

THE LAWS AGAINST HOMOSEXUALITY

by

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Approved:



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THE LAWS AGAINST HOMOSEXUALITY

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CHAPTER I
INTRODUCTION
Problem

A man who feels an attraction toward other men is a social misfit; once he gives way to that attraction, he becomes a criminal and thereafter is "labeled" a homosexual. It should not be the function of law to intervene in the private lives of citizens, nor to seek universal conformity to variable private moral standards through the use of the criminal sanction. As stated in the Wolfenden Report:

We do not think that it is proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its functions as the guardian of that public good.

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.¹

In many civilized countries homosexual behavior does not constitute a violation of the law except in special circumstance of abuse, for instance, if children are involved or if force is used to coerce an unwilling participant. But in the United States any kind of sexual contact between persons of the same sex constitutes a serious crime. Although it is not a crime merely to be a homosexual, all American jurisdictions, with the exception of Illinois², proscribe homosexual acts. The homosexual has no legal outlet for the kind of sex life to which he is drawn. Thus, due to the legal structure, he must decide between breaking the law or abstinence.

The peculiar legal wording frequently employed, referring to such offenses as "crimes against nature,"³ "immoral conduct,"⁴ "acts of indecency"⁵ and "sodomy,"⁶ very carefully avoids spelling out the details of the offenses in question. It is through this vagueness that the judiciary is given a great deal of latitude to interpret the law as they please. Therefore, the laws reveal a curious paradox: those which are supposed to prohibit homosexuality also prohibit a great deal of sexual activity between heterosexually married couples.⁷

The penalties theoretically imposed for homosexual acts are harsh and unjust in relation to the crime. For some homosexual offenses, quite a few states⁸ provide a maximum penalty of ten years or more in prison. The tremendous variation in statutory definitions and prescribed penalties in the different jurisdictions has been described as "chaotic and unrealistic."⁹ For many homosexuals, however, the exposure involved in arrest and trial may be almost as damaging as actual conviction. Homosexuals, are condemned to a life of concealment and fear.¹⁰ The law may be encouraging the development of a psychological problem for the homosexual far more damaging than that of homosexuality.

It should be understood that homosexual tendencies far from being unusual, are a common factor in the makeup of most men. The realization of their abnormality may fill some men with shame and repugnance but no good can come out of refusing to acknowledge its existence. Homosexuality, like heterosexuality, is a relative condition and varies from one individual to another. If a man is found to have a very strong homosexual tendency, it may be difficult or impossible to re-direct his impulses. But it will be possible to help him to understand and control

these impulses and thereby avoid the far worse consequences of a complicated mental breakdown in later life.¹¹

The statutes suggest that homosexuality is a monstrous perversion deliberately chosen, and that the men who make that choice deserve to be punished for it. The upholders of the law will claim that homosexuality has always been a "symptom of a nation's decadence," forgetting that it is widespread and tolerated in such respectable and progressive places as Switzerland, Denmark and Sweden.¹² The fact that so many men do engage in homosexual acts, shows that the law, however savage, is no deterrent. However, many individuals regard the criminalization of homosexuals as the solution to the elimination of the problem. One author, at least, disagrees with such a theory:

Punishment is no deterrent. It may make some homosexuals angry, others bitter, others ashamed, but it has never made a straight person out of a gay one. It has at times--for better or worse--succeeded in preventing the fulfillment of a homosexual desire, but it has never displaced that desire. And even the thwarting of the fulfillment is rare.¹³

Legal proscriptions should be concerned with safeguarding the liberties of the individual, whether they be heterosexual or homosexual, quite irrespective of whether these liberties are infringed by threats, blackmail, robbery or assault. Therefore, the statutes as they stand do not merely fail to act as a deterrent; but instead, encourages blackmail, suicide and many more psychological problems far worse than the actual condition of homosexuality.¹⁴ Legislatures must recognize that the homosexual is not a person with a "criminal mind,"¹⁵ but an individual with a deviation in his sex pattern. Dr. Sigmund Freud

stated:

Inversion is found in people who otherwise show no marked deviation from the normal. It is found also in people whose mental capacities are not disturbed, who, on the contrary, are distinguished by especially high intellectual development and ethical culture.¹⁶

Homosexuals are no more proud of their condition than they would be of having an artificial limb. On the other hand, they are no more ashamed of it than they would be if they were left-handed. The problem of homosexuality is a personal one, and only becomes a matter of public concern when the law makes it so. The present social attitudes toward homosexuality should be aimed at a greater understanding and a more realistic approach. Society can no longer ignore the problem of homosexuality within our culture. According to Dr. Alfred Kinsey, at least four percent of the adult population was exclusively homosexual throughout their adult life.¹⁷ Furthermore, Dr. Kinsey and his associates found that forty-six percent of the population "engages in both heterosexual and homosexual activities, or reacts to persons of both sexes in the course of their adult life."¹⁸ He added:

When it is recognized that the particular boy who is discovered in homosexual relations in school, the businessman who is having such activity, and the institutional inmate with a homosexual record, are involved in behavior that is not fundamentally different from that had by a fourth to a third of all the rest of the population, the activity of the single individual acquires a somewhat different social significance.¹⁹

The importances of sex enlightenment is aptly expressed by Robert MacIver of Columbia University:

We should not be afraid of the truth about human behavior. Knowledge of the facts won't cause immorality, but it will remove false fears and unwise expectations. It will show what are dangers and what are imaginary ones. We all agree that unenlightened guidance is bad where physical health is concerned. We must learn that it is no less bad when moral health is the issue. Only through knowledge of the facts can we deal intelligently with the serious problem of personality that arise in the area of sexual relations.

Our public assumptions are a morass of misdirection. We treat homosexuality as a crime, though of itself it is no more criminal than an endocrine imbalance. We attach the ideas of the sex drive in the young that are profoundly natural. We associate their interest in sex with notions of unwholesomeness or uncleanness that totally misrepresent the situation. We cannot give direction here until we acquire knowledge.²⁰

The essence of a crime, presumably, is the fact that some harm is done to someone. Jerome Hall states "that in some crimes there are harms, but in others there is only punishable conduct." "Harm" to Professor Hall also is defined as "loss of a value."²¹ Herbert L. Packer views harm in a similar manner:

Conduct should not be confused, as it sometimes is, with the infliction. We are simply forcing the criminal law onto a Procrustean bed when we attempt to assimilate diverse kinds of conduct with which it may be concerned to the occurrence of harm.²²

In view of the proceeding statements, when is the most harm done? The adulterer who breaks up a home and the children who are involved; the man who seduces a young girl and leaves her with child; or two adult male homosexuals who prefer to live together? The lesser of these "harms" is the case of the two homosexuals, but criminal justice imposes strong penalties for such conduct.

When do private morals become public morals? The

Wolfenden Report insists upon a distinction between crime and sin. Private morals according to the Wolfenden Report are not within the range of the criminal law. The attempt, by the state legislature, to "equate crime with sin" is not the "proper scope and function of criminal law."²³ Herbert L. Packer states:

Immorality clearly should not be viewed as a sufficient or even a principal reason for proscribing conduct as criminal. Morals belong to the home, the school, and the church; and we have many homes, many schools, and many churches.²⁴

In other words, at what point do the private lives of individuals enter into the domain of the criminal sanction? As the statutes against homosexuality suggest, they are concerned essentially with harm and immorality inflicted by a person upon himself. However, certain statutory sanctions are employed against homosexuals simply because of the "status" involved.

PURPOSE

The purpose of this study is to review the literature in order to analyze the functional aspects of the criminal law in regulating private morality concerning homosexuality among consenting adult males. The various state statutes are surveyed from two points: are the sanctions against homosexuality serving as a deterrent, or are these laws, in reality, encouraging the harassment of the homosexual population? Additionally, the historical development of the criminal sanctions concerning homosexuality is presented, in order to set forth recommendations that hopefully will improve the legal structure governing sexual activities. The specific aim of this study is to consider the extent to which sexual behavior should come under the

Methods and Procedures

A study of origin and philosophy of the laws against homosexuality was made through a search of the literature and research data. The historical development of statutes regulating sexual behavior was the focus of attention in the background material. A review of the literature was examined to establish the psychodynamics of male homosexuality. Attention was also given to recent recommendation advocated by the American Law Institute's Model Penal Code and the effect on the philosophy and procedures of the American judicial system. This study will hopefully provide the basis for state legislatures to analyze more effectively their statutes governing private sexual activities between consenting adults, with a view toward moderating the criminal sanction in this area.

Definition of Major Terms

1. "Sodomy"--This term is one of the legal proscriptions under which homosexuals may be convicted. In Chapter II sodomy is used as a synonym for homosexuality.
2. "Heterosexual"--Individuals whose sexual sphere includes partners of the opposite sex.
3. "Homosexual"--Individuals whose sexual sphere includes partners of the same sex. Referring only to "male" homosexuals.
4. "Gay"--This term is a synonym for homosexual.
5. "Invert"--This term is a synonym for homosexual.
6. "Consensual"--Both partners agreeing to sexual relation, where no force or threat is employed.

Chapter I

FOOTNOTES

¹Great Britain, "Committee on Homosexual Offenses and Prostitution, Wolfenden Report, Paras, 61 and 62., reprinted in C. Berg and C. Allen, The Problem of Homosexuality 24 (1958).

²Ill. Rev. Stat. ch. 38 #11-2 (1963).

³Mont. Rev. Codes Ann. #94-4118 (1967).

⁴Hawaii Rev. Laws #267-1 (1955).

⁵Cal. Pen. Code #650.5 (1955).

⁶Tex. Pen. Code art. (1958).

⁷M. Hoffman, The Gay World 78 (1968).

⁸Ark., Conn., Florida, Hawaii, Mass., Neb., N.J., Ohio, R.I., and Utah.

⁹E. Schur, Crimes Without Victims 78 (1965); See also, R. Bensing, "A Comparative Study of American Sex Statutes" 42 J. Crim. L.C. & P.S. 57 (1951).

¹⁰P. Wildeblood, Against the Law 183 (1959).

¹¹G. Westwood, Society and the Homosexual 149 (1953).

¹²A. Roberts, Forbidden Freedom 49-60 (1960).

¹³D. Cory, The Homosexual in America 32 (1951).

¹⁴Supra note 9 at 110-111.

¹⁵Supra note 13 at 90.

¹⁶S. Freud, The Sexual Revolution 260-261 (1964).

¹⁷A. Kinsey, Sexual Behavior in the Human Male 650 (1948).

¹⁸Id. at 656.

¹⁹Id. at 663.

²⁰R. MacIver, Sex and Social Attitudes About the Kinsey Report (1948) as cited in F. Caprio and D. Brenner, Sexual Behavior-Psycho-Legal Aspect 110 (1961).

²¹J. Hall, Studies in Jurisprudence and Criminal Theory 17 (1958).

²²H. Packer, The Limits of the Criminal Sanction 16 (1968).

²³J. Williams, "The Proper Scope and Function of the Criminal Law" 74 The Law Quarterly Review 81 (1958).

²⁴Supra note 22 at 265.

²⁵H. Black, Black's Law Dictionary 627 (1951): "The act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him."

²⁶American Law Institute, Model Penal Code #207.1-.6 (Tent. Draft No. 4, 1955).

CHAPTER II

History and Philosophy of Homosexuality Legislation

In order to present a clear picture of the development of the philosophy and laws of homosexuality, this researcher made an investigation into the literature of other countries. The homosexual statutes which appeared in American colonial law derived from the English, who were influenced by the Jewish and Roman codes.¹

Homosexuality appears in each period of history. Even in periods when detection meant death the practice was known to be widespread. The popular notion that this is a social problem of the present day, due to a recent relaxation of moral standards, can be disproved by the briefest excursion into history.²

Obviously, no one can trace the first homosexual act in history, but anthropologists have revealed that crude cave paintings of our prehistoric ancestors depicted not only scenes of hunting, but also scenes involving a variety of sex acts including homosexual relationships.³

The Old Testament writings indicate that among the ancient tribes of Israel homosexuality was both practiced and condemned. The fact that homosexuality had ritualistic significance for alien religions lent special force to this condemnation.⁴

Sodomy, or the "crime against nature," was a wrong not too severely punished in some countries, a right legally upheld in Greece and a wrong severely condemned in other countries. Among the Jews it and bestiality were capital offenses punishable by death. The Hebrews abhorrence of sodomy largely developed from their hatred of a foreign cult-They considered unnatural sexual vice the sin of the people who were not the chosen people. Just as there were

female temple prostitutes, so among the Canaanites there were male prostitutes who transmitted the blessings of the gods, and it was because of this type of harlotry that the Canaanites were driven out of the land of Israel. Sodomy and heresy were closely associated.⁵

In Genesis XIX, one of the earliest accounts of homosexuality appears regarding the twin cities of Sodom and Gomorrah. According to the Bible, a group of bebauched men of Sodom stormed the house where Lot was visiting, demanding:

Where are the men which came in to thee this night? Bring them out to us that we may know them.⁶

Because any sexual activity was condemned that did not produce children, Lot offered his virgin daughters instead. The same story with slight modification also appears in Judges XIX. The wrath of God became aroused and ultimately the cities were destroyed by "fire and brimstone." Based upon this account of God's reaction toward homosexuality, many people have mixed emotions concerning this form of sexual activity. Recent writings on the Bible present a different point of view:

.....Careful investigation fails to substantiate the venerable belief that Sodom was destroyed because its inhabitants were inordinately addicted to male homosexual practices. Let us consider first the internal evidence. It is generally held that the Genesis narrative itself affords sufficient proof of the Sodomites' vicious proclivities, since there can be no other satisfactory explanation of their demand: "Bring the men out to us, that we may know them." This interpretation rests upon the fact that the verb "to know" (Yadha) can also mean "to engage in coitus" - but is that its connotation here? Three points tell against it: Although yadha is a common verb, its use in a coital sense is exceptional; when employed in this sense, its reference is always heterosexual, and not homosexual indeed, the very possibility of "knowing" in this way depends upon

sexual differentiation and complementation, and can only occur between man and woman; and the Sodom story can be expounded no less convincingly by taking yadha in its natural sense.

