

## SEXUAL DEVIATION AND THE LAWS OF OHIO

Each age at some time looks at itself and weighs its manners and morals in light of what has gone before and what new refinements have been made. Often the result is a smug acceptance of this as "the best of all possible worlds." Occasionally, when the self examination is particularly searching, the age admits the defects of the extant social order and is led toward a more enlightened approach in the area examined.

Such an analysis may recently have been made by a committee of the Home Office of the United Kingdom. The Committee on Homosexual Offenses and Prostitution, commonly referred to as the Wolfenden Committee, examined the contemporary legal treatment of certain segments of the British community and advised a revision of the laws of Great Britain in this area into a more realistic conformity with the findings of the behavioristic disciplines of sociology and psychology.<sup>1</sup>

The reaction to this report in the popular press, in legal literature, and among religious and political leaders demonstrates a willingness in many quarters to pierce the taboo that has shrouded the area of sex deviation and to support a more tolerant program to deal with the problem of homosexuality specifically and sex deviation generally.

Whether Ohio shares in this movement toward greater latitude in the treatment of the sexual deviate is open to argument; whether it should is the matter at hand. The scope of this comment is to review some selected areas of the Ohio law pertaining to sexual deviation with the aim of noting any defects existent in these laws.

### ANTECEDENTS AND INFLUENCES

Any consideration of the historical evolution of attitudes toward the sexual offender must bear in mind that such attitudes are the product

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<sup>1</sup> REPORT OF THE DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION OF THE HOME OFFICE (1957), Sir John Wolfenden, Chairman. "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. To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the personal and private responsibility of the individual for his actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law. It is not the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour." Paragraph 62. "Homosexual behaviour between consenting adults in private be no longer a criminal offense." Paragraphs 63 and 64. "The questions relating to 'consent' and 'in private' be decided by the same criteria as apply in the case of heterosexual acts between adults." Paragraph 71. "The age of 'adulthood' for the purposes of the proposed change in the law be fixed at twenty-one." Paragraph 187. "That a court by which a person under twenty-one is found guilty of a homosexual offense be required to obtain and consider a psychiatric report before passing sentence."

of the society in which they are found. After the genesis of these attitudes, they may continue to shape the society itself, thereby requiring social conformity even after the basis for their conception is extinct. It should be noted at the outset that our present social system is but one of many alternatives. Other highly developed societies have not shared the views we presently hold; for example, the city states of Greece found homosexuality to be quite compatible with their existent social order.<sup>2</sup> The basis was partially economic necessity and partially the supplemental character of homosexuality to the educational and military goals. On the other hand, the ancient Hebrew society found it necessary to encourage a large population upon which it could draw for military purposes to protect an area constantly subjected to invasion by neighboring states. Homosexuality was incompatible with this aim.<sup>3</sup> The theocratic government merged military necessity with religious disciplines.

The current American view, as expressed in our statutory enactments and judicial decisions, is most directly rooted in Judeo-Christian religious philosophy as it has evolved. It is in the Old Testament that we find many precepts that are echoed in modern state codes.<sup>4</sup> Throughout the middle ages the ecclesiastical courts exercised great control over religious and moral conformity in the community, and in this way colored much of the judgment in sexual matters by often equating deviation with heresy. It was from these same ecclesiastical courts that the common law courts of England drew their pattern for the regulation of human sexual behavior during the late medieval and Renaissance periods.<sup>5</sup> With minor modifications we find a similar approach in contemporary legislation.

Primarily, the historical development of legal control of sexual conduct has been the enforcement of the moral code of the culture. Generally, social mores have been affected by the changes taking place within that culture. In light of the advancements made in the past half-century in the medical and social sciences, it might be hoped that legal treatment of sexually deviant behavior would have undergone major modifications. This, however, is not the case. "Except perhaps for religion, there is no subject on which it is more difficult for us to think with scientific objectivity than sex. And in truth it is herein that much of the fault lies, for in the minds of most of us the two are inextricably, although not always consciously, bound."<sup>6</sup> Anglo-American treatment

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<sup>2</sup> BRINTON, *A HISTORY OF WESTERN MORALS* 93 (1959); KINSEY, POMEROY, & MARTIN, *SEXUAL BEHAVIOUR OF THE HUMAN MALE* 660 (1948); East, *Sexual Offenders, MENTAL ABNORMALITY AND CRIME* 177, 186 (Radzinowicz & Turner ed. 1949).

