instead of hurting an individual's self-respect, control of impulses actually helps to build self-love and self-regard. It is the neurotic who holds the belief that it is harmful to deny gratification of the sexual urges because the strain which such denial entails actually does damage to the personality. But if the anxiety which surrounds sex can be drained off, then reasonable exercise of sexual functions is found to add to the individual's well-being because it contributes to his dignity and self-respect." SYMONDS, THE EGO AND THE SELF 23, 36 (1951).

stronger prohibitions, banned except within conventional forms and inside the limits of marriage.[5]

The Kinsey studies reveal, however, that sexual life in America is breaking and evading the taboos. Statistics of the Kinsey report indicate, for example, that premarital chastity is the exception rather than the rule; at present, 60% of American males have some experience in mouth-genital contacts, 37% some homosexual experience, and 17% of farm boys animal intercourse.[6] However, conscience in the face of the codes remains, and hence evasion of the taboos remains a source of anxiety and guilt. Presupposing that sex legislation is uniform throughout the country, Dr. Kinsey and his associates maintain that the chances are nine out of ten that any American is technically a sex criminal. In many states, all sexual behavior (including fornication and indeed in some places solitary masturbation by an adult) is illegal except for face-to-face intercourse with one's spouse.[7]

Sex offense legislation, which is widely disparate throughout the country, is admittedly largely unenforceable. The Kinsey studies reveal that sex offense laws are more often breached than observed. Sexual activity is essentially private. There is usually no victim to make a complaint in cases of fornication, adultery, sodomy and homosexual activity. In cases of coerced heterosexual activity, the female has her reputation to consider and as a result she refrains from filing charges.[8] It has been reported that

5. See LERNER, AMERICA AS A CIVILIZATION 677 (1957).

6. Dr. George Peter Murdock, Professor of Anthropology at Yale University, in 1949 predicted that our society will be "within a very few generations as tolerant of premarital but postpubertal sexual relations as are the majority of the other peoples of the world." Emphasizing that his own role was not to "advocate" the change, Dr. Murdock said: "I am merely making a cold, inescapable scientific prediction that our society is trending in that direction. As a scientist, I am forced to predict the disappearance of old standards and also to acknowledge that new standards, even if personally unwelcome, probably will work out to the satisfaction of everyone." N.Y. Times, Dec. 29, 1949, p. 28, col. 6.

Dr. Clifford Adams of Pennsylvania State has stated that it is safe to assume that 80% of college students are having sexual relations. See ADAMS & PACKARD, How To PICK A MATE, THE GUIDE TO A HAPPY MARRIAGE (1946). The president of a midwestern university recently remarked that three things are essential for a happy and alert university: parking for the faculty, athletics for the alumni, and, most important, sex for the students. On sex life in American colleges, see KRONHAUSEN, SEX HISTORIES OF AMERICAN COLLEGE MEN (1960); see also Buzzard, *Sex in College*, Tulane Hullabaloo (student weekly), Oct. 27, 1961.

Even though pregnancy may be avoided, coitus has a marked psychological effect on the participants. Among adolescents it results, apart from other considerations pointed out elsewhere, in a premature closure on selection of the marital partner. This closure is detrimental because it occurs at a time of life when selection should remain open.

7. Notwithstanding these laws, the United States has higher rates of illegitimacy, juvenile delinquency and venereal disease than many West European countries.

8. See Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217 (1960). Proof is difficult. See Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1922). Accusations are often false. There are numerous cases on record in which accusations made by mentally defective, psychotic, or otherwise deranged girls were

not more than 20% of such offenses as rape and child molestation are reported to police.[9] Prosecution for sex offenses is indeed small.

The restrictions which are imposed on sexual behavior are defended

proved to be false. See Orenstein, *Examination of Complaining Witness in a Criminal Court*, 107 AM. J. OF PSYCHIATRY 684 (1951). Wigmore recommended that in all cases of alleged sex offenses the complaining witness should be examined before the trial by competent psychiatrists as to her or his probable credibility. See Watts, *Psychiatric Challenge of Witnesses*, 9 VAND. L. REV. 860 (1956); see also Davidson, *Appraisal of the Witness*, 110 AM. J. OF PSYCHIATRY 481 (1954); Mack, *Forensic Psychiatry and the Witness*, 7 CLEV.-MAR. L. REV. 302 (1957); Miller, *Psychiatric Testimony To Impeach the Credibility of a Witness*, 14 N.Y.U. INTRA. L. REV. 239 (1959).

9. See 20 BOWMAN, FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH (Cal. Dept. of Mental Hygiene 1954) (No. 1). See also FINAL REPORT OF THE RESEARCH PROJECT FOR THE STUDY AND TREATMENT OF PERSONS CONVICTED OF CRIMES INVOLVING SEXUAL ABERRATIONS (N.Y. 1952-55); REPORT OF THE GOVERNOR'S STUDY COMMISSION ON THE DEVIATED CRIMINAL SEX OFFENDER (Mich. 1951). Sex offenders in Orleans Parish, Louisiana, are reviewed by Donald A. Smith, *A Report on the Deviated Criminal Sex Offender in Orleans Parish*, in PRIZE ESSAYS (1961) (on file in Tulane University School of Medicine Library).

The Michigan and New York sex stndy groups state that only from 3 to 4% of all crimes known to the police are of a sexual nature. According to the ANNUAL REPORT OF THE NEW ORLEANS DEPARTMENT OF POLICE (1959-60), about 458 adult arrests were for sexual reasons whereas 58,344 (excluding traffic arrests) were for nonsexual reasons, indicating that sexual crimes in New Orleans constitnte only 0.78% of all crimes committed. Juvenile figures in New Orleans indicate 220 sexual arrests in 1959-1960 while 3,298 were for nonsexual reasons, a juvenile sex rate of 6.2%.

The New York sex stndy group points out that of 1,219 persons arrested and charged with rape, there were 123, or 10%, who were convicted of the charged offense. 79, or 6.5%, were actually sent to state institntions. 589 were convicted of a lesser included crime, 466 of them for assault, which disguises the sexual nature of the crime in statistical reporting. Including the lesser offenses, convictions were obtained in 48% of the cases. In 48 rape charge cases in New Orleans (July 1959 to August 1960), not a single conviction is found. Prosecution, either in juvenile court or in criminal district court, was attempted in 13, or 27%, of the cases. In Louisiana, by statnte, only the verdict "guilty of simple rape" is responsive to an "aggravated rape" charge. LA. REV. STAT. § 15:386 (1950). Apparently individuals charged with rape were not recharged with a lesser offense. See Slovenko, *The Law on Double Jeopardy*, 30 TUL. L. REV. 409, 414 (1956).

The charge "crime against nature" draws the highest rate of conviction in New Orleans. Of 25 cases charging crime against nature (Jan. 1960 te July 1960), 15 or 60% were prosecuted by the district attorney. Convictions were obtained in 5 or 20% of the cases (2 dispositions could not be found and 4 cases were still in progress in court at time of study). Only one offender received the maximum sentence of five years, but every other defendant was put on probation. Two of the cases were prosecnted on a charge of simple battery and one case was prosecuted on a charge of simple assault. One person charged with crime against nature was sent to a state hospital.

For the periods stndied there was a total of 116 cases of all sexual offenses (records of individuals arrested and charged with rape from July 1959 to August 1960, and records of individuals arrested and charged with other sexual offenses from January 1960 to July 1960). Of this 116, 56 or 48% were prosecuted. Of the 56 prosecuted cases, 7 or 12.5% were convicted of a sexual crime (16 of the cases were still in court at the time of the study). Not one person was sent to state prison for a sexual offense. The Michigan sex crime stndy indicates that 10.9% of the state prison population consists of sexual offenders, and the New York sex study indicates 10%.

not only by law but also by religion, customs and other institutions. It has been pointed out many times that, as a result, all of us are apparently living in sexual privation, and that the greater part of our sexual desires must remain ungratified. The contrast with other instincts is striking. Feelings of frustration with regard to other instincts (*e.g.*, eating and drinking) are relatively rare, whereas discontent with one's sexual life is the rule. This state of affairs results from the fact that society demands a great number of sacrifices.[10]

II. The Prevailing Sex Crimes

The law defines distinct sexual offenses. In addition, it must be remembered that superimposed on these specific laws in all states are catch-all statutes which serve to cover where none of the specific statutes fit, as in prohibitions on vagrancy, loitering, disorderly conduct, indecent exposure, committing a nuisance and lewd behavior.

Let us now look at the specific sex laws prevailing in the United States and discuss some psychodynamics of sexual behavior. There is considerable variation in the definitions of sexual offenses in the several states, but one thing is typical: legislation on sexual behavior is abundant in all of them.[11]

A. Fornication

Fornication, sexual intercourse by unmarried people, or "bedlock without wedlock" as it is sometimes called, is prohibited in all states except ten (Louisiana, Michigan, Missouri, New Mexico, Oklahoma, South Dakota, Tennessee, Vermont and Washington).[12] The penalties vary from a ten dollar fine in Rhode Island to a three-year prison term in Arizona.[13]

The law against fornication takes no account of the age of the person or of the circumstances.[14] There is the single girl who becomes pregnant after brief sexual contact with a casual acquaintance. There are those who are betrothed but cannot marry: the girl whose fiance is shortly to

10. See Balint, Problems of Human Pleasure and Behaviour 11-12 (1957).

11. We have found helpful Morris Ploscowe's contribution, *Sex Offenses: The American Legal Context*, 25 Law & Contemp. Prob. 217 (1960). An appendix in Drummond, The Sex Paradox (1953) tabulates the punishments for sex offenses in the various states. See also Guttmacher, Sex Offenses (1950); Ploscowe, Sex and the Law (1951); Sexual Offences (Radzinowicz ed. 1957).

12. Under the Louisiana Civil Code, those who live together in "open" (as distinguished from clandestine) concubinage are incapable of making to each other, whether inter vivos or causa mortis, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate. La. Civ. Code art. 1481 (1952).

13. See Ploscowe, *supra* note 11, at 219.

14. The amount of nonmarital coitus tends to increase with the age of the participants; it is relatively infrequent under the age of twenty but increases from that age to perhaps the mid-forties. See Gebhard, Pomeroy, Martin & Christenson, Pregnancy, Birth and Abortion 30 (1958).

be sent overseas on military duty, and the girl whose lover may be a married man waiting for a divorce. There is the widow or divorcee who, often as a result of loneliness and misery, enters into a sexual relationship. The law, of course, must be formulated in general rules, and cannot make exception for particular persons, but it does show the harshness of the legislation. The law in this area pays little respect to ordinary human behavior and needs.