Turning now to the external evidence, we find confirmation from other biblical allusions to Sodom that its sin was not regarded as homosexuality. Ezekiel sums up the Old Testament conception of the wickedness of Sodom in the words, "pride, fullness of bread, and prosperous ease;" and in the Apocrypha, ben Sirach and the author of Wisdom of Solomon denounce the Sodomites for their folly, arrogance toward God, and inhospitality.⁷

History does not reveal any condemnation of David and Jonathan, because of their homosexual relations.

Jonathan was killed during the disastrous defeat of the Israelite army by the Philistines at the Battle of Mr. Gilboa, in the course of which Saul killed himself. Jonathan's beloved David, as is well known, subsequently reunited the kingdom and, in his days of glory, retained the fondest memories of Jonathan's love for him, especially in the famous sentence, "My brother Jonathan, thy love to me was wonderful, passing the love of women." (2 Samuel 1:26).⁸

In classical Greece homosexuality achieved social recognition as an acceptable and expected form of love between normal males. When Plato wrote of the emotions and aspirations of love he was describing what we, today, would call perversion. In his "Symposium" Plato wrote:⁹

And if there were only some way of contriving that a state or army should be made up of lovers and their loves, they would be the very best governors of their own city, abstaining from all dishonour, and emulating one another in honour, and when fighting at each other's side, although a mere handful, they would overcome the world. For what lover would not choose rather to be seen by all mankind than by his beloved, either when abandoning his post or throwing away his arms? He would be ready to die a thousand deaths

rather than endure this. Or who would desert his beloved or fail him in the hour of danger?

Male homosexual sentiments permeated the whole fabric of the Greek society. Homosexuality meant more to the Greeks than a means of sexual activity; it was in their eyes the highest and noblest of passions. They idealized the love of man for man as much as present-day Western civilization idealizes romantic love between men and women.¹⁰

In Greece, sodomy or homosexual relations were observed from two different points of views: one being that homosexuality was chivalrous and martial, as found in the Dorian states and the other view that it was sensual and lustful as found in the cities at Crete.¹¹ The Greeks were well aware of the distinction between the two types of love. As history progressed, both sanctioned and unsanctioned homosexuality came to be more confused.

Greek civilization was essentially a man's world with the Greek women playing a subservient role.¹² Their literature dealt almost entirely with male pursuits and the masculine point of view. The women lacked education and lived in seclusion in their own rooms. There was no domestic life as we know it, so that men of culture looked always to their own sex for stimulating companionship.¹³ On matters of sex the Greeks held sensual enjoyment an important part of life and were not afraid to express their sentiments.

The Greeks were at all times, as we noted in the case of Homer's Helen, most sensitive to physical beauty, whether masculine or feminine. This susceptibility was felt even in the most ascetic of

friendships, when the lover desired nothing more of his beloved than the pleasures of the eye. It should be borne in mind that women were almost entirely excluded from Greek social life, which resembled a man's club. This was especially so at Athens, for at Sparta girls and women had more freedom of movement.¹⁴

It seemed quite natural to Greeks that men should be passionately attracted by beautiful youths, and it was the custom for an older man to take under his wing some favorite youth and to act as his special friend and mentor. The Doric states observed this custom rather strictly. A man failed in his duty if he did not become the guardian of one younger than himself whom he could instruct in the manly virtues, and a youth felt disgraced if he failed to win such a friendship.¹⁵ Coitus in ano was universally practiced. In Athens public brothels for males were widespread and accepted without question. These brothels offered a means of revenues for the states.¹⁶

Greek law allowed agreements between young boys and male adults. These agreements established contractual rights to the sexual use of the persons involved. The courts upheld these contracts of homosexual prostitution, thus, homosexuality became an "effective and actionable right."¹⁷ As one author states:

In line with these beliefs the Athenian law recognized contracts made between a man and a boy, even when the latter was of free birth, whereby the one agreed to render up his person for a certain period and purpose in consideration for a fixed sum of money. In Aristophanes recurs the phrase: "a boy who has been a prostitute." It was also quite respectful for men to engage in these liaisons. Disgrace attached only to the free youth who gained a living by prostitution. He was subject to loss of civil rights at law.¹⁸

Contrasting sharply with our present-day military,¹⁹ it was the Greek theory that the best-manned regiments during war consisted of male lovers. The Greek army permitted soldiers to consort sexually with each other, believing that it bolstered morale and encouraged bravery. The Spartan and Thelian armies were organized on a theory as suggested in Plato's Symposium.²⁰ The celebrated Theban Band, long supposed invincible, consisted of pairs of lovers fighting side by side.²¹ Likewise, the Spartan armies supported a similar theory, that a warrior would strive to impress his male lover.

Affection between males had its origin in the gymnasium, where youths were trained in such techniques as hurling the javelin, which were really in the nature of preparation for active service. They were continued in military camps and finally practiced on the actual field of battle.

At Thebes, when a lad associated with a lover reached the age of enrollment, his protector presented him with a complete fighting outfit. Pammenes, who understood the character of masculine love, drew up his men in accordance with an entirely new principle. He set pairs of lovers side by side in the ranks. For he knew that love is the only unconquerable general. The tribe or the family may be deserted by their members. But once Eros has entered into the souls of a pair of male lovers no enemy ever succeeds in separating them. They display their ardour for danger and risk their lives even when there is no need for it.²²

The earliest history of the laws of homosexuality presents a confused picture as to whether it was sanctioned or unsanctioned. Babylonian and Egyptian codes apparently refer to homosexual acts as being unsanctioned. Homosexual acts were tolerated to varying degrees by the Greek and Roman codes, and perhaps even by the very early Christians.²³

With the coming of Christianity, the practice of homosexuality was condemned. Both sodomy and buggery were attributed to the lawless influences of the heathen Egyptians and Canaanites.²⁴ Homosexuality was regarded a capital offense as early as the third century. Convicted homosexuals were either beheaded or burned at the stake. A more liberal view toward homosexuality was taken when the great Justinian ascended the Roman throne. The punishments of homosexuals were still horribly inflicted. Not only could the "guilty" males suffer from castration, but had reeds driven into their bladders.²⁵ Justinian's legislation had a powerful influence on the development of Christian attitude toward homosexuality.

In his 77th and 141st "novella" he distinguished between the sinner and the criminal and, calling the sodomist to repentance, reserved the penalties of the law for the abderate and impenitent who spurned the Church's ministry of reconciliation. Medieval practices reflected, and indeed went beyond, the spirit of these edicts. Homosexual offenses were reserved for trial and sentence in the ecclesiastical courts.²⁶

The laws condemning sodomy have been derived from the edict of Justinian in the Pandects in 538 A.M. The Justinian Code stated:

We know from the study of the Holy Scripture that God, in order to punish such persons, visited His wrath upon those who formerly inhabited the City of Sodom and caused its territory to be consumed by an inextinguishable fire, and in this manner He informs us that we should abhor conduct of this description, which is contrary to the laws of nature.²⁷

In the Code of Justinian the corruption of minors is also stated:

Anyone who persuades a boy to submit to lewdness, either by leading him aside, or by corrupting his attendant, or anyone who attempts to seduce a woman or a girl or does anything for the purpose of encouraging her in debauchery, either by lending his house, or by paying her money, in order to persuade her, and the crime is accomplished, he shall be deported to some island. Attendants who have been corrupted shall suffer the extreme penalty.²⁸

From the Greeks whose liberal ideas on sex are well known, has been inherited much of the culture and political ideas of Western civilization. But the sex codes and sex taboos of Western civilization has been inherited almost entirely from the Jews through the Christian Churches.²⁹

The Jews were a small and struggling race who urgently needed to expand in order to survive. The ancient Hebrews condemned any sexual practice which might interfere with natural reproduction. Polygamy was encouraged by the Jews who were proud of the fact that Solomon had a thousand wives. The high esteem in which reproduction was held can be found by examining the number of "begats" in the Old Testament. A man, by Jewish law, was required to marry his brother's childless widow. Any sexual activity was condemned that did not produce children - this included withdrawal and in particular any form of homosexual behavior.³⁰ Homosexual behavior was regarded with intense abhorrence and punished by death, for no children could be produced. The Christians adopted this attitude from the Jews and under Christianized Roman Law, homosexuals were subjected to the most harsh treatment.

The punishment was harsh because homosexuality was often associated with the practice of religion.³¹ The sexual

acts were performed as religious rites, aimed at appeasing or honoring the gods. Female homosexuality was held sacred in North Africa.³² The Far and Middle East had widespread and lengthy traditions of organized religious homosexuality. During the Middle Ages, homosexuality was sometimes practiced as anti-religion.³³ It was regarded as an act of blasphemy, operating as Satanic cults.³⁴

In line with this theory and in the interests of increasing the population, severe penalties were established by the Mosiac law. Although Christ seems to have uttered no opinion on the subject, the canon law also severely condemned and punished sodomy. It was also made a capital offense by Mohammed.³⁵

In the twelfth century the Knights Templar, founded to protect pilgrims to the Holy Land, became almost exclusively homosexual.³⁶

At the time of the Crusades, the cult of masculine valour, the hero-worship, the great emphasis on manly fortitude and valour, the tradition of the pure woman to be admired from afar, doubtless helped to foster homosexual tendencies. The homosexual behavior attributed to such bands as the Templars must be understood in the light of this background.³⁷

The Knights Templar became involved in a great scandal during the fourteenth century, with one of the charges against them being that homosexual acts were included in the initiation rites.³⁸ The story of the Templars and their prosecution by Phillip of France is complicated by truth and fiction, since Richard I of England had refused to marry Phillip's sister.³⁹

James I of England is well known for the translation of the Holy Bible into Elizabethan English. Another interesting

point of history is that James I from the age of thirteen was rarely without a male lover, yet it was a crime capitally sanctioned.

The handsome young men, usually referred to with the traditional term favorites, would find him pulling their ears, stroking their cheeks, and adjusting their clothes like an anxious mother.⁴¹

Besides James I, England had several other Kings whose homosexual tendencies are well known.

William Rufus' behavior was so scandalous that he was refused a sanctified burial by the Church. Edward II kept the notorious Piers Galveston and other favorites. James I's favorite, Robert Carr, is said to have escaped punishment for murder because he threatened to make public his relations with the King, and William II is said to have been in love with Albermarle.⁴²

The literature of each period has recorded the incidence of homosexuality. For example, Elizabethan literature has homosexual allusions.⁴³ The sonnets by Shakespeare, were apparently addressed to a young male.

It has also been pointed out that in his poetry the descriptions of Adonis are far more glowing than those of Venus. Shakespeare's handsome and beloved patron of his early days, Henry Wriothesley, Earl of Southampton, the subject of the loving dedication of "The Rape of Lucrece," seems in practically all respects to fit the implication about Mr. W.H. in the sonnets, but there is far from general agreement on the identification.⁴⁴

Across the Channel in Paris, homosexuality had been the custom since there were no laws against it. Homosexuality reached the royal courts of Henry III in Paris during the 1600. Not only was Henry III a practicing sodomist, but he loved to wear feminine clothes. Special clubs and secret societies

composed entirely of male homosexuals were found in Paris. The rage of Paris as well as London were the masked balls and dances.⁴⁵

While the Bible and earlier Roman law dealt severely with the homosexual offender, the Ecclesiastical Courts of early English history decreed that sodomy was a crime for which the penalty was death.⁴⁶ Until the reign of Henry VIII, homosexuality was not a felony and thus subject to ordinary criminal jurisdiction.⁴⁷ A Statute of 1533 made the offense a felony, punishable by death, shortly after the dissolution of the monasteries. In 1547, this Statute was repealed by Edward VI, re-enacted in 1548, repealed in 1553 and re-enacted again in 1562.⁴⁸ The offense remained capitally sanctioned until 1828 when Parliament abolished the death penalty for homosexual offenses. But the death penalty for this crime remained in Scotland until 1889. Again, as in ancient times, these measures were not at all successful in stamping out the practice of homosexuality.

In order to gain an understanding of the heritage of our legislation against sexual deviation, it is important to consider some of the leading writers on English criminal law during this period of history.