<sup>3</sup> LEWINSOHN, *A HISTORY OF SEXUAL CUSTOMS* 29-30 (1958).

<sup>4</sup> *Leviticus* 18: 7, 22; *Leviticus* 20: 13.

<sup>5</sup> KINSEY, *op. cit. supra* note 2, at 465; Bowman & Engle, *A Psychiatric Evaluation of the Laws of Homosexuality*, 29 *TEMP. L.Q.* 273,277 (1956).

<sup>6</sup> GUTTMACHER, *SEX OFFENSES* 11 (1951).

of the sexual deviate remains today, as it was five centuries ago, the product of religious tenets, free of the modifications urged by the psychologist and sociologist. Added to this is the American belief that moral and social conformity must be maintained and the naive assumption that this conformity can be enforced through legislation. Analysis of the statutory regulation of sexually deviant behavior may indicate a difference in degree of punishment, but the prevailing philosophy of Biblical and medieval societies of death by burial or burning or life imprisonment does not differ from that which imposes imprisonment for twenty years with no right of probation or a custodial sentence of indeterminate length.

#### THE CURRENT LEGAL STATUS OF SEXUAL DEVIATION

It is impossible to compile a list with any certitude that it will contain all those transgressions of the law that are classifiable as crimes of the sexually deviant. Many criminal acts, that on the surface appear free of a sexual impulse, contain sexual overtones. Murder, burglary, theft, arson and assault are often sexually inspired.<sup>7</sup> Rape and prostitution are more clearly sexual; however, in the absence of additional factors these violations of the law may not be acts of sexual deviation.<sup>8</sup> However they may be styled, the crimes of indecent assault, homosexuality, bestiality, pedophilia, exhibitionism, and voyeurism are those which most usually invoke the appellation of sexually deviant crimes.

Ohio, by statutory enactment, has attempted to deal with this area of behavior. Four substantive provisions are of immediate import in this field;<sup>9</sup> these are supplemented by municipal ordinances curtailing activities of disorderly conduct disruptive to the peace of the local community.<sup>10</sup> Further, the law provides for special disposition of those offenders who are found to be "mentally deficient and psychopathic."<sup>11</sup>

Of the substantive enactments, the sodomy statute deals with that area most generally thought of as sexual deviation.<sup>12</sup> The approach of the law to sodomy is representative of attitudes frequently present in the whole of regulation of the sexual offender. As set forth in the statute, the offense of sodomy is that of "carnal copulation with a beast, or any

<sup>7</sup> BROMBERG, *CRIME AND THE MIND* 84, 85 (1948).

<sup>8</sup> For consideration of distinctive elements in rape, see GUTTMACHER, *op. cit. supra* note 6, at 50.

<sup>9</sup> OHIO REV. CODE §§ 2905.44, 2903.01, 2905.02, 2905.30 (1953).

<sup>10</sup> OHIO REV. CODE § 715.49 (1953); CLEVELAND, OHIO, CODIFIED ORDINANCES § 13.1302 (Indecent Language and Behavior), § 13.1303 (Indecent Exposure), § 13.1305 (Lewd, Lascivious, Acts, Words, Gestures, etc.) (1951); CINCINNATI, OHIO, CODE OF ORDINANCES § 901-i1 (Indecent Behavior), § 901-i2 (Indecent Exposure) (1957); COLUMBUS, OHIO, CITY CODES § 29.20 (Disorderly Conduct), § 29.52 (Indecent Conduct, Filthy Acts, etc.), § 29.59 (Molesting Females) (1959).

<sup>11</sup> OHIO REV. CODE §§ 2947.24-.29 (1954).

<sup>12</sup> OHIO REV. CODE § 2905.44 (1953).

openings of the body, except sexual parts, with another human being."<sup>13</sup> The statute fails to define with any certainty the manner in which the crime may be committed and resort must therefore be had to the courts for a construction of the statutory language as to the elements of the crime.