Ever since Freud, the sexual instinct has been acknowledged as existing. Society approves of the instinct if it takes a heterosexual form in marriage. The individual attains sexual maturity at puberty, but the cultural pattern or the socio-economic structure requires the postponement of marriage for many years. The standard set by our civilization is that both sexes should abstain until marriage and that individuals who are not legally married should abstain all their life long. Abstinence is demanded notwithstanding the greatest strain and sound biological nature of the instincts that are seeking fulfillment. In our everyday life, women emphasize their sexual attractiveness. They wear low-cut dresses so that men are excited but must behave as if they do not notice. The present-day tendency of early marriage partly gets around the difficulty, but marriages based on sexual instinct alone often break up. As has been quipped, popular lines today are, "I do," and, after a pause, "He (or she) won't do."

Heterosexual activity may be a sign of health where a person has been treated for inhibition, frigidity or homosexuality and is beginning to free himself of these deterrents to heterosexual activity. Fornication may therefore be a healthy milestone in the life of a person.

Sexual intercourse embodies many elements that are healthy or lead to health, particularly because it involves the expression of both libidinal and aggressive impulses in the same activity and within the framework of the same relationship. The educated classes in the United States as well as in other countries are aware of the nature of these drives and commonly regard heterosexual intercourse as being that activity which is least condemned and best understood. It is therefore quite remarkable that fornication should be actually prohibited by statute. While not actively encouraged, people of the Western World regard it as natural rather than criminal behavior. It is doubtful whether any country other than the United States legally prohibits fornication. In any event, no laws have ever slowed down or even delayed the activity.

B. Adultery

Adultery, not so long ago, was punishable by death. It is still a crime, however, in all states except five (Arkansas, Louisiana, Nevada, New Mexico and Tennessee). The penalties vary from a ten dollar fine in Maryland to a five-year sentence in Connecticut, Oklahoma, South Dakota and

Vermont.[15] Adultery in all states is a basis for divorce.[16]

Marriage, to which civilized peoples are directed as a solution of their sexual problems, may fail to compensate for the earlier abstention and fail to meet the demands of later life. Adultery may be a sign that there is something not quite right about the marriage, some defect in the relationship or the personality of the partners. Thus, paradoxically, the institution of marriage or the maintenance of a particular marriage may only be possible where sexual freedom is allowed to one of the partners. This may be the case in arranged marriages or in a marriage nearly on the rocks. It may be important to preserve the marriage because of children.

Sexual freedom can be of some importance where one of the parties suffers from or adheres to a particular sexual ritual or perversion. It is one of the lesser known, but important, reasons for resort to prostitutes. Commonly, a prostitute will not mind and may in fact take part willingly in the performance of perverse activity. It may be best that this activity be carried on outside the home. Cynical though it may seem, such conduct may be necessitated by the way in which the psychosexual life of the individual develops.

It is recognized that to a considerable degree psychosexual development may take place dissociated from the rest of the personality. Consequently, some people whose lives are normal, healthy and indeed admirable in every way known to the spouse or to friends and associates, nevertheless have in a hidden corner of their personality the need for a bizarre, unusual or extremely specific ritual which is the way in which their sexual drive can achieve some expression. Treatment may not be possible or it may not be desired. The way out is to employ a prostitute who will, for example, carry out what is in fact a distorted form of childhood memory. The man may dress in woman's clothes or may be upbraided by the girl before intercourse takes place or before some orgastic discharge occurs. There is a tremendous strain upon the individual who has one of these pockets of abnormality; perhaps the example given provides one of the true occasions where the existence of prostitution tends to preserve the institution of marriage and the structure of healthy society. The prostitute in this way acts to deal with the disruptive tensions.[17]

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15. See Ploscowe, *supra* note 11, at 219.

16. See, *e.g.*, LA. CIV. CODE art. 139 (1952). In a divorce case called "unique," a man who was admittedly the wife's lover was cited by her as the object of her husband's homosexual affections. See Daily Telegraph and Morning Post, Jan. 17, 1962, p. 20.

17. To take another example, an otherwise potent, recently married young man was often seized by a desire to masturbate with a fantasy of "slaughter play" with a woman other than his wife. He remembered that he had played such a game with his sister in his adolescence. She would get down on all fours, and he would ride on her back with a knife in his hand, pretending that he would slaughter her. See Feldman, *The Role of "As If" in Neurosis*, 31 PSYCHOANALYTIC Q. 43, 45 (1962).

It may be the case that in a disturbed marriage the offending party may not be the "guilty" party or the party at "fault." However, the civil law as well as the criminal law is not concerned that one spouse psychologically drove the other to seek a sexual relationship outside the home. Thus, the court in a divorce action alleging adultery is not concerned with the motivation for the adultery. The interest of the court is solely to determine whether the alleged act of adultery was in fact committed.

It is important not to ignore the fact that the incidence of adultery is particularly dependent on the opportunities for its performance. This is quite obvious in time of war where the family is broken up and the marital partners may be separated by large distances, and in time of peace where the duties of husband or wife take them away from home for long periods. The amount of available temptation is an important factor in the incidence of adultery.

C. Bigamy

As monogamy is our sexual ethic, it is to be expected that bigamy would be proscribed as a crime in all states.[18] Lax divorce laws, however, permit frequent successive marriages, that is, "consecutive polygamy."

A "split" in the individual's relationship to others due to a dissociation in the personality is one cause of bigamy. The individual requires opposite and incompatible feelings and attitudes (love and hate) in the object of his interest. But sometimes an individual cannot find these combined in one person, or psychically he cannot permit the fusion or simultaneous awareness of these contrary feelings in himself. Each wife may provide a part of the requirements for a relationship. This is exemplified in the Alec Guinness film "Captain's Paradise," which depicted the skipper of a ferry-boat who had a wife at each end of his day's cruising. The bigamy based on this particular type of dissociation presupposes a severe character abnormality in the bigamist.[19]

Cases are familiar where a man loses his potency with any woman he loves and respects, but who can be potent with one he scorns. Lawrence S. Kubie writes: "I had a patient who had a happy affair with a woman for many years, during which his wife was hopelessly ill. He married this mistress eagerly after his wife's death, only to become impotent with her on their wedding night and thereafter. Comparable reactions occur in women as well; in anyone, in fact, in whom the taboo on sex is so deep-seated that it can be shared only extra-legally or in the gutter. Subtly or grossly these distortions occur with great frequency. They are not rare oddities. They occur because we grow up with a profoundly distorted attitude toward the human body. It is indeed remarkable that although we have been human beings for quite a number of years, we still do not accept the anatomical differences between the body of a man and the body of a woman." Kubie, *Psychoanalysis and Marriage*, in NEUROTIC INTERACTION IN MARRIAGE 28 (Eisenstein ed. 1956).

18. See, *e.g.*, LA. REV. STAT. § 14:76 (1950).

19. In this form of loss of ego integrative functioning, parts of the ego become detached from one another and go their separate ways. Robert Louis Stevenson has immortalized this split in personality in his story of "Dr. Jekyll and Mr. Hyde." Such splits occur in lesser degree in everyday life.

The form of bigamy in which a man may marry several different women simply as a means of acquiring their goods and possessions, rather than acquiring extra sexual relations, is not one which is accepted by the general public as being excusable. This type of activity does not obtain where divorce procedure is simple and rapid.

Another situation in which bigamy occurs, perhaps more commonly than is generally realized, is where a person legally married cannot undo this marriage because of strict divorce laws or the religious views of the unwanted partner, and chooses simply to ignore the previous marriage. In this case, the second or bigamous marriage is fully intended to be the permanent relationship.

D. Incest

Incest is incompatible with the foundations of our culture. As Malinowski put it, "Incest would mean the upsetting of age distinctions, the mixing up of generations, the disorganization of sentiments and a violent exchange of roles at a time when the family is the most important educational medium. No society could exist under such condition."[20] While it is sometimes assumed that members of a democratic society may marry whom they please, this is true only within limits.

Oedipus was destroyed by the gods because he violated the taboo against incest. All fifty American states have declared incest a crime. We agree with Freud that incest is a strong universal temptation.[21] Incest is therefore to an equal degree strongly forbidden. The strength of a prohibition is in proportion to the strength of the temptation. In Louisiana, for example, the penalty is graduated according to the degree of relationship, the union of cousins not being a crime.[22]

Incestuous relations between parents and children and between brothers and sisters occur in urban areas especially where feeblemindedness, alcoholism, and absence of all restraint dominate the mode of living. The home setting usually is utterly disorganized. It takes considerable abandon of all inhibition to overcome one of the strongest taboos of our culture.

"Many individuals who develop delinquent trends represent just such a split in the personality. One part of themselves follows the demands of pleasure but another part responds to the demands of reality. . . . Sometimes the split is of such a nature that the individual recognizes both forces at work but accepts one as being his own and projects the other onto the outer world or to some force foreign to himself. When a delinquent excuses himself by saying that he was forced to participate in a robbery unwillingly by members of his gang, the chances are that he is shifting the responsibility and failing to recognize the part that his own impulses had to play in the act. Another person may recognize his responsibility in the forbidden act but attribute it to a part of himself for which he does not feel responsibility: 'It is not I who did it but a bad impulse within me.'" SYMONDS, THE EGO AND THE SELF 153, 154 (1951).

20. MALINOWSKI, SEX AND REPRESSION IN SAVAGE SOCIETY (1927).

21. See, in particular, FREUD, TOTEM AND TABOO (Strachey transl. 1950).

22. See LA. REV. STAT. § 14:78 (1950); *cf.* LA. CIV. CODE art. 95 (1952). See generally PILPEL & ZAVIN, YOUR MARRIAGE AND THE LAW ch. 2 (1952).

The incidence of reported incest in relation to the total number of sex offenses varies from 2.4% to 6.3%.[23] As to the frequency of the different types of incest, father-daughter is most common, brother-sister is next, mother-son is least common. The relationship between father and daughter is less intense because it starts later than the mother-child relationship. There is a sufficient distance between father and daughter to make it possible for an attraction to arise of the same type as is found between strangers and there is sufficient closeness between them to enable them to know each other well. Furthermore, the opportunities are great and, in a paradoxical way, are actually fostered by family life. A further difficulty is that the incestuous relationship corresponds so closely to what is so often imagined, in innocence, and which in a symbolic way is frequently played out between father and daughter. The differences in closeness, cuddling, modesty, sensuality, seductiveness and teasing vary remarkably from family to family. This is a matter of simple observation. However, there is the greatest gap, as close as is the relationship, between sexualized play and actual incest. The taboo in the majority of cases is never broken. Nevertheless in various small cultural groups scattered about the United States incestuous conduct is more easily perpetrated due to a lack of the limiting factors usually found in large urban communities.