The eighteenth century began a new era of criminal legislation, with the law being excessively crude and confusing. In order to assist in the clear presentation of English law, Sir William Blackstone, published Commentaries of the Laws of England, in 1765. Blackstone went to great pains to provide reasons for the law in history and logic, and at times in "natural law." The terms, "buggery" and "sodomy" were abandoned by Blackstone in favor of the phrase "crime against nature." The subject of

homosexuality was obviously repugnant to Blackstone, as can be seen from the trail of adjectives and epithets he leaves in his wake: "a deeper malignity," "an offense of so dark a nature," and "miscreants." But, still credit must be given to Blackstone's efforts to give order to what had been judicially erected in history.⁵⁰

One of the most important writers on criminal law was Sir James Fitzjames Stephen, who has been described as "the greatest draftsman and codifier of criminal law which Great Britain ever produced."⁵¹ In 1863 he published his General View of the Criminal Law of England, regarded as the first scholarly and literary introduction to the study of the history of the English criminal law. Stephen published the Digest of the Laws of Evidence and Digest of the Criminal Law, which along with his earlier works, had a direct and powerful impact on the criminal law as we know it today in that the "structure was livable."⁵²

In an effort to curb homosexuality in England, the Offences Against the Person Act was passed in 1861. This Act imposed the maximum sentence of penal servitude for life for the act of sodomy.⁵³ Up to 1886 the laws had only punished sodomy committed against a boy.⁵⁴ Under Section 11 of the Criminal Law Amendment Act of 1885, homosexual relations of any kind were made criminal even if the act occurred in private. In its original draft the Bill made no mention of homosexuality since it was part of a campaign against prostitution and white slavery. After a brief discussion in the House, Section 11 was incorporated into the Bill.⁵⁵

Until that Act came into force, on January 1st, 1886, the criminal law was not concerned with alleged indecencies between grown-up men committed in private. Everyone knew that such things took place, but the law only punished acts against public decency and conduct tending to the corruption of youth. The Bill in question entitled "A bill to further provision for the protection of women and girls, the suppressions of brothels and other purposes," was introduced and passed by the House of Lords without any reference to indecency between males. In the Commons, after a second reading without comment, it was referred to a committee of the whole House. In committee Mr. Labouchere moved to insert in the Bill the clause which ultimately became Section 11 of the Act, creating the new offense on indecency between male persons in public or "private." Such conduct in public was, and always has been, punishable at common law. There was no discussion except that one member asked the Speaker whether it was in order to introduce at that stage a clause dealing with a totally different class of offense to that against which the Bill was directed. The Speaker having ruled that anything could be introduced by leave of the House, the clause was agreed to without further discussion, the only amendment moved being one by Sir Henry James with the object of increasing the maximum punishment from twelve to twenty-four months, which was also agreed to without discussion.

It is doubtful whether the House fully appreciated that the words "in public or private" in the clause had completely altered the law; but as soon as the Royal Assent had been given and the Act was published, there began a spate of correspondence in the newspaper, both legal and lay, and references to the subject on various public platform, which were duly reported.⁵⁶

The literature reveals that the nineteenth century was full of scandals, from the suicide of the Foreign Minister Castlereagh because of blackmail on threat of exposure for a homosexual offense,⁵⁷ to the imprisonment of the playwright Oscar Wilde after three sensational trials.

Although Castlereagh enjoyed the warmest of relations with his fine wife, he was also partial to being picked up by prostitutes during midnight walks, and that one such pick-up turned out to be a boy in female garb working a racket with a gang of blackmailers. When matters had progressed to a technically advanced stage, the blackmailers are then thought to have burst into the room and been quite undaunted by having bagged England's political leader.⁵⁸

The conviction of Oscar Wilde raised his status from a minor poet and playwright to that of being the most famous homosexual of history.⁵⁹ His conviction was due largely to the evidence of self-confessed male prostitutes and blackmailers, who turned Queen's Evidence and were released.

When Wilde was sentenced, it is said, prostitutes in the street outside the Old Bailey lifted their skirts to dance in glee, and sermons on the subjects were delivered throughout the country. The learned judge expressed his utmost indignation at the evidence of corruption of the most hideous kind and regretted that the maximum penalty he was allowed to give was totally inadequate.⁶⁰

Not all were in agreement with the judge and the outcome of the trial. In 1895, the famous editor W.T. Stead wrote:⁶¹

Should everyone found guilty of Oscar Wilde's crime be imprisoned, there would be a very surprising emigration from Eton Harrow, Rugby, and Winchester to the gaols of Pentonville and Holloway.

It was not until 1896 that the first organized effort to effect reforms favorable to homosexuals was established.⁶² Dr. Magnus Hirschfeld, the sexological pioneer, published his first work on homosexuality entitled, Sappho and Socrates, which dealt with the lesbianism of the poet Sappho and the homosexuality of the philosopher Socrates. The Scientific Humanitarian Committee was formed due to the overwhelming response to the

book. The aim of the Scientific Humanitarian Committee was to work for the betterment of the homosexual's situation in society by educating the public and seeking to bring about changes in sex legislation.⁶³

From 1899 to 1923, Dr. Hirschfeld published the famous Sexual Intermediates' Yearbook, which dealt with every aspect of homosexuality.⁶⁴ In an effort to find a term devoid of the unpleasant associations attached to "homosexual," he suggested the words "intermediate" and "third sex." The immense impact on the medical, legal and social organization and the liberalizing of the sex laws of several European nations, can be contributed to the Sexual Intermediates' Yearbook and the work of Dr. Hirschfeld's Berlin "Institut fur Sexualwissenschaft." Dr. Hirschfeld continued his fight in behalf of rational thinking and treatment of homosexuality up to his death in 1936.⁶⁵

Homosexuals, encouraged by the work of Dr. Hirschfeld and increased tolerance in scientific, intellectual and literary-artistic circles, began early in the twentieth century to form their own organizations. The primary purposes of these organizations were to issue periodicals aimed at unifying the homosexual population and attempting to educate the general public.

It was not until 1948 that the sex life in the United States was analyzed in the release of the Kinsey Report.⁶⁶ Dr. Kinsey and his collaborators exposed the hypocrisy of legislation dealing with sexual conduct. Not only did his studies reshape the sexual mores, but they revealed that sexual conduct in the United States violated and evaded all the taboos of the past. Kinsey's study estimated that in the United States about

four percent of all white males were exclusively homosexual all their lives.⁶⁷ Kinsey shocked America with a revelation that more than a third of the total male population had experienced some form of homosexual relation, leading to orgasm, after the onset of adolescence.⁶⁸ Kinsey's work met with a storm of criticism, ranging from figures being too high to this being a subject not worthy of investigation.⁶⁹ No one has been able to dispute Kinsey's finding with regard to the prevalence of homosexuality. In fact, he and his collaborators were well aware of the need for caution in such a project. They stated in their report:⁷⁰

We ourselves were totally unprepared to find such incidence data when this research was originally undertaken. Over a period of years we were repeatedly assailed with doubts as to whether we were getting a fair cross section of the total population or whether a selection of classes was biasing the results. It has been our experience, however, that each new group into which we have gone has provided substantially the same data. Whether the histories were taken in large cities, in small towns, or in rural areas, whether they came from one college or from another, a church school or a state university or some private institution, whether they came from part of the country or from another, the incidence data on the homosexual have been more or less the same.

In 1954, the British Government established a committee to study homosexuality and prostitution. After more than three years work, the committee headed by Sir John Wolfenden, submitted its findings to Parliament.⁷¹ The Wolfenden Committee recommended that laws against adult homosexuality be relaxed. After many Parliamentary debates and procedural delays the Sexual Offence Act of 1967 finally removed legal penalties from adult, private, consensual homosexual acts.⁷²

During this same period of time, the American Law Institute drafted its Model Penal Code.⁷³ Like the Wolfenden Report, the Model Penal Code recommended that deviate sexual practices between consenting adults, which do not harm others, should not be punished by law. In response to the Model Penal Code, Illinois in 1962 provided that it would be no longer 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.⁷⁴

CHAPTER II

FOOTNOTES

¹F. Caprio and D. Brenner, Sexual Behavior: Psycho-Legal Aspects 115 (1961).

²G. Taylor, Sex in History 26-27 (1953).

³Supra note 1 at 52.

⁴W. Young, Eros Denied 160-161 (1966).

⁵I. Drummond, The Sex Paradox 20-21 (1953).

⁶Genesis 19.

⁷J. Rees, They Stand Apart 42 (1955).

⁸N. Garde, Jonathan to Gide 7 (1969).

⁹Plato, The Works of Plato 317 (Jowett tr. 1911), as cited in D. West, Homosexuality 23-24 (1967).

¹⁰H. Licht, Sexual Life in Ancient Greece 22 (1952) as cited in G. Henry, All the Sexes 491 (1955).

¹¹Supra note 5 at 11.

¹²W. Johson, Human Sex and Sex Education 83 (1963); see also Henry, supra note 10 at 509.

¹³J. Symonds, A Problem in Modern Ethics, Being An Enquiry into the Phenomenous of Sexual Inversion 23 (1891) as cited in supra note 5 at 6

¹⁴R. Flaceliere, Love in Ancient Greece 65 (1960).

¹⁵D. Cory, The Homosexual in America 17 (1951); West, supra note 9; see also supra note 1 at 116.

¹⁶Supra note 5 at 11; see also supra note 14 at 83.

¹⁷Supra note 1 at 54.

¹⁸Supra note 5 at 11-12.

¹⁹Note, "Government-Created Employment Disabilities of the Homosexual," 82 Harvard Law Review 1738-1750 (1969).

²⁰West, supra note 9 at 24.

²¹Supra note 11.

²²Supra note 14 at 84-85.

²³Bowman and Engle, "A Psychiatric Evaluation of Laws of Homosexuality," 29 Temple Law Quarterly 276 (1956).

²⁴R. Masters, The Homosexual Revolution 41 (1964); A. Roberts, Forbidden Freedom 38 (1960); Henry, supra note 10 at 502.

²⁵G. Scott and C. Wade, Sex Pleasures and Perversions 96-97 (1963).

²⁶Supra note 7 at 46.

²⁷Supra note 5 at 22.

²⁸Supra note 5 at 23-24.

²⁹G. Westwood, Society and the Homosexual 79 (1953); Kinsey, Sexual Behavior in the Human Female 483 (1953); Supra note 12 at 79.

³⁰Id.

³¹Drummond, supra note 5 at 21; Supra note 25 at 96-97; see also supra note 1 at 50.

³²J. Gerassi, The Boys of Boise 86 (1966).

³³Masters, supra note 24.

³⁴Supra note 12 at 516-517.

³⁵Supra note 5.

³⁶Masters, supra note 24 at 86.

³⁷West, supra note 9 at 25-26

³⁸Masters, supra note 24 at 41-42.

³⁹Supra note 8 at 192.

⁴⁰Supra note 8 at 326.

⁴¹N. Garde, Jonathan to Gide 326 (1966).

⁴²West, supra note 9 at 27-28.

⁴³West, supra note 9 at 26.

⁴⁴Supra note 8 at 338.

⁴⁵Supra note 25.

⁴⁶West, supra note 9 at 73.

⁴⁷Westwood, supra note 29.

⁴⁸Supra note 23 at 227.

⁴⁹Westwood, supra note 29 at 81.

⁵⁰A Gigeroff, Sexual Deviation in the Criminal Law 14 (1968).

⁵¹Id., at 28.

⁵²Id., at 7.

⁵³Westwood, supra note 29 at 81.

⁵⁴Roberts, supra note 24 at 50.

⁵⁵Supra note 53.

⁵⁶T. Humphreys, The Trials of Oscar Wilde (1948).

⁵⁷Minister Castlereagh is believed to have been under a great deal of mental strain. Although innocence of the charges, this is an example of the extreme social pressure put upon a person charged with homosexuality.

⁵⁸Supra note 8 at 556-557.

⁵⁹P. Wildleblood, Against the Law 5 (1955).

⁶⁰West, supra note 9 at 27.

⁶¹Id.

⁶²Masters, supra note 24 at 43.

⁶³Id.

⁶⁴Id.

⁶⁵Id., at 44.

⁶⁶R. Slovenko, Sexual Behavior and the Law 8 (1965).

⁶⁷A. Kinsey, W. Pomeroy, and C. Martin, Sexual Behavior in the Human Male 623 (1948).

⁶⁸Id.

⁶⁹West, supra note 9 at 37.

⁷⁰Supra note 67 at 625.

⁷¹West, supra note 9 at 82.

⁷²Id.

⁷³American Law Institute, Model Penal Code #207 .1-.6 (Tent. Draft No. 4., 1955).

⁷⁴Illinois Rev. Stat. ch. 38 #11-2 (1963).

CHAPTER III

PSYCHODYNAMICS OF HOMOSEXUALITY

Review of the Literature

In general, there are two opposed views concerning the etiology or psychodynamics of homosexuality. The first view is that homosexuality is of constitutional formation consisting of direct genetic inheritance or physiological imbalance, such as, an imbalance in the sex hormones. The other view is concerned with the psychosocial factors, such as the psychological and social make-up of an individual.¹ Furthermore, not only is there a problem in the etiology of homosexuality, but there exists a great deal of disagreement concerning the definition of homosexuality.

The term "homosexual" as used in psychoanalysis has come to be a kind of wastebasket into which are dumped all forms of relationships, with one's own feelings, thoughts, or repression of any of these. In short, anything which pertains in any way to a relationship, hostile or friendly, to a member of one's own sex may be termed homosexual. Under these circumstances, what does an analyst convey to himself, his audience, or his patient when he says the patient has homosexual trends! It does not clarify much in his own thinking, when he uses the term in talking with the patient; his words, instead of being helpful, often produce terror, for in ordinary speech the word "homosexual" has a much more specific meaning, and, in addition, a disturbing emotional coloring.²

Psychiatrist Robert Linder criticized some widely accepted yet inadequate definitions of homosexuality:³

According to this definition, a homosexual is a person who demonstrates publicly and, it is assumed, privately, the behavioral characteristics of the opposite sex. Thus the invert is a "pansy", "nance", "sissy", or

"fairy" - terms which all reflect the notion that in his behavior, his manner, his activities, the individual "characteristically" and "unmistakably" apes the behavior, manner, and activities of females.