The rule of strict construction of penal statutes does not require the courts to go to the extent of defeating the purpose of the statute by a severely technical application of the rule.<sup>14</sup>

Having said this the courts expand the common law definition of sodomy to encompass acts not a part of the common law offense.<sup>15</sup> The penalty for this crime is a sentence of not less than one nor more than twenty years.<sup>16</sup>

Pedophilia is proscribed in Ohio by statutes punishing an assault upon a child under sixteen<sup>17</sup> and punishing rape of a female under twelve.<sup>18</sup> The indecent assault of the first of the above statutes need not satisfy the general legal test for criminal assault. It seems sufficient that a child be disturbed by the exposure of an adult if the proximity of the adult is reasonably immediate.<sup>19</sup> Again, the interpretation of the statute by the court exhibits the tendency to give the statutory language the broadest of meanings. The penalty for assault of a child is confinement from one to ten years, or a fine of \$100 to \$1000, or both. The punishment for rape of a female under twelve is life imprisonment.

The fourth of the substantive statutory provisions is that dealing with indecent exposure by any person over eighteen years of age in any public place or in any place where there is a likelihood that the act will be observed.<sup>20</sup> The punishment for violation of this statute is a maximum sentence of six months, a fine of not more than \$200, or both.

The procedural steps preliminary to an adjudication of the above offenses are similar in the case of the indictment or information. The statutory words or a slight variation thereof are considered sufficient to

<sup>13</sup> OHIO REV. CODE § 2905.44 (1953).

<sup>14</sup> *State v. Price*, 12 Ohio N.P. (n.s.) 349, 352 (C.P. 1911), quoting from *Castor v. State*, 75 Ohio St. 52, 69, 78 N.E. 957, 959 (1906).

<sup>15</sup> *State v. Price*, *supra* note 14, at 350.

<sup>16</sup> OHIO REV. CODE § 2951.04 (1953) provides that there shall be no probation in cases of conviction for sodomy.

<sup>17</sup> OHIO REV. CODE § 2903.01 (1953). "No person over the age of eighteen years shall assault a child under the age of sixteen years, and willfully take indecent liberties with the person of such child, without committing or intending to commit the crime of rape upon such child, or willfully make improper exposure of his person in the presence of such child. . . ."

<sup>18</sup> OHIO REV. CODE § 2905.02 (1953). "No person shall have carnal knowledge of his daughter, sister, or a female person under twelve years of age, forcibly and against her will. . . ."

<sup>19</sup> *State v. Green*, 84 Ohio App. 298, 82 N.E.2d 105 (1948).

<sup>20</sup> OHIO REV. CODE § 2905.30 (1953). "No person eighteen years of age or over shall willfully make an indecent exposure of his person in a public place or in a place where there are other persons to be offended or annoyed thereby. . . ."

inform the accused of the charge against him. It has not been the usual practice to describe the particular manner of the commission of the act; "extreme particularity is not necessary."<sup>21</sup>

The entire area of sexual offenses is affected by the Ohio "sexual psychopath" statutes.<sup>22</sup> These sections supplement the general criminal prohibitions in cases where the "applicable penal sentence will not afford to the public proper protection against possible future criminal conduct." After conviction and before sentence the trial court must refer the violator of enumerated offenses to the Department of Mental Hygiene or to a psychiatric clinic or to three psychiatrists for examination. The court may refer any felony, except murder in the first degree, or "any misdemeanor involving a sex offense, or in which abnormal sexual

<sup>21</sup> State v. Zarhorst, 75 Ohio St. 232, 79 N.E. 238 (1906); State v. Stewart, 38 Ohio L. Abs. 543, 50 N.E.2d 910 (Ct. App. 1943); King v. New London, 8 Ohio N.P. (n.s.) 34 (C.P. 1907).