The biological advantages and disadvantages of in-breeding are well-known. There may or may not be a physical detrimental effect produced upon the species by incestuous unions. Animals are believed to mate at random; but man, for the societal reasons pointed out above, is restricted by a strong prohibitive barrier. As for physical detriment, it occasionally happens that the union of close relatives produces a child with an abnormality due to a recessive gene which would not otherwise make its appearance. This, of course, is a well-known argument for exogamy.

Another serious problem area involves incest as the cause or byproduct of mental illness. We have seen psychotic children of an incestuous union between father and daughter. Perhaps the incest itself is to be attributed to a severely abnormal mental state of the mother at the time of conception, and this affected the mental health of the child, in infancy and later. The common finding where there has been incest in highly urbanized sophisticated culture is that the mother even prior to pregnancy was of unsound mind, partially or wholly. In other words, where incest occurs in an American city or in cities of Western Europe, one would not go far wrong if one considered such an act prima facie evidence of psychosis in one or both of the partners.[24] In primitive areas, particularly in isolated parts

23. See KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES (1954); Rhinehart, *Genesis of Overt Incest*, 2 COMPREHENSIVE PSYCHIATRY 338 (1961).

24. Occasionally the theoretical possibility is that the reverse may be true; incest may have unwittingly avoided an inner conflict which would have lead to psychosis.

of the country, this presumption may not apply, due to the opportunity and the need of some outlet for instinctual energy.

We must point out the sometimes narrow and occasionally nonexistent differentiation between fact and fantasy found on the part of some persons who make accusations of incest. Accusers are often found to be mentally disturbed.

E. Miscegenation

Southern criminal codes punish black and white marriages or their habitual cohabitation.[25] The law has not been constitutionally tested. The law governing marriage and family relationships in the United States is essentially state law since, under the federal constitution, the states have retained the right to make their own laws in this field.

An interesting psychological complex that has not been adequately investigated arises particularly in the South, in cases of white children of either sex who have been brought up in large measure by a negro nurse and/or man servant or other male employee. The most intimate moments of childhood, of tenderness and loving care, may be experienced by the white child in a relationship with the Negro. When adult age is reached, a marital partner is sought in the image of the beloved figures of childhood, either the parent or servant. Therefore, a mixed relationship commonly assumed to be based on lust may in actuality be based on a quite fundamentally healthy experience.

F. Rape

Rape is usually defined as "the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, however slight, is sufficient to complete the crime."[26]

The general rule is that a female under the age of twelve is legally incapable of consenting to sexual intercourse. Coitus with a female under the age of twelve constitutes the crime of "aggravated rape," even though she in fact consented to the act. Lack of knowledge of the girl's age is not a defense. The penalty is usually death.[27]

Fear of rape in females may activate a "riddance mechanism" whereby they allow themselves to be raped in actuality in order to deal with the ever-present fear that it may possibly happen. Quite often in cases of alleged sexual assault, we find the victim herself unconsciously tempting the offender. We might refer to the bride in Peer Gynt. One often gets

25. See, *e.g.*, LA. REV. STAT. § 14:79 (1950). The Louisiana law prohibiting concubinage between Indians and Negroes was omitted in the present criminal code due to its lack of "social utility."

26. LA. REV. STAT. § 14:41 (1950).

27. LA. REV. STAT. § 14:42 (1950).

rid of anxiety by doing the very thing that is feared. The suspense of a (presumably) impending disaster may become so unbearably painful that it will blindly drive the individual into the very misfortune he dreads. He may then act automatically, or yield to the irrational impulse "to get it over with." This is similar, in these days of the cold war, to the statement we sometimes hear, "let's drop the bomb and get it over with." Mark Twain aptly described riddance behavior:

> When I was twelve and a half years old . . . the summer came and brought with it an epidemic of measles. For a time a child died almost every day. The village was paralyzed with fright, distress, despair. Children that were not smitten were imprisoned in their homes to save them from the infection . . . . I was a prisoner. My soul was steeped in this awful dreariness and in fear. At some time or other every day and every night a sudden shiver shook me to the marrow, and I said to myself, "there, I've got it! and I shall die." *Life on these miserable terms was not worth living, and at last I made up my mind to get the disease, and have it over, one way or the other.* I escaped from the house and went to the house of a neighbor where a playmate of mine was very ill with the malady. When the chance offered I crept into his room and got into bed with him. I was discovered by his mother . . . . But I had the disease.[28]

The psychological expectation of rape on the woman's part is perhaps commoner than realized. Some women constantly seem to seek men who will ill-treat them in a sexual relationship. Hence, the popularity among women of the particular stereotype played by actors George Raft and Humphrey Bogart.[29]

G. Carnal Knowledge of a Juvenile

Restraint on adolescent sex practice is essential, as the adolescent, although sexually capable, is not socially responsible. Sexual maturity and social maturity do not coincide, and usually there is at least a ten-year gap between the two. Since man, unlike the animal, has the concept of social

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28. TWAIN, *The Turning Point of My Life,* in WHAT IS MAN? AND OTHER ESSAYS 130-31 (1917), quoted in Rado, *Emergency Behavior,* in PSYCHOANALYSIS OF BEHAVIOR 222 (1956). (Emphasis added.) The riddance mechanism might be found in pilots in war. It is possible that occasional plane crashes or the shooting down of pilots are brought about by the anxiety related to the obsession with being shot down or crashing.

29. One of the few modern and detailed accounts of the psychology of the rapist who is also a murderer is given by Williams, *A Psycho-Analytical Approach to the Treatment of the Murderer,* 41 INT'L J. OF PSYCHO-ANALYSIS 532 (1960). Williams gives in some detail the factors governing the behavior, the mode of choice of the victim, and the reasons for raping or killing. The author discusses the surmounting of the barrier between thinking of murder and actually performing it and also discusses the difference between murderers and other criminals. See also Wille, *Case Study of a Rapist: An Analysis of the Causation of Criminal Behavior,* 7 J. OF SOCIAL THERAPY No. 1 (1961). Unfortunately, for the sake of preserving the anonymity of the persons involved, a good deal of the most vital data was deleted when Wille's article was arranged in its final form.

maturity, control of the sexual drive is necessary in order to control the gap between sexual and social maturity. Furthermore, in promiscuous sexual activity, persons are used as objects, or for some neurotic reason. There is no warm feeling and no appreciation of the person as a person. Promiscuity provides for human relatedness in a physical and nonpersonalized form when there is difficulty in maintaining relatedness in an emotional and personalized form.

The criminal law seeks to deter the adult male from engaging in promiscuous activity with minor females. It is a crime in most states (usually called "carnal knowledge of a juvenile") for a male over seventeen to have sexual intercourse with an unmarried girl between the ages of twelve and seventeen, even with her consent.[30] As already pointed out, under the usual law a male over seventeen who has sexual intercourse with a girl under age twelve, even if she consents, is guilty of "aggravated rape."[31] Lack of knowledge of the girl's age in either category is no defense. The male acts at his peril. On the other hand, the law does not condemn elderly women who have sexual intercourse with boys under seventeen.

The law does not consider that a girl past her menarche has sexual desires no less pronounced than those of boys. The sometimes extreme seductiveness of a young female is a factor which has no place in the law, but it certainly affects motivation. Even at the age of four or five, this seductiveness may be so powerful as to overwhelm the adult into committing the offense. The affair is therefore not always the result of the adult's aggression; often the young female is the initiator and seducer.[32]

Criminal assaults on young girls are more often than not committed by men who are growing old, and in just as many instances aging women seduce boys. The aging have the task of adjusting themselves to decline in physical strength and sexual power. One characteristic of aging is a shift from genitality to pregenitality. There may be increasing interest and engagement in scatological activities. Pornographic books and pictures are in great demand in old age as in adolescence, and "peeping-tom" tendencies may be equally strong in both. The so-called perversions are found more

30. It is punishable in Louisiana by a five-year maximum sentence. LA. REV. STAT. § 14:82 (1950).

31. Under the juvenile delinquency laws, a male under the age of seventeen who violates the law is held as a delinquent rather than as a criminal. See LA. REV. STAT. § 13:1569 (1950). A male between the ages of fifteen and seventeen who commits aggravated rape (which includes coitus with a female under twelve) is charged in Louisiana as a criminal. See LA. REV. STAT. § 13:1570 (1950). Among the delinquency cases adjudged by 88 courts of the United States, 2% of the boys and 21% of the girls were arraigned because of sex offenses, mostly of an overtly heterosexual nature. See Markey, *A Study of Aggressive Sex Behavior in Adolescents Brought to Juvenile Court*, 20 AM. J. ORTHOPSYCHIATRY 719 (1950).

32. See Bender & Blau, *The Reactions of Children to Sexual Relations With Adults*, 7 AM. J. ORTHOPSYCHIATRY 500 (1937).

often in old people than in persons in their prime. Further, as Michael Balint has pointed out, one of the difficult problems facing the aged person is how to employ his remaining love.[33] That is, the elderly find themselves gradually deprived of the people for whom they once cared; the inexorability of time parts friends and makes a man's children independent. One of the effects produced by this impoverishment in love, as Balint points out, is that an elderly person may embrace all living creatures in the love which he had hitherto reserved for a few people.

Mental defect or at least a low level of intelligence may be one of the reasons for the choice of a child as a sexual object; the offender may desire a child at the same intellectual level as he, feeling unable to seek and deal with an adult partner.

In some states coitus with an adolescent is outlawed by a crime entitled "statutory rape." The crime of statutory rape can be called a technical rape since it is not an offense against consent and need not involve violence. Technical offenses tend to be less highly condemned and less carefully observed, as are some motoring offenses. The meaning of the word "rape" is understood in all civilized communities as involving overpowering violence, causing physical and particularly mental suffering on the part of the victim. But violence is not involved in the case of statutory rape. It is therefore a pity that the word "rape" is included in the statutory offense since this tends to diminish the significance of an otherwise perfectly well understood and universally abhorred crime. The argument for including the word "rape" in the name of the crime forbidding sex relations with a consenting girl between the ages of twelve and seventeen is similar to (but not as sound fundamentally as) the reason underlying the advertising technique of grafting an idea from one sector of human activity onto another in order to sell the advertised product. An alternative legal title would be indecent assault, which is used in England and in Illinois.[34] Some states, as pointed out, call it "carnal knowledge of a juvenile" or "carnal knowledge of a child," but this is a ponderous and wordy description.[35]

33. Balint, *The Psychological Problems of Growing Old,* in PROBLEMS OF HUMAN PLEASURE AND BEHAVIOR 69 (1957).

34. The new Illinois criminal code, adopted in 1962, has no such crime as statutory rape. The revision has two statutes which can be applied in these cases. One, a felony called indecent liberty with a child; the other, a misdemeanor called contributing to the sexual delinquency of a child.