Nothing, of course, could be further from the truth. It is only the rare invert who is, in the modern idiom, "swish"; only the rare homosexual who expresses feminine traits.

One homosexual author, Donald Cory, states:⁴

Can the homosexual be accurately defined, in the sense of a limiting definition which will on the one side include all those properly encompassed by the term, yet exclude the remainder of the population? For purposes of understanding this problem, I would call any person a homosexual who feels a most urgent sexual desire which is in the main directed toward gratification with the same sex.

George W. Henry in All the Sexes points out:⁵

The word "homosexual" is frequently misused in referring to sexual maladjustment. It is doubtful whether homosexuality necessarily implies maladjustment, because some homosexuals are reasonably well adjusted. The usual meaning of homosexuality connotes a preference for overt physical relations with persons of the same sex and an habitual indulgence in this preference.

He concludes:

Unless the "homosexual" is clearly defined, objective discussion regarding it is futile, and misunderstanding and erroneous conclusions are inevitable. Even when the term is defined but restricted to a meaning different from that in common usage, erroneous impressions result.⁶

Illustration of such a definition and restriction of

the meaning is the following by Kinsey:

The statistics given throughout this volume are the incidence of homosexual activity... are based on those persons who have had physical contacts with other males, and who were brought to orgasm as a result of

such contacts. By any strict definition such contacts are homosexual, irrespective of the extent of the psychic stimulation involved, of the techniques employed, or of the relative importance of the homosexual in the history of such an individual. These are not data on the number of persons who are "homosexual", but on the number of persons who have had at least some homosexual experience...⁷

Contrary to public opinion, it would be difficult, if not impossible to divide people into two clear-cut groups - homosexuals and heterosexual. Furthermore, these terms represent the extreme poles of a continuum. In between we find many individuals whose experiences combine both heterosexual and homosexual components, as the following statistics indicate:

50 percent of the adult male population has neither overt nor psychic experiences of a homosexual nature after the onset of adolescence.⁸

13 percent of all males react erotically to other males without having overt homosexual experiences after the onset of adolescence.⁹

37 percent of all males have homosexual experiences to the point of orgasm after the onset of adolescence.¹⁰

50 percent of all males who remain unmarried to the age of 35 have had overt homosexual experience to the point of orgasm since the onset of adolescence.¹¹

18 percent of all males reveal as much of the homosexual as the heterosexual in their histories.¹²

8 percent of males engage exclusively in homosexual activities for at least three years between the ages of 16 and 55.¹³

4 percent of males are exclusively homosexual from adolescence on.¹⁴

Thus there are many degrees of heterosexuality and homosexuality in America with approximately six and a third

million confirmed homosexual males.¹⁵ Therefore, if all the males were arrested for an isolated homosexual experience the increase in our penal institutions would be tremendous.¹⁶

Just as there are different definitions of homosexuality, there are also highly conflicting explanations of the psychodynamics of homosexuality.

Early theories dealt with homosexuality as having a constitutional base or chromosomal imbalance. Kallman for instance, in his study of 40 male homosexuals with identical twins, found that 39 of the twins were also homosexuals.¹⁷ But criticism of these findings are overwhelming due to Kallman's lack of objectivity in his investigations.¹⁸ Recent studies have been concerned with the possibility that the chromosome structure of a homosexual is abnormal.¹⁹ However, since abnormal chromosomes have only recently been discovered, no suitable etiology of homosexuality has thus been presented.

The viewpoint now favored by most psychiatrists and psychologists is that homosexuality constitutes, or at least reflects, some kind of psychological disturbance in the subjects' sex pattern.

From 1952 to 1962, Dr. Irving Bieber and his associates made an extensive study of 106 homosexuals who were undergoing psychoanalysis. Dr. Bieber and his associates concluded:²⁰

A homosexual adaptation is a result of "hidden but incapacitating fears of the opposite sex." A considerable amount of data...has been presented as evidence that fear of heterosexuality underlies homosexuality, e.g., the frequent fear of disease or injury to the genitals, significantly associated with fear and aversion to female genitalia; the frequency and

depth of anxiety accompanying actual or contemplated behavior.

Some interesting questions have been raised concerning

Dr. Bieber's study:

All the patients, both the homosexual and the heterosexual, desired analysis, thus might not have been well adjusted to begin with. This does not prove that the homosexuals who do not seek analysis are not well adjusted.²¹

Or as the psychoanalyst Ernest van den Haag wrote:²²

To be sure, homosexual behavior often is a symptom or part of illness; so is heterosexual behavior. (I am reminded of a colleague who reiterated "all my homosexual patients are quite sick" - to which I finally replied "so are all my heterosexual patients." As or culture-bound. It seems a questionable gain.)

Many homosexuals are neurotic or psychotic and seek the help of an analyst, as do many heterosexuals. It does not follow that homosexuality itself is an illness - that it is always associated with clinical symptoms...

But careful examination of Dr. Bieber's theory reveals how closely it is related to the Freudian theory of homosexuality. Personality development was viewed by Freud as the organization and expression of basic sexual energy, or "libido".²³ He saw this development occurring in five stages:²⁴ oral, anal, phallic, latency, and genital stage. The events of infancy and early childhood are major determinants of adult personality.²⁵ Therefore, Freud insisted upon the critical importance of the first years in the development of sexual identity. Furthermore, one of the most important conflicts arises during the Oedipus complex. Freud viewed the Oedipus complex as occurring around the ages of three to five, when the young boy develops a sexual desire for his mother, which ultimately has to be repressed. This complex

is complicated by a fear of castration or, as Freud called it, "castration anxiety."

The boy enters the Oedipus phase; he begins to manipulate his penis, and simultaneously has phantasies of carrying out some sort of activity with it in relation to his mother; but at last, owing to the combined effect of a threat of castration and the spectacle of woman's lack of a penis, he experiences the greatest trauma of his life, and this introduces the period of latency with all its attendant consequences.²⁶

He added:

In the earlier phases the separate component instincts set about their pursuit of pleasure independently of one another; in the phallic phase there are the signs of an organization which subordinates the other trends to the primary of the genitals and signifies the beginning of a co-ordination of the general pursuit of pleasure into the sexual function. The complete organization is not attained until puberty, in a fourth, or genital phase. A state of affairs is then established in which many earlier libidinal cathexes are retained; others are included in the sexual function as preparatory or auxiliary acts, their satisfaction producing what is excluded from the organization, and either entirely suppressed (repressed) or are employed in the ego in some other way, forming character-traits or undergoing sublimation with a development of their aims.²⁷

He concluded:

This process is not always carried out perfectly. Inhibitions in the course of its development manifest themselves as the various disturbances of sexual life. Fixation of the libido to conditions at earlier phases are then found, the trend of which, moving independently at the normal sexual aim, is described as "perversion".²⁸

Freud assumed that each individual is inherently bisexual; each sex is attracted to members of the same sex as well as to members of the opposite sex:

It is necessary to make clear that the conceptions, "masculine" and "feminine," whose content

seems so unequivocal to the ordinary meaning, belong to the most confused terms in science and can be cut up into at least three paths. One uses masculine and feminine at times in the sense of activity and passivity, again, in the biological sense, and then in the sociological sense...The result of this in man is that there is no pure masculinity or femininity either in the biological or psychological sense. On the contrary, every individual person shows a mixture of his own biological sex characteristics with the biological traits of the other sex and a union of activity and passivity; this is the case whether these psychological characteristic features depend on biological elements or whether they are independent of them.²⁹

The theory that the human individual is actually bisexual has been promulgated by other studies, but presented in different terms. The usage of "bisexual" has been replaced by the phrase "psychosexually neutral at birth."³⁰ Such an idea was presented by John Money, Joan Hampson, and John Hampson³¹ in a series of studies done in 1955. These authors accumulated a great deal of evidence that both gender identity³² and sexual object-choice³³ are due to social learning. Thus, a child is not born to be normal (heterosexual) or abnormal (homosexual); but instead the individual learns sexual responses in social interaction with his parents and peers.³⁴

In addition, as Frank Beach³⁵ has pointed out, studies of mammals show that as one ascends the mammalian scale there is a lessening hormonal control of sexual behavior and an increased control by the cerebral cortex. In other words, the higher one goes in the primate scale, the more the sexual development of the organism is under the control of social interaction of learned factors. As another author stated:

We conclude that an individual's gender

role and orientation as boy or girl, man or woman, does not have an innate, pre-formed instinctive basis as some theorists have maintained. Instead the evidence supports the view that psychologic sex is undifferentiated at birth - a sexual neutrality one might say - and that the individual becomes psychologically differentiated as masculine or feminine in the course of the many experiences of growing up.³⁶

He adds:

As an alternative to employing a drive concept, it might be preferable to say simply that the erotically sensitive parts of the human body can be stimulated and used by oneself or another person, and that during the process of psychologic maturation and development erotic sensations become firmly associated with, and inextricably a part of, adult gender role.³⁷

Freud points out that homosexuality can also be caused by some form of fixation as the child goes through this process of learning sexual responses..

In all cases examined we have ascertained that the later inverts go through in their childhood a phase of very intense but short-lived fixation on the woman (usually on the mother) and after overcoming it they identify themselves with the women and take themselves as the sexual object; that is, proceeding on a narcissistic basis, they look for young men resembling themselves in persons whom they wish to love as their mother loved them.³⁸

While Freud contributes the notion that homosexuality could be caused by narcissistic actors, a similar view has been stated by Karen Horney.³⁹

If the need for affection is concentrated on the same sex, this may be one of the determining factors in latent or manifest homosexuality. The need for affection may be directed toward the same sex if the way to the other sex is barred by too much anxiety.

So far, the psychodynamics of homosexuality has been rated as: constitutional bases or chromosomal differences; fear

of the opposite sex; unresolved Oedipus complex, fear of castration and a fixation; need for affection; and bisexuality; thus sex orientation is a learned process. Recent writers have observed homosexuality from a different stance. Such an author is Kenneth Keniston⁴⁰, who has pointed out the damaging effects of the modern urbanized, technological society that is found in the large cities, which in turn, has produced a serious alienation between persons. As a community becomes more urban, the individuals lose their sense of identity, thus deviant behavior becomes more enticing. Since everybody is expected to be heterosexual, this following of the normal pattern does provide the necessary identity that these individuals are seeking. Therefore, being a homosexual, the individual can make this identity the center of his own self-concept and develop a sense of pride about being a member of a deviant community. As a member of this underground community he is not only provided with an identity, but is afforded a place to go and things to do even in another strange city.⁴¹

Dr. Robert Linder is another author who does not believe that homosexuality is due entirely to early childhood experiences but instead states:⁴²

I am personally convinced after intensive study of the problem and experience with homosexuals that it is - a pattern of sex orientation adopted by certain individuals as their solution to the conflict between the urgency of the sexual instincts and the repressive efforts brought to bear upon sexual expression by the reigning sex morality...This view of homosexuality as a form of rebellion and the homosexual as a non-conformist, cuts through much of the debris of prejudice and pretense which ordinarily interfere with intelligent discussion of the problem.

If homosexuality is not of constitutional origin or abnormal in the psychological range, then is it really a mental illness in the psychoanalytic terms? This notion was stated in a study by U.C.L.A. psychologist, Dr. Evelyn Hooker.⁴³ Dr. Hooker obtained thirty homosexuals from the Mattachine Society,⁴⁴ and matched them with thirty heterosexuals for age, education and IQ. These sixty men were given a battery of psychological tests, including the Rorschach, the TAT, and the MATS along with a considerable amount of information concerning their life history. The results of these tests were given to a group of psychologists and psychiatrists for analysis. The examining committee was unable to distinguish between the two groups, nor was there any evidence that the homosexual group had a higher degree of pathology than the heterosexual group. Dr. Hooker concludes:

Homosexuality as a clinical entity does not exist. Its forms are as varied as are those of heterosexuality...Some homosexuals may be very ordinary individuals indistinguishable, except in sexual pattern, from ordinary individuals who are heterosexual, and that homosexuality, may be deviation in sexual pattern which is within the normal range, psychologically.⁴⁵

Dr. Martin Hoffman, author of The Gay World, is another writer who does not view homosexuality as a mental illness. After years of research, Dr. Hoffman came to the same results as Dr. Hooker. Commenting on Dr. Hooker's study, Dr. Hoffman has stated:

When a sensitive clinical instrument, such as the Rorschach, was used, the conclusions were the same as those reached by Curran and Parr, by Freud, by van den Haag, and by myself, namely, that there certainly exists a significant number of homosexual men who are not mentally ill by any clinical criteria.⁴⁶

He added:

If all this evidence is not to be discounted, then it is clear that the overt male homosexual is not necessarily subject to clinical symptoms of illness, to neurotic or psychotic disturbance.⁴⁷

Furthermore, Dr. Hoffman states that: "Homosexuals seen in psychiatric treatment are no more representative of homosexuals in the general population than are Jews seen in psychiatric treatment representative of all Jews."⁴⁸

In conclusion, after reviewing the literature on the origin of the homosexual drive, it must be assumed that each homosexual is an individual unto himself. Like all individuals, the homosexual has his own family background and general history that must be considered. Each person will have different experiences and surroundings in which many conflicts will occur, it is how the individual perceives these situations that is important. If logic and reasoning are to be used in analyzing the causes of homosexuality, then the heterosexual individual must look at the problem in more realistic and objective terms.

²⁰I. Bieber, Homosexuality 303 (1962).

²¹J. Gerassi, The Boys of Boise 93 (1966); See also D. Cory, The Homosexual and His Society 233-235 (1963).