<sup>22</sup> OHIO REV. CODE § 2947.24 (1954). "Definitions. Sections 2947.24 to 2947.29, inclusive, of the Revised Code shall be administered by the criminal courts in dealing with mentally deficient offenders in cases in which the court finds that the imposition or continued enforcement of the applicable penal sentence will not afford to the public proper protection against possible future criminal conduct of such mentally deficient or psychopathic offenders. (B) 'psychopathic offender' means any person who is adjudged to have a psychopathic personality, who exhibits criminal tendencies and who by reason thereof is a menace to the public. Psychopathic personality is evidenced by such traits or characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsible, reckless and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, marked deficiency of moral sense or control." Section 2947.25 provides: "After conviction and before sentence, a trial court must refer for examination all persons convicted under Sections 2903.01, 2905.02, 2905.03, 2905.04, 2905.07, or 2905.44 of the Revised Code, to the department of mental hygiene and correction or to a state facility designated by the department, or to a psychopathic clinic approved by the department, or to three psychiatrists. Prior to sentence the court may refer for such examination any person who has been convicted of any felony except murder in the first degree where mercy has not been recommended, or any misdemeanor involving a sex offense, or in which abnormal sexual tendencies are displayed, when it has been suggested or appears to the court that such person is mentally ill, or a mentally deficient or psychopathic offender. . . . The department, clinic, or psychiatrists shall make a careful examination of such person and furnish the court a report in writing of the finding as to the mental condition of the person. . . . The court shall conduct a hearing thereon. . . . If upon consideration of such report and such other evidence as is submitted the court finds that such person is . . . a psychopathic offender . . . the court shall enter such finding in the records and shall impose the appropriate sentence for the offense of which the person was convicted. At the same time the court shall enter an order of indefinite commitment of such person to the department, during the continuance of which the execution of the sentence shall be suspended. Thereupon such person shall be sent to an appropriate institution designated by the department. If the department, because of lack of facilities, fails to designate an appropriate institution, such person shall be sent to the institution to which he would have been sentenced had he not been adjudged . . . a psychopathic offender. . . ."

tendencies are displayed" to the Department of Mental Hygiene for examination. The examining body, upon examination of the offender, renders a report in writing to the court containing its findings, together with recommendations, suggestions and opinions. Upon receipt of the report a hearing is held. If the court after consideration of the report finds the offender mentally ill (Ohio Revised Code § 5123.01) or if it finds him to be "a mentally deficient or psychopathic offender" it imposes the appropriate sentence for the offense of which the person was convicted; at the same time it hands down an order of indefinite commitment of the offender to an appropriate institution for treatment or purely custodial purposes. The release from the indeterminate sentence is effected only if the offender is found to have improved so that "he no longer needs the special custody, care, or treatment of such institution." Such a decision rests in the hands of the superintendent of the institution to which the offender is committed. If the offender obtains the certification of improvement and after further examination is found to be sufficiently cured, he may be released. At this time he is either transferred to the appropriate penal institution to serve the remaining term of his sentence or freed under supervision if the penal sentence has been satisfied.

The letter of some of the substantive laws dealing with sexual deviation is often tempered by a minimum of enforcement. It is only in cases of violence, corruption of minors and public solicitation that a vigilant attempt is made to require compliance with the legal standard.<sup>23</sup> This laxity is on occasions, generally following an extremely outrageous sex crime, the subject of journalistic criticism. Such an attack results in a zealous enforcement of all sexual statutes and ordinances until the pressure to "clean up" the community is removed. The arrest of the non-violent sexual offender then lapses to lie dormant until something again arouses a public crusade against all sexual offenders.

#### CRITIQUE

Enactments which aim at the prohibition of certain conduct should meet some objective criteria of excellence. Ideally, they should (1) curtail those acts which result in probable harm to the community and its inhabitants, (2) define with the greatest possible exactness those proscribed activities, (3) incorporate all the procedural safeguards due the accused, (4) grade the severity of the punishment to fit the degree of the crime, and (5) take account of the enforcement and treatment facilities available. What is the measure of the existent Ohio law by these criteria?