35. While the term "statutory rape" or "aggravated rape" might be acceptable in prohibiting sexual activity with girls under twelve, it would be preferable that the word "rape" not be used when there is no actual force or pressure. Of course, a child cannot legally assent (*i.e.*, no defense may be entered by the offender saying the girl was willing). Nonetheless, it is questionable whether the activity should be called rape and whether it is justifiable to alter the meaning of the word to fit a variety of crimes. Some other phrase might be used here as well and the word "rape" restricted to the common and easily intelligible meaning, intercourse by violence.

H. Indecent Behavior With Juveniles

Other acts of sexual misconduct, committed upon the person or in the presence of a juvenile of either sex, are punishable as "indecent behavior with juveniles."[36] This crime consists of behavior which falls short of sexual intercourse, carried on with young children. It covers indecent sexual displays in the presence of children under the age of seventeen. Lack of knowledge of the juvenile's age is not a defense. Statistical studies show that the greatest number of all sex offenders are men who indulge in sexual activities with children. Fondling or manipulation of children, or exposure of genitals, is usually carried out by impotent men, usually older ones (for reasons previously discussed), whereas penetration is usually committed by younger men.[37]

Today's well-known fact that children have sexual ideas, pointed out by Freud in 1905, is sometimes taken to mean that these ideas are the same as those of adults. Sandor Ferenczi, one of the founders of psychoanalysis, described it as a "confusion of tongues between adult and child." Ferenczi pointed out in detail the traumatic effect on a child who is in a physical way sexually awakened by an adult.[38] Children have sexual thoughts and often giggle at ideas about body activity, but these ideas remain for children somewhat unrealistic, perhaps dream-like in quality and without very deep feelings being involved. Once having experienced the impact of adult feeling, which has an intensity quite foreign to children and which totally overwhelms them, the child then experiences an entirely devastating change in his or her nature at a time when there is no developed organization for dealing with the powerful emotions that are aroused. One can think theoretically of two factors which might seriously affect the child: the intense libidinal, that is "sexual" emotions aroused; and the intense aggressive quality of the act.

It has been said that a courtroom trial is often an appalling experience for the child. The events following sexual activity with children and adolescents may be as traumatizing, if not more so, as the sex act itself; conversely, if the family tries to ignore the occurrence, there will perhaps be little devastating effect on the child. But the family, understandably disturbed, excited and overwrought, makes inflammatory statements and forces the child into court. Some jurisdictions (*e.g.*, New Zealand) in cases involving sex offenses against minors make an exception to the hearsay

36. See LA. REV. STAT. § 14:81 (1950).

37. Legal language often uses decorous and formalistic terminology, such as "pedophilia" to describe sexual activity with children. Numerous other examples could be cited. See KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES (1954). In the place of technical names or words of Greek origin (*e.g.*, pedophilia), why not simply spell out the activity, such as by the language "indecent assault"? The public is well aware of the meaning of the word "indecent" and also of "assault." This would have the effect of making the law simpler, more precise and intelligible for the public.

38. See SANDOR FERENCZI, SELECTED PAPERS (1950-1955).

rule and admit the child's out-of-court statements.[39] This is done to proteet the child from the ofttimes traumatic experience of beimg on the witness stand. Some American states keep the child off the stand by holding that, because of age, the child is not a competent witness,[40] although in fact children can be very good witnesses.

We are not aware, however, of any investigatory work that has been done to determine whether children who have appeared in court have suffered any ill-effects from the court appearance itself. It is possible that the most disturbing and perhaps injurious aspect in a court appearance of a child as a witness would be the awareness of the aggressive factor in the court procedure, assuming that aggressive examination and cross-examination were permitted. The operative word here is "aggressive" and not necessarily the examination and cross-examination itself.[41] Wigmore said that there must be an opportunity for an effective cross-examination,[42] but in the case of children, the most effective way of reaching the truth is by an examination which is considerate, reasonably gentle and courteous.

In addition, beimg able to talk about the event, the child may find a court appearance to have a releasimg or mitigating effect. Furthermore, since children know well that crimes require or deserve punishment, a court appearance for many of them would seem an appropriate event rather than something outrageous.

I. Crime Against Nature

A substantial group of offenses are pigeon-holed under the euphemistic caption of "crime against nature." The use of the broad category "crime against nature" for prohibited sexual behavior represents legal definition at its vaguest. The Louisiana statute, which is more explicit than most statutes, defines the crime in this way: "Crime against nature is the unnatural carnal copulation by a human being with another of the opposite sex or with an animal. Emission is not necessary, and, when committed by a human beimg with another, the use of the genital organ

39. Some Southerners have been heard to justify lynching of rapists on the basis of avoiding a trial, which would require embarrassing testimony from a (white) female.

40. See, *e.g.*, People v. Porcario, 6 N.Y.2d 248, 189 N.Y.S.2d 194 (1959). On the ehild as a witness, see SULLIVAN, THE INTERPERSONAL THEORY OF PSYCHIATRY 223 (1953); Note, 225 L.T. 252, 280 (1958).

41. In the English case of Rex v. Dunne, 143 L.T. R. (N.S.) 120 (Crim. App. 1929), an attempt was made to examine the child witness in the calm atmosphere of the judge's private room. Unfortunately, the court of criminal appeal condemned the practice as offending against the principle that criminal proceedings must be conducted in open court. The fecling that a public trial is an absolute and inflexible necessity is found even in police states, which go so far as to stage public trials in political offenses.

42. See 5 WIGMORE, EVIDENCE § 1371 (3d ed. 1940).

of one of the offenders of whatever sex is sufficient to constitute the crime."[43]

Some courts have gone so far in prosecutions for "unnatural crimes" as to say that "recitation of the nauseating details would serve no purpose."[44] The extent of "recitation of the nauseating details" apparently depends on the prudishness of the judge. We might ask the court why it is so overwhelmed in a sex case when the most minute details of a murder would be regarded as suitable material for consideration. The fact that details of a sex case nauseate the judge should not be grounds for failing to mention them. It is traditional in a criminal case that the defendent be proven guilty by proof beyond a reasonable doubt (unless the defendant pleads guilty). This surely involves an examination of the details.

1. Homosexuality

The crime-against-nature statute prohibits, among other things, consensual homosexual acts between adults. No state specifies homosexuality as a crime by that name. It is prohibited usually under the name of crime against nature or sodomy.

The Wolfenden Committee in England and the American Law Institute in its model code have recommended that sexual relations of a homosexual nature between consenting adults should no longer be subject to law, provided they take place in private. The reasons given are the lack of harm to the secular community; the unenforceability of the penal law; the opportunities created for blackmail; the unsuitability of imprisonment for offenders; the undue interference in personal affairs; and the strain placed by the law on limited police resources.[45] Illinois is apparently the

43. LA. REV. STAT. § 14:89 (1950).

44. See People v. Ramos, 125 Cal. App. 2d 383, 270 P.2d 540 (Dist. Ct. App. 1954). To quote another judge: "It was never the practice to describe the particular manner or the details of the commission of the crime, but the offense was treated in the indictment as the abominable crime not fit to be named among Christians. The existence of such an offense is a disgrace to human nature. The legislature has not seen fit to define it further than by the general term (crime against nature), and the records of the courts need not be defiled with the details of the different acts which may go to constitute it. A statement of the offense in the language of the statute is all that is required." Quoted in PLOSCOWE, SEX AND THE LAW 197 (1951). See also State v. Murry, 136 La. 253, 66 So. 963 (1914). In Canter v. Maryland, 224 Md. 483, 168 A.2d 384 (1961), the defendant and one Howard were caught in "an act of sodomy" by two police officers who had flashlights. The appellate court said: "Without reciting their testimony it is enough to say that we think the trial judge could properly draw the inference that penetration occurred and that Canter admitted as much to the officers."

45. It has been said that the Wolfenden report, after all the talk, ended up as so much hot air. Due to the great public controversy, the British Government was unable to formulate any kind of legal provisions which had any chance of being enacted without considerable political and moral controversy. Educated people in all walks of life were sharply divided into categories which may be described as tolerant, enlightened, frightened, condemnatory, disgusted and so forth. This is typical of the state of affairs that arises whenever the subject of homosexuality comes up for

only American state to remove consenting varied sex expression, including that of homosexual adults, from the status of crime when conducted in private and without pressure.[46] In the first major revision of its criminal code since 1874, Illinois, effective January 1, 1962, has provided that it is not unlawful for persons of the same sex to engage in sexual relations in private so long as the participants are adults and force has not been used.[47]

Under the usual law, however, the homosexual is branded as a criminal and is condemned to a penal institution, where there can be no development unless it is homosexual.[48] If the person is not a confirmed homosexual when he enters prison, he may be by the time he comes out.

The law's singling out of this emotional disturbance, and attaching to it the stigma of a crime, is similar to arresting a victim of infantile paralysis because he might somehow transmit the disease to someone else. Homosexuals arouse unconscious anxiety in many persons, and as a result they are often treated with vengeful brutality when they are apprehended. At least one psychological source of this high feeling and condemnation must arise from the prevalence of fragments of homosexuality arising during normal psychological development. Some degree of homosexuality in thought and feeling (which is quite different from action) arises in the ordinary course of development and becomes particularly prominent in the immediate postpubertal age group, partly as a developmental phase and

discussion. The English film "Victim," recently released, seems to treat the whole question of homosexuality as if society's sole injustice to homosexuals is in making them susceptible to blackmail. In the film, a ring of blackmailers harass and prey on a homosexual by means of a photograph taken with a telephoto lens. The potential consequences of the photo are harmful, and the implicated youth commits suicide. But any married person would be as vulnerable to blackmail if he were photographed with a mistress. See The New Republic, March 12, 1962, p. 35.

46. *Accord*, Rittenour v. District of Columbia, 163 A.2d 558 (D.C. 1960) ("it is our opinion that the [1948 Miller statute] was not designed or intended to apply to an act committed in privacy in the presence of a single and consenting person. . . . [U]nder our law homosexuality is not a crime").

47. See SOWLE, POLICE OFFICER'S GUIDE (1961). Homosexuals usually become involved in criminal behavior when, for various reasons of inadequate controls, they attempt to force their form of sexual behavior on unwilling partners. There are delinquent boys who make a career of prostituting themselves to adult homosexuals. They regard the activity as an easy means of obtaining money. In any city with a large concentration of homosexuals, there are found adolescent boys who try to exploit the older homosexuals. They work in two ways: (1) they go along with the older man and collect their fee, or (2) they entice the older homosexual into a trap where he can be easily robbed (or "rolled," as it is called). The latter might be described as an attack against a father figure. Very rarely is a young homosexual "rolled."