²²E. van den Haag, Notes on Homosexuality and Its Cultural Setting as reprinted in M. Hoffman, The Gay World 157 (1968).

²³B. Wolman, The Unconscious Mind 10, 31 (1968).

²⁴R. Waelder, Basic Theory of Psychoanalysis 109 (1964).

²⁵Supra note 23 at 33-34.

²⁶J. Strachey, An Outline of Psychoanalysis 29-30 (1949).

²⁷Id. at 30-31.

²⁸Id. at 31.

²⁹S. Freud, Contributions to the Theory of Sex as cited in A. Krich, The Sexual Revolution 330 (1964):

"The first of these three meanings is the most essential and the only one utilizable in psychoanalysis. It agrees with the masculine designation of the libido...for the libido is always active, even when it is directed to a passive aim. The second, the biological significance of masculine and feminine, is the one which permits the clearest determination. Masculine and feminine are characterized by the presence of semen or ovum and through the functions emanating from them. The activity and its secondary manifestations, like stronger developed muscles, aggression, a greater intensity of libido, are as a rule soldered to the biological masculinity, but not necessarily connected with it, for there are species of animals in whom these qualities are attributed to the female. The third, the sociological meaning, receives its content through the observation of the actual existing male and female individuals."

³⁰M. Hoffman, The Gay World 121 (1969); Dr. Hoffman refers to this as "undifferentiated sexual potential in the child."

³¹J. Money, J. Hampson and H. Hampson, "An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism" XCVII Bulletin of the Johns Hopkins Hospital 301 (1955).

³²This is referring to one's feeling of masculinity or femininity.

³³One's preference for a type of sexual partner.

³⁴Supra note 30.

³⁵F. Beach, Sex and Behavior (1965).

³⁶J. Hampson, "Determinants of Psychosexual Orientation" in supra note 35 at 119.

³⁷Id.

³⁸Supra note 29 at 266.

³⁹K. Horney, The Neurotic Personality of Our Time 119 (1964).

⁴⁰K. Keniston, The Uncommitted: Alienated Youth in American Society (1965).

⁴¹Id.

⁴²Supra note 3 at 40-41.

⁴³E. Hooker, "The Adjustment of the Male Overt Homosexual" XXI Journal of Projective Techniques 18 (1957).

⁴⁴The Mattachine Society is one of the largest of the homosexual organization. The purpose of this organization is for the "development of a homosexual ethnic in order to better integrate the homosexual into society."

⁴⁵Supra note 43 at 30.

⁴⁶Supra note 30 at 161.

⁴⁷Id.

⁴⁸Id. at 157.

CHAPTER IV

ANALYSIS OF STATUTORY SEX LEGISLATION

American legal concepts of homosexual conduct are derived from the English and were, as we have previously seen, influenced by the Jews through the Christian churches. Homosexuality in the early writings of the Christian religion was labeled "that unmentionable crime not fit to be mentioned by Christians." Closely related to this concept, the laws in the United States today are just as evasive and undefined as they were in the past.¹ Although it is not a crime to be a homosexual, every state with the exception of Illinois² has enacted a complex group of statutes designed to define an enormous range of sexual activities. The total number of legislative enactments in the field of sex regulation are very diversified and extend over a wide range of human behavior and activity.

Analysis of the statutes is impeded by their dissimilarity, both as to definition and punishment. The legislatures have enacted laws restraining almost every variety of noncoital sex - heterosexual and homosexual, marital and non-marital - including fellatio, cunnilingus, pederasty, buggery, and mutual masturbation.³

The primary source of confusion is the failure of the states to employ similar definitions in describing their sex offenses. Therefore, the very same conduct in one state may not be criminal in another.⁴ The statutes contain such phrases as "unnatural crimes,"⁵ "the famous crime against nature,"⁶ "any unnatural copulation,"⁷ "the abominable and detestable crime against nature with mankind or beast,"⁸ and "any unnatural and lascivious acts."⁹ From these terms it is obvious that they

reflect an attitude of moral condemnation and lack a degree of specificity usually required in statutory definitions of crime.

The purpose of a criminal statute is to set forth with all possible precision those acts of omissions which the statute prohibits or commands, and to state what the penalty shall be for failure to comply. Where statutes go beyond this, and certain language which does not serve to define the crime but rather to describe it in moral terms one may justifiably pause to wonder why.¹⁰

This element of moral condemnation in our sex laws are vividly revealed in the statutes defining "crimes against nature." The very use of such a vague and ill-defined concept is related to the Puritan's attitudes of our heritage. Judge Ploscowe noted such a feeling in a judge's ruling.¹¹

It was never the practice to describe the particular manner of 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 terms, 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.

In order to illustrate the confusion and lack of uniformity that exists in our present regulation of sex activity, an examination has been made of the sex statutes and penalties. At the outset, it should be remembered that only those laws regulating adult homosexual, consensual activities were investigated. Criminal acts such as rape, fornication, lewd cohabitation, statutory rape and any other heterosexual or homosexual act involving force, coercion, or juveniles are not pertinent

to this study.

Felony Offenses

Homosexuality, per se is not illegal, therefore homosexual behavior is legally considered under the heading of "Sodomy." It is generally accepted that sodomy, as defined by common law, included relationships between males, "per anum" and the term bestiality denoted sexual relations between man and beast...¹² For the most part, present American statutes in their effort to define sodomy have enlarged its meaning so as to include most sexual acts whether they be man or beast and only excepting the act of vaginal intercourse as legal.

The term "sodomy" is used exclusively in fifteen states.¹³ The label "crime against nature" is employed in nineteen states.¹⁴ The State of South Carolina is the only state that employs the term "buggery."¹⁵ A combination of "sodomy" and "the crime against nature" are used in six states¹⁶ while two other states preferred the combination of "sodomy" and "buggery."¹⁷ The remaining states have selected other words, phrases and labels which add to the confusion.¹⁸

In an effort to give proper meaning to "sodomy" and "the crime against nature," some states have enacted new statutes which unequivocally delineate the elements of the offense.¹⁹ The sodomy laws in eighteen states have been specifically rewritten to embrace the meaning as set forth in the common law definition.²⁰ Twenty-seven states do not give any definition of sodomy or the crime against nature, merely stating that it is prohibited.²¹ To compensate for the uncertainty of the sodomy statutes, many courts in different jurisdictions have stretched

the statutory definition to include the practice of fellatio from their broadly-defined sodomy statutes,²³ while Indiana and Wyoming includes masturbation in their sodomy statutes.²⁴ This panoramic view therefore supports the proposition that the crime of sodomy or the crime against nature includes all acts of unnatural carnal copulation with man or beast except male-female vaginal intercourse.

The penalties imposed on those convicted of sodomy vary as greatly as the statutory definitions. A person convicted of private, consensual, adult sodomy is guilty of a felony except in Kansas, North Dakota, New York, New Jersey and Illinois.²⁵ Furthermore, each state legislature has provided penalties ranging from five years to life imprisonment for such offenses. In California, Idaho, Missouri, Montana, and Nebraska, a person convicted of sodomy can receive the maximum penalty which is life imprisonment. The maximum penalties of twenty years can be given in ten states.²⁶ In two states, the penalty of over twenty years can be given.²⁷ The minimum penalty of not less than five years is imposed in Arizona, Idaho, Montana, South Carolina, and Tennessee. In Alabama, Indiana, Kentucky, Missouri, and Texas the minimum penalty is not less than two years. The defendant may pay a fine without imprisonment in Indiana, Louisiana, Maryland, Minnesota, New Hampshire, New Jersey, Pennsylvania, South Carolina and Wisconsin; however in Delaware and Hawaii, there are provisions for a monetary assessment and a jail term.²⁸ Besides the fine in Hawaii the statute adds hard labor for not more than twenty years. Up to five years with or without hard labor can be given in Louisiana and up to ten years at hard

labor in Pennsylvania. In New York, when the act of sodomy has not been against the will of the partner the maximum sentence of one year is imposed. However, a maximum sentence of twenty years may be imposed if the act was carried out against the will of the victim.²⁹ This misdemeanor offense of one year in New York is in direct contrast with eighteen other jurisdictions which have the maximum sentence between ten and fifteen years.³⁰ Since 1951, Arizona, California, New Hampshire, New Jersey and Wyoming have made their penalties for sodomy more severe while thirteen³¹ other states have lessened their sanctions.

Misdemeanor Offenses

Anal intercourse and oral copulation, which fall under felony charges are by far the most severe limitations on homosexual conduct: however these statutes do not exhaust the laws under which homosexuals are penalized. Misdemeanor statutes for punishing homosexual conduct, besides the sodomy and fellatio statutes, are found in all states. The language contained in a number of these laws are aimed specifically at punishing a particular act such as solicitation. Others are so inclusive that any sexual behavior could be interpreted as prohibited.³² For clarification purposes, the misdemeanor statutes have been divided into three general categories, outrageous conduct, lewd and lascivious behavior and vagrancy laws.

Outrageous Conduct. When a more serious crime cannot be proved these laws serve as a provision of imposing a penalty. This is illustrated by one California law prohibiting conduct "outrageous to public decency". This statute specifically

states that this section is limited in application to acts "for which no other punishment is expressly prescribed by the code."³³ Sixteen states employ these statutes to serve as punishment for indecent exposure,³⁴ while the remainder do not include open lewdness or indecency in their outrageous conduct provision, but instead have separate statutes for each offense. The divergence in language of these statutes is found from state to state. The all-inclusive language characteristic of many of these laws is absent because many states already have a complex set of sex laws which prohibit many varieties of sexual behavior. In Hawaii, for example, the outrageous conduct law punishes a person who "loiters about any public place and solicits men for the purpose of committing a crime against nature or other lewdness."³⁵ However, Hawaii also has a separate statute against sodomy,³⁶ indecent exposure and common nuisance,³⁷ along with vagrancy.³⁸ Therefore as in many states, each of these laws are intended to cover the different varieties of sexual behavior.

Lewd and Lascivious Behavior. Arizona³⁹, Arkansas⁴⁰, Connecticut⁴¹, Delaware⁴², Florida⁴³, Massachusetts⁴⁴, New Jersey⁴⁵, New Hampshire⁴⁶, and Ohio⁴⁷ have misdemeanor laws prohibiting acts which may vary from outrageous conduct because they are committed in private (not publicly visible) or because they do not tend to cause a breach of the peace. The acts of sodomy and fellatio might be punishable under these laws due to the broad language used in these statutes. Most states include acts of solicitation within their lewd behavior statutes; however Arkansas⁴⁸, Delaware⁴⁹, Florida⁵⁰, Hawaii⁵¹, Indiana⁵², Louisiana⁵³, Michigan⁵⁴, New Jersey⁵⁵, New York⁵⁶, Ohio⁵⁷,

Pennsylvania⁵⁸, Texas⁵⁹ and Wyoming⁶⁰ impose punishment for the solicitation of homosexual acts as a distinct offense.

Vagrancy. Of all the statutes which condemns homosexuals the vagrancy laws appear to be the most debatable.⁶¹ The vagrancy statutes appear with even more ambiguous language than those of the statutes governing sodomy. For example, the language employed in the statutes define vagrants as "ablebodied persons who loaf without visible means of support,"⁶² "lewd, disorderly or dissolute persons,"⁶³ "persons engaged in any unlawful calling,"⁶⁴ and "habitual gamblers".⁶⁵ Even though these laws do not punish specific conduct, but instead, penalize a certain status or condition, the courts have been unwilling to circumscribe the broad applicability of these statutes.⁶⁶ While a number of states have vagrancy statutes which have no sexual elements mentioned, twenty-three states have statutes relating to adult homosexuals.⁶⁷

Evaluation of the sodomy statutes governing homosexual activity may be aided by briefly considering the special sex psychopath legislation. Though these offenses bear no direct relation to homosexuality,⁶⁸ they indicate the thinking which predominates in the whole field of sexual deviation.

The sexual psychopathic laws were designed to serve as a safeguard for the community from any violent or dangerous sexual offenders. This type of legislation provided an indefinite term of treatment for sex offenders found to be sex psychopaths or anyone convicted of certain sex offenses. Since the definitions and procedures used are of such wide range, the

homosexuals could be convicted under these laws.⁶⁹

Enforcing the Law. For the most part consensual adult homosexual activity takes place privately, leaving behind no damage and no complaining victim. Convictions have to be obtained by persuading one of the participants to confess, by the testimony of police officers describing what they saw, or by the use of decoys.⁷⁰ It is with the use of decoys that arguments rage over the distinction between legitimate decoys and illegitimate entrapment.⁷¹

Homosexuals frequently accuse the police of engaging in "entrapment." Actually, in the use of decoys the law makes a fine distinction between entrapment and "entice-ment." The distinction hinges on whether the intent to commit the crime originated in the mind of the defendant or in the mind of the officer. If the defendant has a pre-existing criminal intent, the officer's intent is irrelevant and there is no entrapment. It is permissible to entice the subject who is engaged in criminal activity or who has a predisposition to commit the crime. Illegal inducement occurs only when it would be sufficient to lead the innocent into a criminal act.⁷²

These decoys are used in an attempt to draw indecent proposals⁷³ or as stated in the California statute: "Whoever solicits anyone to engage in or who in any public place... engages in lewd or dissolute conduct...."⁷⁴ The use of such methods by the police have been questioned: if homosexual activity is "as difficult to detect as all that, it can't matter much to public decency."⁷⁵ Another issue involved in the employment of decoys is the great amount of police manpower that it requires to apprehend the offenders. On this matter of decoys, the U.C.L.A. Law Review has stated:

Empirical data indicate that utilization of police manpower for decoy enforcement is not justified...Societal interests are infringed only when a solicitation to engage in a homosexual act creates a reasonable risk of offending public decency. The incidence of such solicitations is statistically insignificant. The majority of homosexual solicitations are made only if the other individual appears responsive and are ordinarily accomplished by quiet conversation and the use of gestures and signals having significance only to other homosexuals. Such unobtrusive solicitations do not involve an element of public outrage.⁷⁶

The use of decoys is not the only method employed by the law enforcement officers to apprehend suspected homosexuals. Harassment⁷⁷ is used against suspected homosexuals in parks or other areas contiguous to public restrooms.⁷⁸ Also, when a bar is suspected of being a "gay" bar,⁷⁹ plainclothes officers may check the identification of suspects every half hour or on every hour. Often marked patrol cars will park in front of homosexual bars and will question customers upon entering or as they are leaving.⁸⁰ These bars are checked to see if they have violated any fire department regulations concerning the number of customers that are in a bar. This is done by having everyone inside the bar to file outside for a "body count."⁸¹ The customers of a homosexual or gay bar are arrested on any legitimate ground, such as for failing to make a full stop before crossing the sidewalk when exiting an adjacent parking lot, or for jay walking.⁸²

Generally, these enforcement methods are technically within the "letter of the Law"; however, they are objectionable because they are deliberately used only with respect to homosexuals and homosexual bars.