Initially, it must again be stated that the particular problem presented by laws dealing with sexual transgressions is the common tendency

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<sup>23</sup> KINSEY, *op. cit. supra* note 2, at 391-92; MODEL PENAL CODE § 207.5, comment (Tent. Draft No. 4, 1956); PLOSCOWE, SEX AND THE LAW 209 (1951); Bowman & Engle, *supra* note 5, at 295-96; Note, 17 U. CHI. L. REV. 162 (1949).

to codify moral standards and enforce these standards even though some lapses from them do no harm to the secular interests of the community. In the pursuit of this goal of moral conformity the laws are enforcing a standard of conduct the validity of which has been questioned.<sup>24</sup> Kinsey points out that morals vary with the many different social levels (determined by educational level, occupational class, and paternal influences).<sup>25</sup> Faced with this kaleidoscopic nature of social mores it is impossible to incorporate any set of moral standards in the law that speaks for more than a segment of the population. Witness the fact that the enforcement of the law rests with two divergent social groups, the better educated social strata of judges, lawyers, and state legislators and those with an entirely different educational background, the police officers. Within the operation of the legal procedure, this conflict of mores results in an uneven functioning of the law; arrests generally reflect the police officer's moral predilections while trials and sentences often mirror the judge's moral views.<sup>26</sup>

To the extent that the law attempts to regulate matters that are the concern of the spiritual bodies it is rendering a "service" that the criminal law should not be called upon to do. A compromise between the concerns of the community in legal as differentiated from religious matters is desirable.<sup>27</sup> This, to a degree, is an educational matter that cannot be easily corrected. American society has put particular emphasis upon the presence of the law in the province of morals and might be shocked by the withdrawal of legal sanctions. But there seem to be indications of changes in the public attitudes toward sexual mores with a more lenient interpretation of the kind of behavior condemned as sexual delinquency.<sup>28</sup> Further, it is clear that there is no necessary "decay" in the social structure in countries where moral issues are left to the moral authorities. France, Switzerland, Italy, Denmark, Sweden, and Mexico have recognized the distinction; their codes leave moral judgments and sanctions to bodies other than the judiciary, *i.e.*, society and religion.<sup>29</sup>

There are matters which combine morals and necessity. To the extent that necessity demands sanctions, these laws are justified. The violator cannot be allowed to harm the social fabric by commission of crimes of violence or crimes involving children. The moral basis for these laws is backed by a social need for regulation of asocial behavior.<sup>30</sup>

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<sup>24</sup> East, *supra* note 2, at 178; Porterfield & Salley, *Current Folkways of Sexual Behavior*, 52 AM. J. SOCIOLOGY 209 (1949); Glueck, *An Evaluation of the Homosexual Offender*, 41 MINN. L. REV. 187 (1957).

<sup>25</sup> KINSEY, *op. cit. supra* note 2, at 329.

<sup>26</sup> KINSEY, *op. cit. supra* note 2, at 389.

<sup>27</sup> THE PROBLEM OF HOMOSEXUALITY, AN INTERIM REPORT (1954), published by the Church of England Moral Welfare Council.

<sup>28</sup> Bowman & Engle, *supra* note 5, at 311; Glueck, *supra* note 24, at 193.

<sup>29</sup> MODEL PENAL CODE § 207.5, comment (Tent. Draft No. 4, 1956); Bowman & Engle, *supra* note 5, at 304.

<sup>30</sup> PLOSCOWE, *op. cit. supra* note 23, at 213.

Once society does assume that legal curtailment is necessary (whether it be the result of social prejudice or social need) the language employed in the legislation is frequently vague.<sup>31</sup> This absence of definitive draftsmanship may be the reflection of the revulsion of legislators to abnormal sexual impulses and a result of uncertainty as to what the law is really attempting to accomplish.