Mardi Gras in New Orleans affords a public opportunity for the male homosexual or transvestite to dress as a female.

48. The "crime against nature" is punishable in Louisiana by a five-year maximum imprisonment. LA. REV. STAT. § 14:89 (1950). The laws in the various states punishing homosexual offences are set out in ST. JOHN-STEVAS, LIFE, DEATH AND THE LAW (1961). See also DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 123 (1962); Bowman & Engle, *Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMP. L.Q. 273 (1956).

partly out of anxiety about approaching heterosexual activities. Hence, homosexuality is both a stage in normal development and a type of abnormal development.

One aspect of homosexuality that is often ignored is the extreme dependency shown by homosexuals or by persons having substantial amounts of latent homosexuality.[49] Legal literature commonly thinks of homosexual activity as being performed for orgastic pleasure whereas this may be insignificant. Indeed, actual sexual activity may be rather rare. The intense love for each other and admiration and perhaps mutual dependency may be far more important.[50] Loyalty and faithfulness loom large. Violent disturbance occurs during the breakup of a homosexual partnership because of the loss of affection, loyalty and dependence, rather than for loss of an orgastic outlet.

Socially valuable and artistically talented persons may be found in striking numbers among homosexuals.[51] In the political debates of the early 1950's, a great deal of discussion was centered on the presence of "sex perverts" in the State Department and in other "sensitive" government posts. It opened a broader debate on homosexuality. Two plays on Broadway, Gore Vidal's *The Best Man* and Loring Mandel's dramatization of Alan Drury's novel, *Advise and Consent*, both discuss the relationship of politics and homosexuality. Harry Golden, the American humorist, aptly evaluates the situation: "I think it is more than a coincidence that both these two men have used homosexuality as a convention in their work. It is a symptom. It is a symptom first of a deficiency of imagination to use

49. Lionel Ovesey, finding that the theoretical approach used by Freud in his discussion of homosexuality makes it difficult to explain certain phenomena, has recast in highly regarded articles the psychodynamics of homosexuality within an adaptational context in order to demonstrate the crucial role of societal forces. See Ovesey, *The Homosexual Conflict*, 17 PSYCHIATRY 243 (1954); Ovesey, *The Pseudohomosexual Anxiety*, 18 PSYCHIATRY 17 (1955); Ovesey, *Pseudohomosexuality, the Paranoid Mechanism, and Paranoia*, 18 PSYCHIATRY 163 (1955). See also BIEBER & ASSOCIATES, HOMOSEXUALITY (1962); Gershman, *Psychopathology of Compulsive Homosexuality*, 17 AM. J. OF PSYCHOANALYSIS 58 (1957); Monroe & Enelow, *The Therapeutic Motivation in Male Homosexuals*, 14 AM. J. OF PSYCHOTHERAPY 474 (1960); Salzman, *The Concept of Latent Homosexuality*, 17 AM. J. OF PSYCHOANALYSIS 161 (1957); West, Doidge & Williams, *An Approach to the Problem of Homosexuality in the Military Service*, 115 AM. J. OF PSYCHIATRY 392 (1958).

50. See, *e.g.*, the biblical story of David and Jonathan. See also Rado, *A Critical Examination of the Concept of Bisexuality*, 2 PSYCHOSOMATIC MEDICINE 459 (1940).

51. "Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation. . . . Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty too. If you do not believe me, read the books of Havelock Ellis." Letter written by Freud in 1935 to an American woman who appealed to him for advice about her homosexual son. See 3 JONES, THE LIFE AND WORK OF SIGMUND FREUD, THE LAST PHASE: 1919-1939 (1957). *One* magazine, founded in 1952, deals primarily with homosexuality, and vigorously advocates "the right of the homosexual to be homosexual and to live a homosexual life."

homosexuality as the sin cardinal in politics and second it is a symptom of how corrupt we are to maintain the only sure-fire weapon to defeat a political candidate is by revealing his sexual aberrations."[52]

Condemnation of homosexual acts between men should be compared with the lack of public condemnation of perhaps qualitative, but not necessarily actual, homosexual acts between women. For instance, it is far more common for women to share beds than for men.

The possibility of successful treatment of homosexuals is a much debated point. It is most possible where the homosexuality is a source of pain to the person, and least likely to be effective where the homosexual is perfectly content with his way of life and in fact prefers it as long as it does not involve him in legal difficulties. The majority of homosexuals defend their forms of sexual activity as perfectly normal.

J. Abortions and Contraception

A person who performs an abortion, for whatever purpose, commits a criminal act.[53] The abortion is criminal even though the operation is performed by a reputable doctor and the operation is necessary either because the woman's life is endangered, or her health will be seriously impaired without the operation, or because she has been raped. Despite the law, abortions are being regularly performed, and there are no criminal prosecutions. Although difficult to prove, it is quite likely that abortion is practiced more commonly among women in the higher social classes. The Planned Parenthood Federation of America has stated "that a conservative estimate of criminal abortions in the United States is 330,000, roughly a thousand a day." But, because of the existence of the law, abortions are performed clandestinely often under substandard conditions.[54]

52. Golden, *Politics and Homosexuality*, The Carolina Israelite, Jan.-Feb. 1961, p. 20. See also GAP REP. No. 30, REPORT ON HOMOSEXUALITY WITH PARTICULAR EMPHASIS ON THIS PROBLEM IN GOVERNMENT AGENCIES (1955); Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962).

53. See, *e.g.*, LA. REV. STAT. § 14:87 (1950). In Commonwealth v. Fisher, 189 Pa. Super. 13, 149 A.2d 666 (1959), involving an abortion prosecution of a doctor, the girl not wanting to testify claimed the privilege against self-incrimination. She was not married, and it could be posited that she had committed the crime of fornication. The district attorney contended that there had been in the jurisdiction no prosecutions for fornication, that the law on fornication was a dead letter. The court nonetheless upheld the girl's claim of privilege, saying that the test for the plea is whether the testimony can possibly incriminate.

54. See Morrow, *The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered*, 17 TUL. L. REV. 1, 22 (1942). The person performing the abortion, and not the person upon whom it is performed, is guilty of crime. In one case, in which a doctor was being prosecuted for the crime of abortion, the patient, who was unmarried, refused to testify against the doctor, claiming the privilege against self-incrimination. The court held that while the patient was not criminally liable for abortion, her testimony, since she was not married, could possibly lead to her conviction for fornication. The court upheld her claim of privilege even though prosecutions in the jurisdiction for fornication were practically nil. Commonwealth v. Fisher, 189 Pa. Super. 13, 149 A.2d 666 (Super. Ct. 1959).

The mental consequences of abortion performed to terminate an illegitimate or adulterous pregnancy should be considered. The tendency is to terminate the pregnancy on the principle that the person did not wish to conceive. This may be so consciously but there may nevertheless be a deep wish for the pregnancy. The psychological results of an abortion are therefore not always favorable to the person aborted and may result in a severe depression.

In his book *Listening With the Third Ear,* Theodor Reik describes a patient who had severe depression following an abortion. It was only after the abortion that she realized how desperately she wanted the pregnancy and how little chance there would be of having a baby, particularly from the putative father with whom she had the greatest ties of affection. Likewise, in real life it may be that persons who perform abortions are not in fact doing the great service to their clients which they would like to believe.

Similarly, in cases of illegitimate babies, people are quick to advise immediate adoption.[55] In some situations that we have encountered the adoption of the child resulted in a severe depression disorder in the mother. In one case a young mother was arrested for stealing a garment from a department store on the day her child was adopted. The probation officer on investigating the case realized that the theft had occurred on the same day that the child had been given to the adoptive parents. The young mother was put on probation and sent for out-patient treatment to an institution for study and treatment of delinquency. The extent of the depression and misery at losing the child she had grown to love was overwhelming; the consequences were irreversible. One can well suppose that this event will cause the girl to suffer unhappiness for a good deal of her life. Perhaps girls who have babies out of wedlock would be better off in a culture where it is regarded as ordinary and healthy to bring up their children even though they are unmarried. This is particularly well accepted in certain European countries. One must pay tribute to George Bernard Shaw who, with his customary iconoclasm, forthrightly asserted in *Mrs. Warren's Profession* a woman's right to have a baby; this

55. Harry Golden quips on illegitimacy: "Some of the DAR ladies took time out from their fight against the United Nations and fluoridation to demand the elimination of the Tarzan books from the libraries. The DAR suspects Tarzan and Jane are living together without benefit of clergy, openly and happily if athletically. But as with fluoridation, the ladies are wrong. Jane and Tarzan are indeed married by Edgar Rice Burroughs in the second Tarzan book and sometime later Boy floated down from an airplane which solved the obstacle of illegitimacy, and at the same time gave Boy an advantage in not being related to Jane and Tarzan and therefore not as neurotic as they. As for Cheetah, he is a confirmed bachelor but admits to being a monkey's uncle." The Carolina Israelite, Jan.-Feb. 1962, p. 1. Tarzan and Jane were married in *The Return of Tarzan* (p. 312) by Jane's father, an ordained minister. As a result of the DAR publicity, librarians report, there has been a run on Tarzan books.

right, he felt, was valuable and important and was not to be confused with her wish to be married and have a husband.[56] Furthermore, irrespective of the wishes of the mother, the fact that a goodly number of putative fathers are married men and therefore not free to marry is of significance in assessing the value of current theories regarding illegitimacy. The mother's wishes aside, it is important that children may live without a sense of guilt and shame.

Birth control prevents recourse to abortion. The use of contraceptive devices is popular in the United States (excepting the Roman Catholic and Orthodox Churches).[57] Abram Kardiner expresses the opinion that the primary purpose of all sexual control is not to interfere with a pleasant pastime, but rather to limit population growth by irresponsible procreation. Different societies differ in how they accomplish this end. Some societies (Marquesas) kill the female infant; others terrorize the child into abandoning its pre-sexual maturity activities and permit none until social maturity.[58]

Although there is much legislation in the United States against the use or advertisement of contraceptive devices, the courts have modified the operation of federal statutes and most state statutes have been liberally interpreted. Twenty states and the District of Columbia have no legislation on contraception. Seventeen states outlaw traffic in contraceptives, but doctors, pharmacists, or others operating under special license are excepted from the prohibition. Eight states have no law against contraceptives but restrict or prohibit their advertisement. Five states prohibit the sale of contraceptives and advertising.[59]

Considerable litigation resulting in interpretation of birth control statutes has taken place in Connecticut, Massachusetts and New York. The constitutionality of the Connecticut law, which prohibits the use of contraceptive devices, was recently argued before the United States Supreme Court.[60] The physician who advised their use contended that the law unconstitutionally deprived him of a valuable property right—to practice the best modern medicine; the patient, whose life was endangered by another pregnancy, claimed that she was being deprived of her constitutional right to life.