Harassment aimed at homosexuals "because" they are homosexual may violate the equal protection clause of the fourteenth amendment. Although a defendant in a criminal prosecution cannot defend solely on the ground that others were not arrested for the same offense, he can successfully defend by a further showing that his arrest was unconstitutional because it resulted from arbitrary, intentional discrimination by enforcement officers. It has been indicated that discriminatory enforcement based on race, religion, or political beliefs would constitute a valid defense. There is little reason to believe that a classification based exclusively on homosexuality should be privileged. Furthermore, discriminatory enforcement can be enjoined.⁸³

Only a slight incursion is made into the deterrence of homosexuality under present laws and law enforcement measures. A policy of more stringent penalties and stepped-up enforcement would not improve the situation.⁸⁴ Sex offense legislation is admittedly largely unenforceable.⁸⁵ Many authors have pointed out serious problems associated with enforcing our sex laws of today that were designed in response to circumstances of a distant time and place.⁸⁶ For example, G. W. Henry has written:⁸⁷

If the present laws in the United States against various sexual practices were enforced, the majority of the population would be classed as sex offenders... Our laws decree that all sexual activity, except vaginal coitus between husband and wife, and solitary masturbation in privacy, is illicit. This means that the single, the divorced, the widowed and the wives of husbands who are impotent, have no legitimate sex outlet except through involuntary or self-induced orgasms. Some of the more rigid religious codes would make sexual activity solely procreative. Opposed to this is the reality of illicit sexual activity in which the majority of the population have at some time engaged.

Another author has made a similar statement concerning both the unreasonableness and non-enforceability of the sex laws:

They are too completely out of accord with the realities of human behavior, and because they attempt too much in the way of social control...it is inconceivable that the present laws could be administered in any fashion that even remotely approaches systematic and complete enforcement.⁸⁸

There are too many discrepancies and variations in the United States with regard to the laws and enforcement of laws of deviate or homosexual behavior. Also, the laws are not clear and many times these laws are not and can not be enforced. There is a need for re-examination as well as an overhauling of the sex laws so that they will be more realistic and more understanding.

CHAPTER IV

FOOTNOTES

¹R. Slovenko, Sexual Behavior and the Law 83 (1965).

²Ill. Rev. Stat. ch. 38 #11-2 (1963). Illinois' new statute employs the term "deviate sexual conduct;" however, this does not apply to consensual, private homosexual activities among adults.

³Project, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County," 13 U.C.L.A. L. Rev. 643, 657 (1966).

⁴E.g., 1 A Consensual homosexual act which is legal in Illinois, but punishable as a misdemeanor in New York or even be life imprisonment in some states where it is a felony.

⁵E.g., Alas. Stat. (1962) #11-40-120.

⁶E.g., Mont. Rev. Code Ann. #94-4118 (1969).

⁷E.g., Colo. Rev. Stat. Ann. #40-2-31 (1963).

⁸E.g., Fla. Stat. #800.01 (1965).

⁹E.g., N.H. Rev. Stat. Ann. #570:9 (1955).

¹⁰D. Cantor, "Deviation and the Criminal Law," 55 J. Crim. L.C. & P.S. 446 (1964).

¹¹M. Ploscowe, Sex and the Law 197 (1951).

¹²Not all legal writers agree on what constitute the common law crime law of sodomy. In Bowman and Engle, "A Psychiatric Evaluation of Laws of Homosexuality," 29 Temple L.Q. 273-326 (1956): The definition of sodomy is said to be connection per anum between two males or connection between a human being and animal. See, State v. Start, 65 Ore. 178, 180, 132 Pac. 512 (1913): "The rule of at common law was that: All unnatural carnal copulation whether with man or beast seems to come under the notion of sodomy."

¹³Ga., Hawaii, Ind., Iowa, Kansas, Md., Minn., Neb., N.M., N.D., Ohio, Pa., Tex., Utah, and Wash.

¹⁴Ala., Ariz., Colo., Del., Fla., Idaho, La., Me., Mich., Mo., Mont., N.C., Okla., R.I., S.D., Tenn., Va., and W. Va.

¹⁵S.C. Code #16-412 (1962).

¹⁶Ala., Calif., N.J., N.Y., Ore. and Wyo.

¹⁷Arkansas and Kentucky.

¹⁸Connecticut employs the combination of "bestiality" and "sodomy"; Illinois in its newly drafted statute coined the term "deviate sexual conduct"; however, this is not employed to describe adult, consensual, private, homosexual activities for which there is no penalty in Illinois; Massachusetts combines three terms while Mississippi settles for two, "unnatural intercourse" and the more conventional "crime against nature." New Hampshire uses the words "lascivious act," and Ohio combines the veteran "sodomy" with a unique "carnal copulation"; Wisconsin with its original "sexual perversion" completes the list.

Vermont has no sodomy statute. The only provision is a crime against fellation. Vt. Stat. Ann. tit. 13 #2603 (1959). However, it could be speculated that since most other states call this practice sodomy, other acts more basically sodomy might be included. Nevertheless, this would be contrary to the express wording of the statute: "A person participating in the act of copulating the mouth of one person with the sexual organ of another shall be imprisoned in the state prison not less than one nor more than five years."

¹⁹Typical of the wording of sodomy statutes are the following: Colo. Rev. Stat. Ann. #40-2-31 (1963).

The infamous crime against nature, or the attempt to commit said crime, either with man or beast, or any unnatural carnal copulation per anus or per os or in any other way whatsoever shall subject the offender to be imprisoned in the penitentiary for a term of not less than one year and not more than fourteen years.

The solicitation of any unnatural carnal copulation shall subject the offender to confinement in the county jail for not less than thirty days or more than two years.

Iowa's statute, Iowa Code #705 1 (1962), states, "whoever shall have carnal copulation in any opening of the body except sexual parts with another human being or shall have carnal copulation with a beast, shall be deemed guilty of sodomy."

²⁰Alaska, Cal., Colo., La., Md., Minn., Mo., N.M., N.Y., N.D., Ore., Pa., Utah., Vt., Va., Wash., W.Va., and Wis.

²¹Typical of these states is Maine, Me. Rev. Stat. 17 #1001 (1964): "Whoever commits the crime against nature, with mankind or with a beast shall be punished by imprisonment for not less than one year nor more than ten years."

²²Alabama: Woods v. State, 10 Ala. App. 96, 64 So. 508 (1914); Arkansas: Mangum v. State, 227 Ark. 381, 299 S.W. 2d 80 (1957); Delaware: State v. Maida, 29 Del. 40, 96 Arl. 207 (1915); Florida: Lason v. State, 152 Fla. 440, 12 So. 2d 305 (1943); Georgia: Jones v. State, 17 Ga. App. 825, 88 S.E. 712 (1916); Hawaii: Territory v. Wilson, 26 Hawaii 360 (1922); Idaho: State v. Altwatter, 29 Idaho 107, 157 Pac. 256 (1916); Indiana: Glover v. State, 179 Ind. 459, 101 N.E. 629 (1913); Maine: State v. Cyr, 135 Me. 513, 198 Atl. 743 (1938); Mississippi: State v. Davis, 223 Miss. 862, 79 So. 2d 452 (1955); Nevada: Ex parte Benites, 37 Nev. 145, 140 Pac. 435 (1914); New Hampshire: State v. Desilets, 96 N.H. 245, 73 a.2d 800 (1950); Oklahoma: Roberts v. State, 57 Okal. Crim. 244, 47 P2d 607 (1935).

²³Arizona: State v. Potts, 75 Ariz. 211, 254 P.2d., 1023 (1953); Michigan: People v. Schmitt, 275 Mich. 575, 267 N.W. 741 (1936); New Jersey: State v. Morrison, 25 N.J. Super. 534, 96 A.2d 723 (1953).

²⁴Ind. Stat. Ann. #10-4221 (1956); Wyo. Stat. #6-98 (1957).

²⁵Kansas has the penalty of Class B misdemeanor as of July 1, 1970; North Dakota has a felony-misdemeanor arrangement; New York's penalty is a misdemeanor and in New Jersey it is a high misdemeanor. (No crime in Illinois).

²⁶Ariz., Ark., Conn., Fla., Hawaii, Mass., Neb., N.J., Ohio and Rhode Island.

²⁷Arkansas and Connecticut.

²⁸Delaware: Not more than \$1000., and not more than three years; Hawaii: Not more than \$1000., and not more than twenty years at hard labor.

²⁹New York Penal Code #130.38 (1967).

³⁰Ala., Alas., Colo., Ga., Ind., Iowa, Me., Md., Miss., Okla., Ore., Pa., S.D., Tenn., Tex., Wash., W. Va., and Wyo.

³¹Ark., Colo., Ga., Ill., Kan., Minn., Mich., N.C., Nev., N.D., N.Y., Ore., and Wis.

³² Almost every current sex statute throughout the United States is applicable to homosexual or heterosexual activities. Connecticut, Georgia, Kentucky and South Carolina restrict their statutes to male homosexuals.

³³ Cal. Pen. Code #650.5. The applicable provision is as follows:

A Person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health or which openly outrages public decency.....for which no other punishment is expressly prescribed by this code, is guilty of a misdemeanor.

³⁴ Minnesota, Delaware, Georgia, Illinois, Iowa, Kansas, Louisiana, Missouri, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, Virginia, Washington and Wisconsin.

³⁵ Hawaii Rev. Laws #314-2 (1955).

³⁶ Hawaii Rev. Laws #309-34 (1955); "Whoever commits sodomy, that is, the crime against nature, either with mankind or any beast, shall be fined not more than \$1000, and imprisoned at hard labor not more than twenty years."

³⁷ Hawaii Rev. Laws #267-1 (1955): "The offense of common nuisance is the endangering of the public personal safety or health;...or is a public outrage against common decency or common morality; or tends plainly and directly to the corruption of the morals, honesty and good habits of the people.... As for example: Open lewdness or lascivious behavior, or indecent exposure."

³⁸ Hawaii Rev. Laws #314-1 (1955): "Every idle, or lewd, or dissolute person....or who is wanton or lascivious in speech or behavior..is a vagrant and shall be fined not less than one, or \$10, nor more than \$500., or imprisoned not more than one, or both."

³⁹ Ariz. Rev. Stat. Ann. #13-652 (1965).

⁴⁰ Ark. Stat. Ann. #41-3202 (1963).

⁴¹ Conn. Gen. Stat. Rev. #53-226 (1958).

⁴² Del. Code Ann. tit. 11 #731 (1953).

⁴³Fla. Stat. #796.07 (1965).

⁴⁴Mass. Ann. Laws ch. 272, #16 (1956).

⁴⁵N.J. Stat. Ann. #2A:115-1 (1953).

⁴⁶N.H. Rev. Stat. Ann. #579:3 (1955).

⁴⁷Ohio Rev. Ann. #2905.30 (1964).

⁴⁸Ark. Stat. Ann. #41-3202 (1963).

⁴⁹Del. Code Ann. tit. 11#731 (1953).

⁵⁰Fla. Stat. #800.02 (1965).

⁵¹Hawaii Rev. Laws #267-1 (1955).

⁵²Ind. Ann. Stat. #10-2801 (1956).

⁵³La. Rev. Stat. Ann. #14-106 (1963).

⁵⁴Mich. Stat. Ann. #750.167 (1967).

⁵⁵N.J. Stat. Ann. #2A: 170.5 (1953).

⁵⁶N.Y. Pen. Code #240.35 (1967).

⁵⁷Ohio Rev. Code Ann. #4502 (1963).

⁵⁸Pa. Stat. Ann. tit. 18, #4502 (1963).

⁵⁹Tex. Pen. Code Art. 607 (1958).

⁶⁰Wyo. Stat. Ann. #6-102 (1957).

⁶¹Supra note 3 at 666.

⁶²Ex parte Strittmatter, 58 Tex. Crim. 156, 124 S.W.
906 (1910).

⁶³State v. Harlowe, 174 Wash. 227, 24 P.2d 601 (1933).

⁶⁴In re Clancy, 112 Kan., 247, 210 Pac. 487 (1922).

⁶⁵Town of Marksville v. Brouillette, 192 La., 916, 77 So. 790 (1918).

⁶⁶Supra note 3 at 667.