In the decision, handed down on June 19, 1961, a majority of five fonnd the question too "abstract" for decision. It said that Connecticut had brought only one prosecution under the statute and there was no indication any violator would now be prosecuted. But Justice Harlan, in a

56. See also YOUNG, OUT OF WEDLOCK (1954): "In the majority of cases the unmarried mother wants a baby, specifically an out-of-wedlock baby without a husband."

57. One of America's least known but most lucrative businesses is the contraceptive industry. It is reviewed in Eros, vol. 1, no. I.

58. See Kardiner, *Discussion*, in PSYCHOSEXUAL DEVELOPMENT IN HEALTH AND DISEASE 85 (Hoch & Zubin, eds. 1949).

59. See ST. JOHN-STEVAS, LIFE, DEATH AND THE LAW 50 (1961). The appendix to the book contains a table of laws in the various states.

60. Poe v. Ullman, 368 U.S. 869 (1961). See Time, March 10, 1961, p. 49.

thirty-four page dissent, pointed out that the one prosecution, in 1940, may well have had the intended effect of discouraging doctors and nurses from participating openly in birth control programs. All birth control clinics in Connecticut were closed after the 1940 case, and they remained closed. As Justice Harlan said, conscientious persons may well hesitate to violate a criminal law no matter how seldom it is enforced. The *New York Times* editorialized: "[W]hile we respect the moral and religious arguments of those who object to birth-control devices, we do not believe that they have the right to impose their views by force of law in our pluralistic society on others who feel differently."[61] On November 1, 1961, the Planned Parenthood League of Connecticut opened a birth control clinic in New Haven in open defiance of the law, in order to make a court test of it. Police closed the clinic two days later.[62]

K. Prostitution

Prostitution, and the related acts of soliciting for prostitutes, pandering, letting premises for prostitution, and enticing minors into prostitution are well-known criminal offenses.[63] Prostitution is generally defined as the indiscriminate sexual intercourse by a female with a male for compensation,[64] but in many states indiscriminate and promiscuous sexual intercourse even without gain or hire is deemed prostitution.[65]

In America, by and large, romantic love looks to marriage as its fulfillment. It is usually felt that sexual response is crucial for love and integral to marriage; hence, prostitution has not played in America the major role it has had in European cultures for centuries. In those countries prostitu-

61. N.Y. Times, June 21, 1961, p. 34M, col. 2. The Connecticut birth control statute, it appears, is not Roman Catholic in origin. The statute was originally passed under Protestant pressure during the notorious "Comstock era," when the reformist confusion between civil law and private morality reached its apogee. See Time, March 31, 1961, p. 2. See also O'Leary, *The Crowded World—The Church and the Population Dilemma—The Roman Catholic Position,* Punch, Dec. 27, 1961, p. 926.

62. See Zimmerman, *Contraception and Commotion in Connecticut,* Look, Jan. 30, 1962, p. 78.

In April 1962 the General Counsel of the Post Office approved mail delivery to booksellers of *The Complete Book of Birth Control,* by Dr. Alan F. Guttmacher. The decision overruled the Chicago Post Office's refusal to accept 7,000 copies of the book destined for paperback distributors.

63. See LA. REV. STAT. §§ 14:82-86 (1950).

64. See LA. REV. STAT. § 14:82 (1950).

65. *E.g.,* Connecticut, Delaware, Florida, North Carolina, Texas, Wyoming. See Ploscowe, *Sex Offenses: The American Legal Context,* 25 LAW & CONTEMP. PROB. 217, 221 (1960). The objection to labelling promiscuous sexual intercourse without hire as prostitution is much the same as that discussed *supra* regarding the term "statutory rape." To describe any kind of promiscuous intercourse as prostitution is to diminish the meaning and significance of the word "prostitution" so that the point is reached where nonsense is made of the word itself. We feel that the extension of the meaning of the word prostitution to include sexual intercourse of any kind outside marriage makes the word much less reprehensible. On the other hand, it is an advertising technique to make a prostitute seem not to be a prostitute by calling her a "call girl."

tion has allowed husbands to obtain sexual gratification outside the home, and has served to bolster the institution of "respectable marriage."[66] But America is certainly not without its prostitution. According to a recent report, businessmen in the United States use prostitutes to stimulate business.[67] It was said that large corporations used 30,000 call girls to clinch business deals, the call girls receiving from $50 to $100 per hour and allegedly making $25,000 annually tax free.[68]

The poor man's prostitute usually walks the street. In 1959 England drove prostitution indoors. It now prohibits only open prostitution. English law does not have what it considers the impractical objective of eliminating prostitution; rather, it treats it as a nuisance.[69]

Many reasons have been supplied to explain the prostitute's behavior: revenge on the male, circumvention of sexual fears, self-destruction, financial gain.[70] More often than not, as pointed out above, promiscuity provides human relatedness in a physical and nonpersonalized form for those who have difficulty in maintaining relatedness in an emotional and personalized form. And, as Hollender points out, prostitution is well suited for such a purpose.[71] Agoston comments: "The choice of partner is not only indiscriminate and promiscuous, but purposely unselective. There is involved a kind of defiant intent to show that 'anyone at all will do, no

66. See LERNER, AMERICA AS A CIVILIZATION 592 (1957). See the discussion of adultery at notes 15-17 *supra* and accompanying text.

67. See N.Y. Times, Jan. 20, 1959; DRAZAZGA, SEX CRIMES (1960).

68. *Ibid.* See also GREENWALD, THE CALL GIRL: A SOCIAL AND PSYCHOANALYTIC STUDY (1958).

"In Winnemucca, Nevada, an aspiring district attorney brought before the bar of justice a blonde proprietress of a house of ill repute, the madame of a brothel. He charged her with operating a public nuisance. The defense offered no witness, only a closing argument . . . After eleven minutes, the jury came back from their room and read their verdict—not guilty. One of the men in the courtroom left immediately to ring the church bells in celebration. Irene Roy, the accused, took a deep breath and left amid a swirl of perfumed skirts to embark in her gold colored limousine for a triumphal tour through town. The district attorney, stunned by the jury's decision, announced that though he had several more cases pending against houses of prostitution he thought he'd 'go home and sleep on it before I decide what to do.'" The Carolina *Israelite*, March-April 1962, p. 12.

69. Two good recent books about prostitution are WILKINSON, WOMEN OF THE STREETS (1955) and MURTAGH & HARRIS, CAST THE FIRST STONE (1958). The first is a sociological study; the second consists mainly of a few life stories. The low self-esteem and masochistic nature of the prostitute is described in HARRIS, NOBODY CRIES FOR ME (1958). Perhaps the best piece of writing about prostitutes and their clients is Jean Genet's play, *Le Balcon*. See also the classic by Stephen Crane, *Maggie: A Girl of the Streets*.

70. "I'd been working in that factory five years before I realised I was sitting on a fortune all the time." Prostitute quoted in Young, *Sitting on a Fortune*, Encounter, May 1959, p. 19.

71. Hollender, *Prostitution, The Body, and Human Relatedness*, 42 INT'L J. OF PSYCHO-ANALYSIS 404 (1961).

matter who, as long as he pays'."[72] It has often been said that prostitutes are frigid. To use a phrase of Abraham, "frigidity is practically a *sine qua non* of prostitution."[73] Out of the encounter, although frigid, the prostitute derives bodily but nonsexual (genital) human contact, her quest.[74]

L. Sexual Psychopath Legislation

In addition to the numerous statutes on sex deviation, as illustrated above, approximately twenty-six states[75] and the District of Columbia have enacted legislation providing for the indeterminate commitment of the so-called sexual psychopath.[76] The statutes are not in agreement as to the definition of a sexual psychopath, but usually such a person is defined as one lacking the power to control his sexual impulses or having criminal propensities toward the commission of sex offenses.[77] The law usually defines a sexual psychopath as "any person who is affected, in a form predisposing to the commission of sexual offenses, and in a degree constituting him a menace to the health or safety of others . . . ."[78] Twenty-two of the states having sexual psychopath legislation provide that a person must have been convicted or charged with some crime before he can be committed, while the remaining five states do not require that a charge be brought against the person, but simply demand that cause be shown that he is probably a sexual psychopath.[79]

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72. Agoston, *Some Psychological Aspects of Prostitution: The Pseudo-Personality*, 26 INT'L J. OF PSYCHO-ANALYSIS 62, 63 (1945).

73. ABRAHAM, *Manifestations of the Female Castration Complex*, in SELECTED PAPERS 361 (1948).

74. Hollender, *supra*, note 71.

75. Alabama, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Massachuetts, Michigan, Minnesota, Missouri, Nebraska, New Hamphire, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming.

76. Some of the ideas expressed herein on the sexual psychopath were developed in Slovenko & Super, *The Mentally Disabled, The Law, and The Report of the American Bar Foundation*, 47 VA. L. REV. 1366, 1380 (1961).

77. See Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L., C. & P.S. 215 (1960).

78. CAL. WELFARE & INST'NS CODE §§ 5500-22, 5600-07. A proposed Louisiana law is based on the California statute. See FINAL REPORT OF THE JOINT SEX CRIME STUDY COMMITTEE, STATE OF LOUISIANA (1960); New Orleans Times-Picayune, March 6, May 3, 1958; Feb. 17, 1959.

79. *E.g.*, Minnesota, Nebraska. Under Wisconsin's Sex Crimes Law, persons convicted of a sex crime *must* be committed to the department of public welfare for a pre-sentence social, physical, and mental examination, to be completed within sixty days. The law provides further that if the person is convicted of any other offense which, in the opinion of the court, is prompted by a desire for sexual gratification, the court may commit him to the department for a pre-sentence examination if the department is willing to accept him. If the person is found to need specialized treatment, he is either placed on probation for outpatient treatment or committed to the department for an indefinite period. If no treatment is needed, he is sentenced under the criminal code.

The majority of individuals committed for pre-sentence diagnostic examination are

The sexual psychopath legislation has been criticized in many aspects.[80] For one thing, the vagueness of the definition of a sexual psychopath has resulted in the commitment for long periods of time—at state expense—of many nuisance-type, nondangerous sex offenders, such as the homosexual, the exhibitionist, and the peeping tom.[81] It appears that offenders who are dangerous, such as those who use children as sexual objects and whose sex offenses are marked by sadism, can be dealt with effectively under traditional criminal and commitment laws.[82] Furthermore, sexual psychopath legislation usually has not been implemented by provision of facilities for treatment, one of the major purposes of the legislation.[83]

sent directly to the Wisconsin State Prison, where, during the sixty-day pre-sentence period, the individual is segregated from the general inmate population. He receives a battery of psychological tests including both psychometrics and projective techniques. He has a series of interviews with a psychiatrist. A medical examination is performed and, where indicated, neurological consultation is available. A social history is received from the field. When the different disciplines have completed their examinations, the offender is discussed at a staff conference, and a "group decision" is made with respect to his diagnosis and his proper committability under the Sex Crimes Law. A report of the staff decision is then submitted to the department of public welfare and from there to the committing court. The decision of the psychiatric staff is definitive with regard to whether the man is recommitted under the Sex Crimes Law, sentenced under the Criminal Code, or handled under the Mental Health Act. Decisions as to probation with out-patient treatment as opposed to treatment in a confined institutional setting are, however, entirely the province of the legal authorities. The staff does have the responsibility of providing information which the judge can use in making this decision. This is a program under which a psychiatrie staff takes full responsibility for deciding whether a man is sentenced indeterminately with opportunities for treatment or whether he is processed through usual correctional procedures and gives a definitive sentence.

In a nine-year study of the law, presented at the American Psychiatric Association meeting on May 12, 1961, Seymour L. Halleck, Asher R. Pacht and John Ehrmann of the Wisconsin State Department of Public Welfare stated: "By making our decisions as a group, we benefit from one another's counsel and are better able to control any tendency toward a capricious use of the extraordinary powers that are vested in us." Is the "group decision" reached by votes? By counting heads? An individual should take the responsibility of deciding, otherwise vigilance is soon lost. One can benefit from the counsel of others and still make an individual decision.

80. See ABRAHAMSEN, THE PSYCHOLOGY OF CRIME 157 (1960); GAP REP. No. 9, PSYCHIATRICALLY DEVIATED SEX OFFENDERS (1950); KORN & MCCORKLE, CRIMINOLOGY AND PENOLOGY 162 (1959); PLOSCOWE, SEX AND THE LAW (1951); Ploscowe, *supra* note 65, at 223; REPORT OF THE NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER AS FORMULATED BY PAUL W. TAPPAN (1950); Sutherland, *The Sexual Psychopath Laws,* 40 J. CRIM. L., C. & P.S. 543, 553 (1950); Comment, *New York's New Indeterminate Sentence Law for Sex Offenders,* 60 YALE L.J. 346 (1951).

81. See Ploscowe, *supra* note 65, at 223. To make the California statute workable as a matter of practice, Dr. Fred Cutter of the Atascadero, Calif., State Hospital says: "The medical staff at Atascadero State Hospital looks for a personality disorder as defined in the Diagnostic and Statistical Manual (APA, 1952)." CUTTER, SEXUAL PSYCHOPATHY: AN MMPI SURVEY (mimeo.).

82. See Ploscowe, *supra* note 65, at 223-24.

83. The New Hampshire statute, for example, states: "[T]he frequency of sex crimes within this state necessitates that appropriate measures be adopted to protect society more adequately from aggressive sexual offenders. . . . [T]he laws of this

The indeterminate sentence seems to be the result of the feeling aroused by sex crime rather than a punishment for the actual damage which is done by the offender. Why, we have to ask, is more care taken about the future damage that the sex offender might do than about the potential damage of, for example, the armed robber. If the indeterminate sentence has any application, it would surely apply equally well to the nonsexual offender who is a public menace.

A long sentence takes no note of a change in the instinctual drives of the prisoner. A man with violent sexual feelings and outbursts of rage at the age of twenty-six may be quite a different person at the age of forty. And almost certainly he is different at the age of fifty when certain involutional processes have begun to take place so that the disparity between the strength of his drives and the strength of the controlling forces within him is much less or absent. Maturation while slow occurs even with a psychopath. Self-control may increase slowly with the years and become relatively greater than the instinctual drive.

Most important, sexual psychopath legislation is deficient in that it lacks a scientific foundation. It is fallacious to group biological disorders together simply because they share one symptom. Similarly, it is an error from the medical viewpoint to group sex offenders under one diagnostic category, although it may be technically correct from the legal standpoint. The successful resolution of the problem will ultimately require that the law distinguish between personal illness and danger to the community. In numerous studies of so-called sex offenders, there is found among them psychopathic personalities, schizoid personalities, alcoholics, neurotics, schizophrenics, persons with chronic brain damage, mental defectives, and others. Some persons with sexual problems may obtain sexual pleasure by committing arson or by plunging a knife into a woman's back.

With the possible exception of California, sexual psychopath legislation has proven ineffective and unworkable.[84] Even assuming the efficiency of

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state do not provide for the proper disposition of those who commit or have a tendency to commit such crimes and whose actions result from a psychopathic condition. . . . [S]ociety as well as the individual will benefit by a civil commitment which would provide for indeterminate segregation and treatment of such persons." N.H. REV. STAT. ANN. § 173:1 (1955).

84. The New Jersey Commission on the Habitual Sex Offender (see note 80 *supra*) discusses ten major errors current in public opinion on sexual psychopath legislation. They are:

1. *That there are tens of thousands of homicidal sex fiends abroad in the land.* In fact the vast majority of the sex deviates are minor offenders, most of whom never come to official attention (*e.g.*, there are sixty million homosexual acts performed in the United States for every twenty convictions in our courts). It has been carefully estimated by Dr. Kinsey that not more than 5% of our convicted sex offenders are of a dangerous variety, exercising force or injury upon a victim. Crime reports support this finding. Homicide associated with sex crimes is unusual. A recent study by the criminologist, Dr. Sutherland, shows that the "danger of murder by relative or other intimate associate is very much greater than the danger of murder by an unknown

the law in California, other states should not willy-nilly follow it. California

sex fiend." Nearly 90% of the murders of females he studied were committed by relatives or suitors, and 25% of those who murdered females committed suicide. The sex fiend as portrayed by D. Wittels *et al.* is a rare phenomenon in the criminal history of any state; the tens of thousands that he hypothecates are the much publicized creatures of his well-stirred imagination. Most of those who do occasionally appear are insane, not merely sexual deviates.

2. *That sex offenders are usually recidivists.* Sex offenders have one of the lowest rates as "repeaters" of all types of crime. Among serious crimes homicide alone has a lower rate of recidivism. Careful studies of large samples of sex criminals show that most of them get in trouble only once. Of those who do repeat, a majority commit some crime not involving sex. Only 7% of those convicted of serious crimes are arrested again for a sex crime. Those who recidivate are characteristically minor offenders—such as peepers, exhibitionists, homosexuals—rather than criminals of serious menace.

3. *That the sex offender progresses to more serious types of sex crime.* It is the consensus among psychiatrists, confirmed by crime statistics, that sex deviates persist in the type of behavior in which they have discovered satisfaction. That any thoroughly frustrated, rigidly repressed personality may conceivably explode into violence is true. There is no evidence, however, that this occurs more frequently among sex offenders than others; indeed there is good psychological ground to believe that individuals who experience some outlet of sexual tensions are less likely to need release of rage and aggression. Progression from minor to major sex crimes is exceptional, though an individual may engage at any given time in a variety of forms of sex outlets.

4. *That it is possible to predict the danger of serious crimes being committed by sex deviates.* Reports from 75 prominent psychiatrists reveal a consensus that it is impossible to predict the occurrence of serious crime with any accuracy. That the behavioral sciences have not attained this level of prognostication is attested in these statements by authorities:

Dr. J. B. Gordon, Medical Director, New Jersey State Hospital: "This would require superhuman intelligence and the gift of prophecy."

Dr. Hilding Bengs, Commissioner of Mental Health, Pennsylvania: "It is impossible to predict accurately commissions of serious crimes in a person of certain tendencies. There are the unpredictable facts of circumstances, opportunity, and the timely reaction of the person."

Dr. Philip Q. Roche, Chairman, Committee on Forensic Psychiatry, Group for the Advancement of Psychiatry: "The expedience of the law would call upon unqualified physicians to make guesses or to express prejudices. There are very few psychiatrists who have sufficient training and experience with offenders."

Dr. Edwin H. Sutherland, Professor of Criminology, Indiana University: "Accurate prediction could not be made in any case or percentage of cases."

This inability to predict is of special importance in relation to recent laws that are designed to constrain individuals who have committed no law violations as well as minor sex deviates and even juveniles.

5. *That "sex psychopathy" or sex daviation is a clinical entity.* Two-thirds of the psychiatric authorities consulted by the writer pointed to the wide disagreement among psychiatrists as to the meaning of the term, "sex psychopath." More than half of them maintained that this condition is not a sufficiently clear diagnostic entity to justify legislation concerning the type. Hospital authorities handling cases of "sex psychopaths" committed by the courts find, in fact, a wide variety of psychological types: neurotics, psychotics, schizoids, feebleminded, epilepties, constitutional homosexuals, alcoholics, and many who are normal. In different states the authorities look for different qualities as evidence of dangerous sexual psychopathy; the cases they adjudicate as such display varied forms of sex deviation and assorted types of personality organization.

is different. For one thing, Hollywood is in California, probably resulting in a defensive attitude among the population about sex. Furthermore,

6. *That these individuals are oversexed.* From the point of view of their treatment and their dangerousness, it is important to realize that most of the sex deviates treated under the laws are undersexed rather than hypergonadal types. A majority are passive or nonaggressive. The problem is very rarely one of drives too strong to control, as commonly recommended programs of castration, sterilization and close correctional custody would imply.

7. *That effective treatment methods to cure deviated sex offenders are already known and employed.* As compared with other types of psychological and constitutional abnormality, we are peculiarly at a loss in the handling of abnormal sex offenders. Methods of effective treatment have not yet been worked out. The states that have passed special laws on the sex deviate do not attempt treatment! The "patients" are kept in bare custodial confinement. This point is central to the atrocious policy of those jurisdictions that commit noncriminals and minor deviates for indefinite periods to mental hospitals where no therapy is offered. Most psychiatrists indicate that psychotherapy of some sort should be given to sex offenders, but they are in agreement that professional staffing is not available to perform this work and that an unknown but undoubtedly very high percentage of deviates would not respond to such treatment. In private practice the treatment applied to the sex deviate by many psychiatrists is designed to help him accept his peculiarity without guilt feelings and to be more discreet in its expression. The point should be stressed that commitment of a sex deviate to a state mental hospital *does not imply clinical treatment.* These institutions lack the space, the personnel, the treatment methods, or even the desire to handle deviated sex offenders who are nonpsychotic.

8. *That the laws passed recently in one-fourth of the states are getting at the brutal and vicious sex criminal.* Data secured from the several jurisdictions reveals that, although laws have been passed in response to public fears about the dangerous aud aggressive offenders, in fact these are the types least frequently brought under the statutes in actual administration. Most of the persons adjudicated are minor deviates, rarely if ever "sex fiends."