⁶⁷Ariz., Fla., Hawaii, Mo., N.Y., N.D., Ore., R.I., S.C., Tex., Utah, Ala., Colo., Ga., Ind., Iowa, Kansas, La., Mich., Mont., N.H., and Wis.

⁶⁸In some states these laws apply to persons accused or merely suspected of sex offenses.

⁶⁹Supra note 10 at 447-448; see D. West, Homosexuality 78 (1967); see also, E. Schur, Crimes Without Victims 78 (1965).

⁷⁰Decoys are police officers who intentionally provide homosexuals with the opportunity to make a prescribed solicitation. Most of the time, they are young and attractive and dress in tight-fitting Levis. The decoys may initiate a conversation so long as he avoids making an outright solicitation. The conversation may be preceded by eye-to-eye contact between the decoy and the suspect. Thus, the decoy in this manner has given the impression that he is a homosexual. See also D. Cory, The Homosexual in America 117-118 (1960); Supra note 3 at 692.

⁷¹West, supra note 69 at 88.

⁷²M. Hoffman, The Gay World 83 (1968).

⁷³J. Stearn, The Sixth Man 145 (1961).

⁷⁴Cal. Pen. Code #647 (a) (1963).

⁷⁵C. Rolph, "The Problem for the Police," New Statesman (June 25, 1960), p. 945, as reprinted in Schur, Crimes Without Victims 80 (1965).

⁷⁶Supra note 3 at 795-796.

⁷⁷Harassment is active police conduct which eliminates public congregations of suspected homosexuals when there are no grounds for an arrest under the penal code.

⁷⁸This is legal under the soliciting or engaging in lewd conduct statutes.

⁷⁹Gay bars have their own type of stratification. A few of the bars catered almost exclusively to homosexuals of the most effeminate "swishy" variety. If these bars are private clubs, their dancing is allowed. In complete contrast to this, there are bars where only the supermasculine type of homosexuals are admitted. The males are dressed in tight dungarees, leather jackets, boots and sometimes motorcycle helmets. In the middle of this continuum are the everyday types of bars with the clientele dressed in suits for, it would be hard to tell it from any heterosexual bar except for the absent of mixed couples.

⁸⁰Supra note 3 at 719.

⁸¹Id.

⁸²Id., some bars display a "Do Not Jaywalk" sign inside the premises.

⁸³Supra note 3 at 720-722.

⁸⁴Schur, supra note 75 at 107.

⁸⁵Supra note 1 at 9.

⁸⁶W. Johnson, Human Sex and Sex Education. 108 (1963).

⁸⁷G. Henry, All the Sexes 379-380 (1955).

⁸⁸A. Kinsey, W. Pomeroy, C. Martin and P. Gebhard, Sexual Behavior in the Human Female 262 (1953).

CHAPTER V

CONCLUSION AND RECOMMENDATIONS

The purpose of this study was to develop a narrative account of the historical development and recent legislative enactments, along with the research done in the area of homosexuality. Although each state has its own set of statutes concerning homosexuality, very few have taken steps to revise their laws in accordance with those recommended by the American Law Institute's Model Penal Code.¹ As this investigation has pointed out neither the present statutes nor a stiffer enforcement of these laws could be expected to significantly curb or stop homosexual behavior.

There are many reasons why there has been such strong resistance to the adaption of the Model Penal Code. It has been argued that homosexuality is both unnatural and immoral. But according to Beach and others there may be some anthropological basis for believing that the capacity for homosexual behavior is quite natural. On the other hand, many individuals believe that only heterosexual activity is natural. But what is natural or unnatural is not satisfactory grounds for legal penalties, nor what is moral or immoral grounds for legal proscriptions. Each individual has and should develop his own moral standards. The legal structures of the United States cannot impose a standardized code of moral behavior for its members. As each individual in American society is fighting for the preservation of his identity, the statutes are trying to enforce a certain pattern of behavior. But Lord Devlin, a prominent English jurist,

disagrees with this concept, stating that "the suppression of vice is as much the law's business as the suppression of subversive activities."² A leading legal philosopher, H.L.A. Hart is highly critical of Lord Devlin's reasoning:

There is very little evidence to support the idea that morality is best taught by fear of punishment...But where there is no victim but only a transgression of a moral rule, the view that punishment is still called for as a proper return for the immorality lacks even this support. Retribution here seems to rest on nothing but the implausible claim that in morality two blacks make a white: that the evil of suffering added to the evil of immorality as its punishment makes a moral good.³

Another author who substantiates H.L.A. Hart's statement is Professor J.E. Hall Williams:

No useful purpose is served by legislating against an activity you cannot satisfactorily control. The attempt to equate crime with sin is doomed to failure, and the law is made to look ridiculous or unjust in its operation...Of course not all behavior which is morally reprehensible can be brought within the reach of the criminal law.⁴

The harm done by the mere fact that a person engages in homosexual behavior is not nearly as great as the amount of harm imposed upon this individual by our present laws. Besides creating a sub-culture the present statutes are constantly reinforcing minority values involving millions of people. When these millions are excluded from government and private employment, from participation in the armed forces or from educational opportunities, then it would be a fair assumption to consider these individuals as representing a minority group.⁵ Just as the general public has a false image of other minority groups, the American people from their puritanical upbringing have

classified the homosexual group as sick, unnatural, perverted and immoral. Like other minority members the person who is a homosexual has not deliberately and perversely chosen his sex pattern anymore so than the heterosexual has chosen his method of gratification. It appears strange, as the problem is viewed objectively, that at a period of American history when the government is fighting for the ultimate annihilation of discriminatory practices against any minority, so very few measures are being taken in behalf of the homosexual group. This researcher does not feel that we can afford to alienate such a large group from our culture and society.

It has been pointed out that the difference between treatment of minorities in the democracies and in totalitarian lands lies essentially in the right of those in the former countries to protest and appeal. The courts are free, and discriminatory action can be fought by legal means. Yet this does not hold true for the homosexual minority. The price for making the struggle is public disgrace and further economic discrimination, a price so great that society in this manner has protected itself against the possibility that its own customs will be challenged.⁶

Another reason that has been given for not changing the sex laws is that a relaxation of these laws might seriously threaten the central role of the family unit. This researcher finds this assumption very weak, for what "natural" heterosexual married man is going to abandon his family for the homosexual life? As one author has stated:

It is quite true that control over homosexuality serves to strengthen the position of the family and to reinforce sex-role differentiation. But this fact hardly provides a basis for wholesale legal and social persecution of inverts. Surely it is fantastic

to think that enactment of the proposed reform would impel hordes of individuals immediately to discard their current heterosexual inclinations and activities for a life of homosexuality, thus precipitating the decline and eventual demise of the conventional family and of civilization as we know it.⁷

A major argument for a rational approach to the criminal law is that the majority must first seek an answer to the reasoning behind the law itself. Such a writer is Edwin M. Schur, who states:

It has frequently been noted that the punishment of any "criminal" or deviant is an opportunity for the socially sanctioned release of hostility and aggression among the "law-abiding" citizens, as well as for a relief from guilt concerning their own deviant impulses. It has also been suggested by various writers that Americans seem unusually preoccupied with, or concerned about homosexuality. And many psychiatrists assert that those who speak out most loudly for harsh treatment of the homosexual often do so because they themselves are plagued by doubts and fears suggestive of latent homosexuality.⁸

Many judges and politicians claim that the supposed dangers of homosexual corruption of youths by older males will tend to make these "normal" youths into converts for the homosexual movement. There is a common theory that a young male can be permanently diverted into homosexuality by a single experience. As Dr. D.J. West states:

Traditional psycho-analytic views seemed all agreed on one point, namely that the conditions which determine an obligatory homosexual orientation are laid down in early childhood, and that the events of the adolescence merely unfold a preordained disposition. This view gains support from the evidence that seductive homosexual experiences in youth have little importance in fixing permanent

sexual orientation and that the peculiarities of some effeminate male homosexuals appear long before adolescence.⁹

To summarize: As pointed out in Chapter II, homosexuality has been present even in primitive society with varying amounts of approval and disapproval. Throughout history social condemnation or legal regulations have been unable to stop homosexuality. Research into the causes of homosexuality has pointed to the need for further investigation into the psychodynamics of this problem. Furthermore, no known method of treatment or punishment has been presented that will reduce the number of homosexuals. The use of decoys and the question of entrapment are best evaluated by Dr. Martin Hoffman:

There are really two issues involved here. The first is: Do the police sometimes, or often, engage in behavior which actually constitutes illegal entrapment? For example, do they lead the defendant on by conversation which cannot be documented in court and in which the ultimate legal disposition revolves around the defendant's word against the officer's? The second question is: Even if police were never to engage in any illegal entrapment devices, is it desirable that police manpower be used for this kind of activity?¹⁰

The wording of the statutes, has been seriously questioned by many socio-medical,¹¹ judicial and administrative personnel.¹² In fact, the American Law Institute realizes that the criminal sanctions against homosexuality are "unjust and unenforceable laws,"¹³ furthermore, the question of private morality "is the distinctive concern of spiritual authorities"¹⁴ and not of the legal system.

The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate

for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences. Apart from the question of constitutionality which might be raised against legislation avowedly commanding adherence to a particular religious or moral tenet, it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.¹⁵

The American Law Institute Model Penal Code provides that private sexual acts, whether heterosexual or homosexual, should be criminal only where minors are involved or some force or coercion is used. In other words, "homosexual behavior between consenting adults in private should no longer be a criminal offense."¹⁶ The Model Penal Code draftsmen have made distinctions between similar offenses in an effort to eliminate such wording as "crime against nature," "unnatural" and "infamous crime." These terms have been replaced by "deviate sexual intercourse."¹⁷ Furthermore, the phrase "deviate sexual intercourse" is defined as "intercourse per os or per anum."¹⁸

The Model Penal Code contains a provision which this researcher does not find to be in relation to the other sections of the code:

A person is guilty of a petty misdemeanor if he loiters in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations.¹⁹

It is not clear, as stated in this provision, whether or not "public place" includes a bar. Furthermore, this section does not distinguish solicitation from harmless inquiry by one homosexual to another. The Model Penal Code approves of consenting

adult homosexual acts in private; but on the other hand, it appears to make it an offense for homosexuals to congregate in a bar. This researcher does not question the necessity for patrolling of public places²⁰ by uniformed police officers but this provision provides for the continuation of harassment of certain establishments because they are homosexual bars. Both heterosexual or homosexual activity in which there is genital display or contact should be under the criminal sanction.

The following guidelines are offered for improving the approach to homosexuality:

1. The disparity between legal definitions found in the various state laws should be eliminated by establishing uniform penal code covering sexual crime as suggested by Model Penal Code. The wording of the statutes should read "sexual deviate" denoting intercourse per os or per anum.

2. A program of cooperation between the Medical Association and Bar Association should initiate a program in this field in which the various members will be better informed and better able to handle the homosexual problem.

3. The statutes containing prison sentences should be revised since imprisonment is not the answer.

4. The churches and synagogues should support a movement for the abandonment of laws which impose a moral question.

5. The homosexual should be viewed as a minority group with the consideration that they be given the full legal rights and social privileges that other minority segments have been given:

- (a) This means the elimination of the methods used by police against homosexuals, including the use of decoys and harassment in the gay bars.
- (b) The firing of government employees, including dismissal of members of the armed forces because they are homosexuals should cease.
- (c) Private industry should be encouraged to stop discriminatory practices against homosexuals.

6. A re-evaluation of attitudes, of the general public and judicial system, toward the homosexual through educational programs.

7. The criminal law should remove all legal sanctions against consensual, adult homosexual acts committed in private.

CHAPTER V

FOOTNOTES

¹American Law Institute, Model Penal Code #207.5 (Tent. Draft No. 4, 1955).

²P. Devlin, The Enforcement of Morals 13-14 (1965).

³H. Hart, Law, Liberty, and Morality 58-60 (1965).

⁴J. Williams, "Proper Scope and Function of Criminal Law" 74 L.Q. Review 81 (1958).

⁵D. Cory, The Homosexual in America 91 (1951).

⁶Id. at 45.

⁷E. Schur, Crimes Without Victims 110-111 (1965).

⁸Id. at 112-113; see also C. Berg, Fear, Punishment, Anxiety and the Wolfenden Report 51 (1959).

⁹D. West, Homosexuality 206 (1967); See G. Westwood, Society and the Homosexual 44-45 (1953); and P. Wildeblood, Against the Law, 21-22 (1955).

¹⁰M. Hoffman, The Gay World 83 (1968).

¹¹Bowman and Engle, "Certain Aspects of Sex Psychopath Laws" 114 Am. J. of Psychiatry 690 (1958); See Walker, "Psychopathy in Law and Logic" 5 Medicine, Science and Law 3 (1965); See also England, "Sexual Psychopaths" Current History 239 (June, 1967).

¹²N. Morris and G. Hawkins, The Honest Politician's Guide to Crime Control 19-20 (1969); see H. Packer, The Limits of the Criminal Sanction 296-331 (1968); and Kadish, "The Crisis of Overcriminalization" 374 Annals 157 (1967); and J. Tapp, "Psychology and the Law: The Dilemma" 2 Psychology Today 17-22 (1969); See also H. Packer "Making the Punishment Fit the Crime" 77 Harv. L. Rev. 1071-1082 (1962).

¹³Id., 94.

¹⁴Supra note 1

¹⁵Id.

¹⁶Id.

¹⁷Model Penal Code #213.2 (Tent. Draft, 1962).

¹⁸Id. at #213.2 (b).

¹⁹Id. at #251.3.

²⁰Public places for example would be parks or cars but not bars which cater to homosexuals.

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APPENDIX A

STATE STATUTES

Ala. Code (1958) Tit. 14 #106

Crime Against Nature. Any person who commits a crime against nature, either with mankind or with any beast, shall on conviction, be imprisoned in the penitentiary for not less than two nor more than ten years.

Alas. Stat. (1962) #11-40-120

Unnatural Crimes. A person who commits sodomy, or the crime against nature, or has unnatural carnal copulation by means of the mouth, or otherwise, either with a beast or human being, upon conviction, is punishable by imprisonment in the penitentiary for not less than one year nor more than ten years.

Ariz. Rev. Stat. Ann. (1969) #13-651

SODOMY. Crime Against Nature. Any person who shall commit the crime against nature, with mankind or beast, shall be punished by imprisonment in the state prison not less than five (5) years nor more than twenty (20) years.

#13-652 Lewd and Lascivious Acts. Any person who shall willfully commit any lewd or lascivious act upon or with the body of (or) any part of member thereof, of any male or female person, with the intent of arousing, appealing to or gratifying the lust or passion or sexual desires of either of such persons, is guilty of a felony punishable by imprisonment for not less than one nor more than five years.

Ark. Stat. Ann. (1964) 41 #813

Sodomy or Buggery. Every person convicted of sodomy, or buggery, shall be imprisoned in the penitentiary for a period

not less than one (1) nor more than twenty-one (21) years.

Cal. Pen. Code (1969) #286

Sodomy. Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than one year.

#288a. Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year.

Colo. Rev. Stat. Ann. (1963) #40-2-31

Crime Against Nature. The infamous crime against nature, either with man or beast, or any unnatural carnal copulation per anus or per os or in any other way whatsoever shall subject the offender to be imprisoned in the penitentiary for a term of not less than one year and not more than fourteen years.

The solicitation of any unnatural carnal copulation shall subject the offender to confinement in the county jail for not less than thirty days nor more than two years.

Conn. Gen. Stat. Rev. (1958) #53-216

Bestiality and Sodomy. Any person who shall have carnal copulation with any beast, or who shall have carnal knowledge of any man, against the order of nature, unless forced or under fifteen years of age, shall be imprisoned in the state prison not more than thirty years.

Del. Code Ann. (1953) tit., 11 #831

Sodomy, Crime Against Nature. Whoever shall commit the crime against nature is guilty of felony, and shall be fined not exceeding one thousand dollars, and shall be imprisoned not exceeding three years.

Fla. Stat. (1965) #800.01

Crime Against Nature. Whoever commits the abominable and detestable crime against nature, either with mankind or beast, shall be punished by imprisonment in the state prison not exceeding twenty years.

Ga. Code Ann. (1969) #26-2002

Sodomy; aggravated sodomy - a person commits sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits aggravated sodomy when commits sodomy with force and against the will of the other person. A person convicted of sodomy shall be punished by imprisonment for not less than one nor more than twenty years. A person convicted of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

#26-2003. Solicitation of Sodomy - a person commits solicitation of sodomy when he solicits another to perform or submit to an act of sodomy and upon conviction shall be punished for as a misdemeanor.

Hawaii Rev. Laws #309-34 (1955)

"Whoever commits sodomy, that is, the crime against nature, either with mankind or any beast, shall be fined not more

than \$1000. and imprisoned at hard labor not more than twenty years."

Idaho Code Ann. (1948) #18-6605

Crime Against Nature, Punishment. Every person who is guilty of the infamous crime against nature, committed with mankind or with animal, is punishable by imprisonment in the state prison not less than five years.

Ill. Rev. Stat. (1963) ch.38 #11-2

Deviate Sexual Conduct (No Crime)

Ind. Ann. Stat. (1956) #10-4221

Sodomy. Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution shall be deemed guilty of sodomy, and on conviction shall be fined not less than one hundred dollars (\$100) nor more than one thousand (\$1000), to which may be added imprisonment in the state prison not less than two (2) years nor more than fourteen (14) years.

Iowa Code (1962) #705.1

Sodomy - 1. Definition - Whoever shall have carnal copulation in any opening of the body except sexual parts, with another human being, or shall have carnal copulation with a beast shall be deemed guilty of sodomy.

#705.2 Punishment. Any person who shall commit sodomy, shall be imprisoned in the penitentiary not more than ten years.

Kan. Gen. Stat. Ann. (1969) #21-3505

Sodomy: Sodomy is oral or anal copulation between

persons who are not husband and wife or consenting adult members of the opposite sex - or between a person and an animal, or coitus with an animal. Any penetration, however slight is sufficient to complete the crime of sodomy.

Sodomy is a Class B Misdemeanor.

Ky. Rev. Stat. (1969) #436.050

Sodomy; buggery. Any person who commits sodomy or buggery, with man or beast, shall be confined in the penitentiary for not less than two nor more than five years.

La. Rev. Stat. Ann. (1950) #14:89

Crime Against Nature. Crime against nature is the unnatural carnal copulation by a human being with another of the same or opposite sex or with an animal. Emission is not necessary, and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

Whoever commits the crime against nature shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

Me. Rev. Stat. (1964) 17 #1001

Crime Against Nature. Whoever commits the crime against nature, with mankind or with a beast shall be punished by imprisonment for not less than one year nor more than ten years.

Md. Ann. Code (1957) Art. 27 #553

Sodomy. Every person convicted of the crime of sodomy shall be sentenced to the penitentiary for not less than one

year nor more than ten years.

#554. Every person who shall be convicted to taking into his or her mouth the sexual organ of any other person or animal or who shall be convicted of placing his or her sexual organ in the mouth of any person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fined not more than one thousand (\$1000.), dollars or be imprisoned in jail or in the house of corrections or in the penitentiary for a period not exceeding ten years or shall be fined and imprisoned within the limits above prescribed in the discretion of the court.

Mass. Ann. Laws (1960) ch.272 #34

Crime Against Nature. Whoever commits the abominable and detestable crime against nature, either with mankind or with a beast, shall be punished by imprisonment in the state prison for not more than twenty years.

#35 Unnatural and Lascivious Acts. Whoever commits any unnatural and lascivious act with another person shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years.

Mich. Law Ann. (1968) #750.158

Crime Against Nature or Sodomy. Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony,

punishable by imprisonment in the state prison not more than 15 years or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life as amended.

Minn. Stat. Ann. (1969) #617.14

Sodomy. Subdivision 1. definition "Sodomy" means carnally knowing any person by the anus or by the mouth.

Subdivision 5. Consensual Acts. Whoever, in cases not coming within the provision of subdivision 2 and 3, voluntarily engages in or submits to an act of sodomy with another may be sentenced to imprisonment for not more than one year to payment of fine of not more than \$1000. or both.

Miss. Code Ann. (1956) #2413

Unnatural Intercourse, Sodomy and Crime Against Nature. Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years.

Mo. Rev. Stat. (1953) #563.230

The Abominable and Detestable Crime Against Nature - Penalty. Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years.

Mont. Rev. Codes Ann. (1969) #94-4118

Crime Against Nature. Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years.

Neb. Rev. Stat. (1965) #28-919

Crimes Against Nature. Whoever has carnal copulation with a beast, or in any opening of the body except sexual parts with another human being, shall be guilty of sodomy and shall be imprisoned in the Nebraska Penal and Correctional Complex not more than twenty years.

Nev. Rev. Stat. (1963) #201.190

Crime Against Nature. The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the state prison for a term not less than 1 year, and which may extend to life.

N.H. Rev. Stat. Ann. (1955) #579:9

Lascivious Acts. Whoever commits any unnatural and lascivious act with another person shall be imprisoned not more than five years or fined not more than one thousand dollars, or both.

N.J. Stat. Ann. (1969) #2A:143-1

Sodomy: Sodomy, or the infamous crime against nature, committed with man or beast, is a high misdemeanor, and shall be punished by a fine of not more than \$5,000., or by imprisonment for not more than 20 years, or both.

N.M. Stat. Ann. (1964) #40A-9-6

Sodomy. Sodomy consists of a person intentionally taking into his or her mouth or anus the sexual organ of any other person or animal or intentionally placing his or her sexual organ in the mouth or anus of any other person or animal, or coitus with an animal. Any penetration, however slight, is sufficient to complete the crime of sodomy. Whoever commits sodomy is guilty of a third degree felony.

N.Y. Pen. Code (1967) #130.38

Consensual Sodomy. A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person. Consensual sodomy is a Class B Misdemeanor.

N.C. Gen. Stat. (1969) #14-177

Crime Against Nature. Any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the Court. (Maximum is ten years)

N.D. Cent. Code (1960) #12-22-07

Sodomy. Every person who carnally knows in any manner any animal or bird, or carnally knows any male or female by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, or attempts sexual intercourse with a dead body, is guilty of sodomy and shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years, or in the county jail for not more than one year.

Ohio Rev. Code Ann. (1954) #2905.44

Sodomy. No person shall have carnal copulation with a beast, or in any opening of the person, except sexual parts,

with another human being.

Whoever violates this section is guilty of sodomy and shall be imprisoned not less than one nor more than twenty years.

Okla. Stat. (1961) tit. 21 #886

Crime Against Nature. Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten years.

Ore. Rev. Stat. (1969) #167.040

Sodomy. Any person who commits sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustains osculatory relations with the private parts of any person, or permits such relations to be sustained with his private parts, shall be punished upon conviction by imprisonment in the penitentiary for not more than 15 years.

Pa. Stat. Ann. (1963) tit. 18 #4501

Sodomy. Whosoever carnally knows in any manner any animal or bird, or carnally knows any male or female person by the anus or by or with the mouth, or whoever voluntarily submits to such carnal knowledge, is guilty of sodomy, a felony, and upon conviction thereof shall be sentenced to pay a fine not exceeding five thousand dollars (\$5,000), or to undergo imprisonment, by separate or solitary confinement at labor, not exceeding ten (10) years, or both.

R.I. Gen. Laws Ann. (1969) 11-10-1

Abominable and Detestable Crime Against Nature. Every

person who shall be convicted of the abominable and detestable crime against nature, either with mankind or with any beast, shall be imprisoned not exceeding 20 years nor less than 7 years.

S.C. Code (1962) #16-412

Buggery. Whoever shall commit the abominable crime of buggery, whether with mankind or with beast, shall, on conviction be deemed guilty of a felony, and shall be imprisoned in the penitentiary for five years, and shall pay a fine of not less than five hundred dollars, or both, at the discretion of the court.

S.D. Code (1939) #13.1716

Crime Against Nature. Every person who is guilty of the detestable and abominable crime against nature committed with mankind or with a beast is punishable by imprisonment in the State Penitentiary not exceeding ten years.

Tenn. Code Ann. (1955) #39-707

Crime Against Nature. Crimes against nature, either with mankind or with beast, are punishable by imprisonment in the penitentiary not less than five nor more than fifteen years.

Tex. Pen. Code (1958) art. 524

Sodomy. Whoever has carnal copulation with a beast, or in any opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty

of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Utah Code Ann. (Supp. 1969) #76-53-22

Sodomy. Every person who is guilty of sodomy, committed with mankind with either the sexual organs or the mouth, shall be deemed guilty of a misdemeanor, and upon conviction may be punished by imprisonment in the county jail for not more than six months, or a fine of not exceeding \$299, or both.

Va. Code Ann. (1969) #18.1-212

Crime Against Nature. If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such a carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one nor more than three years.

Vt. Stat. Ann. (1959) tit. 13 #2603

Fellation. A person participating in the act of copulating the mouth of person with the sexual organ of another shall be imprisoned in the state prison not less than one nor more than five years.

Wash. Rev. Code Ann. (1961) #9.79.100

Sodomy. Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female by the anus, or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished by imprisonment in the state penitentiary for not more than ten years.

W. Va. Code Ann. (1961) #61-8-13

Crimes Against Nature. If any person shall carnally know in any manner any brute animal, or carnally know any male or female by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony, and upon conviction thereof, shall be confined in the penitentiary not less than one nor more than ten years.

Wis. Stat. Ann. (1958) #944.17

Sexual Perversion. Whoever does either of the following may be fined not more than \$500 or imprisoned not more than 5 years or both:

- (1) Commits an abnormal act of sexual gratification involving the sex organ of one person and the mouth or anus of another;
or
- (2) Commits an act of sexual gratification involving his sex organ and the sex organ, mouth or anus of an animal.

Wyo. Stat. Ann. (1957) #6-98

Sodomy. Whoever commits the abominable and detestable crime against nature, by having carnal knowledge of a man or beast; or who being a male carnally knows any man or woman through the anus, or in any other manner contrary to nature; and whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution is guilty of sodomy and shall be imprisoned in the penitentiary for not more than ten years.

APPENDIX B

CASES

State v. Start, 65 Ore. 178, 180, 132 Pac. 512 (1913)

State v. Potts, 75 Ariz. 211, 254 P. 2d. 10023 (1953)

People v. Schmitt, 275 Mich. 575, 267 N.W. 741 (1936)

State v. Morrison, 25 N.J. Super. 534, 96 A .2d 723 (1953)

Ex parte Strittmatter, 58 Tex. Crim. 156, 124 S.W. 906 (1910)

State v. Harlowe, 174 Wash. 227, 24 P .2d 601 (1933)

In re Clancy, 112 Kan. 247, 210 Pac. 487 (1922)

Town of Marksville v. Brouillette, 142 La. 916, 77 So. 790 (1918)

Vita redacted during scanning.