9. *That civil adjudication of the sex deviate and/or indeterminate commitment to a mental hospital is similar to our handling of the insane and, therefore, human liberties and due process are not involved.* This type of thinking has been nsed in several states to support long-term custody of minor deviates, many of them without a criminal charge. Under these laws the insane and mentally defective are specifically excluded. Those covered are in fact a variety of psychological types that have never before been exempted from criminal responsibility nor committable to mental hospitals. No sound reason has ever been advanced for committing a "peeper" to a mental hospital for an indeterminate period (or any period) of time where he will be segregated from his community and family in an nnproductive existence at state expense. Nevertheless this has become common practice today under the recent legislation throughout the country. Regardless of the type of court employed to attain this result, it is in effect a serious punishment in which liberty and due process are vitally involved. Reasoning to the contrary is founded in a technical legalism of the most vicious sort.

10. *That the sex problem can be solved merely by passing a new law on it.* Common sense must indicate to the contrary. Certainly experience with these laws reveals the futility of ineffectual legislation. In general the statutes appear to have served only the purpose of temporarily satisfying the public that "something is being done." In fact, and fortunately, very little is being done under the sex psychopath laws, but that little is worse in effect than the operation of the traditional criminal law would have been. Thus far no problems have been resolved by the new sex laws that have been enacted. On the contrary, some extremely dangerous precedents have been established (1) for adjudicating individuals without ordinary due process—in five states even without a criminal charge, (2) for indeterminate commitments to mental hospitals of individuals who are not insane and who psychologically deviate little or

California has the wealth, lacking in most other states, for the establishment and maintenance of institutions for the commitment of the deviate.[85] But even so, there has been criticism of California's legislation.[86]

III. CONCLUSION

It is important to separate sex activity of a traumatizing or menace type from the nontraumatizing or nuisance type; the latter comprises 95% of all illegal sex offenses. It is essential to distinguish the sick from the offender. Society has the right to decide what is crime, but it should consider the views of the medical profession.[87] For good and bad, these alter both with the change of fashion and the increase in sound and reliable scientific knowledge. Is the best legislation that which is conservative and waits until the new ideas are proven? Or should it be experimental and lead perhaps to new knowledge from its own operation?

Perhaps a person should be classified as an offender only when he unreasonably hurts someone else. A distinction might be made between those sexual deviates whose conduct offends good taste (such as homosexuals, exhibitionists, and minor lewd offenders), and those whose conduct is dangerous and aggressive (such as aggressive rapists, sex slayers, and those who are damaging to young children). The community might well tolerate the former group. Is not homosexuality when practiced in private between consenting partners, or the farm boy's private sex act with his horse, a personal matter, rather than an offense against society? Cannot these sexual irregularities be dealt with solely from the point of view of public decency when they are performed in public?

Restraint on adolescent sexuality is necessary, as the adolescent is not socially responsible. But society does not have to label as crime such activity as masturbation and homosexuality. A litigious society overshoots the mark and restrains all activity.

As for the dangerous and aggressive offender, society is injured by his

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not at all from the normal person, and (3) for providing hospital custody to a growing body of minor sex deviates who are to be held until "cured" though without treatment, at great cost to the taxpayer and with serious diminution of the facilities available for those mental patients who are seriously disturbed.

85. See Lieberman & Siegel, *A Program for "Sexual Psychopaths" in a State Mental Hospital*, 113 AM. J. OF PSYCHIATRY 801 (1957); Rapaport & Lieberman, *The Sexual Psychopath in California*, 85 CALIF. MEDICINE 232 (1956).

86. CUTTER, *op. cit. supra* note 81; Bowman & Engle, *Certain Aspects of Sex Psychopath Laws*, 114 AM. J. OF PSYCHIATRY 690 (1958); Bowman, *Review of Sex Legislation and Control of Sex Offenders in the United States of America*, in FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH 37 (1954).

87. On the importance of punishment as a deterrent for third persons, and treatment as a means of rehabilitation of the offender, see the able article by Raymond L. Erickson, *Psychiatry and the Law: An Attempt at Synthesis*, 1961 DUKE L.J. 30. See also the symposium on crime and correction in 23 LAW & CONTEMP. PROB. 583-783 (1958).

acts and is entitled to protection. These sex crimes can apparently be handled under traditional legislation. They should be regarded as part of the general problem of criminal deviation; the limited therapeutic facilities available should be concentrated on those criminals who would benefit most from treatment, whether or not sexually abnormal. Indeed, about seven states no longer distinguish sex offenders as a group from other groups of criminals. This is a psychiatric advance, when all law violators, not just sex offenders, are given at least a psychiatric examination. It is to be noted that the dangerous offender, even prior to the commission of a crime, can be indeterminately removed from society under the usual commitment laws. "Sexual psychopath" legislation seems unwarranted. As Paul W. Tappan puts it, "[T]heir popularity must be attributed in the main not to any foundation in fact for their adoption, but to the exploitation of the peculiarly intense anxieties about sex crime that most people feel: the channels of publicity have been receptive mainly to the rabidly distorted declarations of ill-formed, often hysterical prophets of calamity . . . . [S]ingle instances of the crimes of 'sex fiends' are given widest currency."[88]

It is generally true to say that the child whose early sexual activities are treated with polite and friendly understanding is much less likely to get into trouble in later life than the child whose anxieties and guilt are unjustifiably aroused by threats and punishments. This conclusion has important bearing on the legal aspects of sexual abnormality. For if the sexual difficulties of later life can to a considerable extent be prevented by proper upbringing, it is reasonable to assume that measures of psychological understanding would produce better results than the moral opprobrium and punishment inflicted on sexual offenders under present laws.[89] A person is forced into a deviant form of sexual adaptation by the injection of fear into the normal sexual function.[90] Hence, the law itself unwittingly encourages the commission of sexual offenses by inflicting drastic penalties and by paying too much attention to them. Much in the manner of Victorian taboos, penal clauses more often than not aggravate the problem instead of resolving it.[91] More than any other technique, the educational approach may serve to prevent sex deviation by getting at its roots by proper training of attitudes, habits and values. Utopian as it may sound, educational programs should be carried on in all areas of community life, such as in the schools and in the church.[92]

88. REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER 13 (N.J. 1950).

89. 2 GLOVER, THE ROOTS OF CRIME 178-79 (1960).

90. See Ovesey, *The Homosexual Conflict,* 17 PSYCHIATRY 243 (1954).

91. See note 28 *supra.*

92. See REPORT, *op. cit. supra* note 88, at 52. It might be noted that the use of female sex hormones in the therapy of male sex delinquents has been studied. The use of

In this survey of sex crimes, we have attempted to point out various psychosexual factors that we consider to be of importance and that should be considered whenever sex legislation is proposed.[93] The question is not whether sex should be absolutely free or rigidly restricted, but rather which restrictions are necessary and which may be discarded.[94]

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synthetic estrogen seems to have a sedating effect and achieves something like a medical castration. The sex drive seems to lose its disturbing and overwhelming character. The effect is reversible, but the doses can be safely administered under continuous supervision. Men with a problem of sexual misconduct might choose to seek hormone therapy before they become subjects of prosecution. See Newkirk, *The Use of Female Sex Hormones in Therapy of Male Sex Delinquents*, 2 J. OF NEUROPSYCHIATRY 163 (1961).

93. The authors are not to be understood as advocating promiscuity, illegitimacy, and so on. We do not believe that these things should be encouraged, but rather that legislative assemblies should take account of ordinary human behavior. Unless society is very much disturbed by the activity, the individual should be allowed to lead his life as he sees fit. See note 4 *supra*. To a very large degree, sexual behavior should be considered a private rather than a public matter. It is far better to understand the causes of abnormal behavior than to legislate against the symptom. Thus, in the home, it is more important for parents to discover and remove the source of anxiety leading to excessive masturbation than to prohibit masturbation.

94. See generally Apfelberg, Sugar & Pfeffer, *A Psychiatric Study of 250 Sex Offenders*, 100 AM. J. OF PSYCHIATRY 762 (1944); Barratt, *Criminal Prosecution, Abnormal Sex Offenders, and Pre-sentence Investigations and Sentences*, The Legal Intelligencer, Sept. 1948 (reprint of articles); Bonner, *Who and What Are Sexual Psychopaths?*, Focus, July 1948, p. 104; Drayton, *The Cats of Society*, 45 PHIL. MED. 115 (1949); East, *Sexual Offenders—A British View*, 55 YALE L.J. 525 (1946); Haines, Hoffman & Esser, *Commitments Under the Criminal Sexual Psychopath Law in the Criminal Court of Cook County, Illinois*, 105 AM. J. OF PSYCHIATRY 420 (1948); Henry & Gross, *The Sex Offender: A Consideration of Therapeutic Principles in Dealing with Delinquency*, in NATIONAL PROBATION ASS'N YEAR-BOOK (1940); Horaek, *Sex Offenses and Scientific Investigation*, 44 ILL. L. REV. 149 (1949); Kopp, *Surgical Treatment as Sex Crime Prevention Measure*, 28 J. CRIM. L., C. & P.S. 692 (1938); Minow, *The Illinois Proposal To Confine Sexually Dangerous Persons*, 40 J. CRIM. L., C. & P.S. 186 (1949); Ploscowe, *The Sexual Psychopath, Some Suggestions for Control*, in PRISON WORLD 19 (1947); COMMITTEE ON FORENSIC PSYCHIATRY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRICALLY DEVIATED SEX OFFENDERS, REP. NO. 9 (1949); REPORT OF THE INTERIM COMMISSION OF THE STATE OF NEW HAMPSHIRE TO STUDY THE CAUSES AND PREVENTION OF SERIOUS SEX CRIMES (1949); REPORT OF THE MAYOR'S COMMITTEE FOR THE STUDY OF SEX OFFENSES (New York City 1940); Selling, *The Extra-Institutional Treatment of Sex Offenders*, in HANDBOOK OF CORRECTIONAL PSYCHOLOGY (Lindner & Seliger, eds. 1948); Silverman, *Electroencephalograph and Therapy of Criminal Psychopaths*, 5 J. OF CRIM. PSYCHOPATHOLOGY 439 (1944); SUMMARY REPORT, GOVERNOR'S LAW ENFORCEMENT AGENCIES' CONFERENCE ON SEX CRIMES AGAINST CHILDREN (Cal. 1949); Tappan, *The Sexual Psychopath, A Civic Responsibility*, 35 J. OF SOCIAL HYGIENE 354 (1949); Taylor, *The Psychopath in our Midst*, 1 LANCET 32 (1949); Note, *The Legal Disposition of the Sexual Psychopath*, 96 U. PA. L. REV. 872 (1948).