Left open to individual interpretation are many matters that should be settled by the written law once it invades the field. How far will the decisions go in the expansion of the plastic language of the statutes?<sup>32</sup> Is the language equally applicable to persons of both sexes?<sup>33</sup> Are the statutes to be read to include certain sexual acts that may often be a part of the marital relationship?<sup>34</sup> By leaving the language open to personal interpretation the drafters allow great discretion to the law enforcement officers in making arrests. Further, the statutes are subject to *ad hoc* treatment by the judiciary, making each case a reflection of the biases and class standards of the judge.<sup>35</sup>

Criminal statutes should not employ words of art. For example, there should be no need for judicial interpretation of "sodomy," when it would be possible to compile a list of specific offenses.<sup>36</sup> Nor should the elements of an assault vary with the facts of the case.<sup>37</sup>

The catalog of offenses—homosexuality, bestiality, exhibitionism, and voyeurism—makes no distinction between a single experimentation or transgression and the persistent offender with a record of sexual violations. All such persons are subject to the same degree of punishment. The sodomy statute of Ohio makes no differentiation between the acts of consenting adults in private and the offender who finds his sexual gratification with children or through public solicitation.<sup>38</sup> Local ordi-

<sup>31</sup> BROMBERG, *op. cit. supra* note 7, at 81; MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 143 (1958); Note, 29 *IND. L.J.* 539 (1954).

<sup>32</sup> *State v. Tarrant*, 83 Ohio App. 199, 80 N.E.2d 509 (1948); *Franklin v. State*, 14 Ohio C.C.R. (n.s.) 253 (Cir. Ct. 1910).

<sup>33</sup> KINSEY, POMEROY, MARTIN, & GEBHARD, *SEXUAL BEHAVIOR OF THE HUMAN FEMALE* 484, n.36 (1953), found no reported case in the United States where the sodomy statute has been applied to a female for a conviction. *But cf. Foster v. State*, 1 Ohio C.C.R. 467 (Cir. Ct. 1886), holding that a party of either sex can be guilty of sodomy.

<sup>34</sup> *State v. Forquer*, 74 Ohio App. 293, 58 N.E.2d 696 (1944), has held cunnilingus is not a crime in Ohio under the sodomy statute. This decision still leaves unanswered many questions as to the status of heterosexual acts.

<sup>35</sup> *Barnett v. State*, 104 Ohio St. 298, 135 N.E. 647 (1922), is an example of judicial reaction to the sexual offender. Such an individual is termed a "moral degenerate," a "sex pervert," and a "moral leper."

<sup>36</sup> *State v. Tarrant*, *supra* note 32; *Franklin v. State*, *supra* note 32; *State v. Price*, *supra* note 14. *Cf.* 66 N.Y. PENAL LAWS § 690 (1958).

<sup>37</sup> *State v. Green*, *supra* note 19.

<sup>38</sup> OHIO REV. CODE § 2905.44 (1953). Compare 66 N.Y. PENAL LAWS § 690 (1958) providing for three degrees of offense in the case of sodomy.

nances, with disregard of all factors other than the specific arts in question, bunch prohibitions under such unenlightening terms as "lewd, lascivious acts, words, gestures, etc."<sup>39</sup> or "indecent conduct, filthy acts, etc."<sup>40</sup>

This problem of vagueness is found in other areas where the sexual mores of the society are involved. In the area of obscenity the vagueness of state statutes has been tested before the United States Supreme Court. The statutes have been upheld if there is a reasonable standard for ascertaining guilt—the standard to be applied is that of the "contemporary community."<sup>41</sup> But Mr. Justice Reed's question remains unanswered by this decision:

Are the tests of the Puritan or the Cavalier to be applied, those of the city or the farm, the Christian or non-Christian, the old or the young?<sup>42</sup>

If we accept Kinsey's view that there is no "average," but rather many "averages," each reflecting a part of the community, it seems vain to search for the moral standards of *the* contemporary community. It is no answer to vague statutory language to conjure a test that is equally unascertainable.

In addition to the vagueness of statutory language and the broadness of the interpretation rendered by the judiciary, there is the absence of full procedural safeguards. A summary of the statutory words without a definitive account of the nature, manner, time or parties satisfies the procedural requisites for a valid indictment.<sup>43</sup> This uncertainty is modified by the presence of the bill of particulars provisions in Ohio. The defendant is thereby afforded an opportunity to fully acquaint himself with the detailed factors of the indictment and in this way prepare his defense.

In many cases a defendant is not allowed, in the hearing wherein he is charged with sodomy, to present evidence of his previous sexual conduct which may have been exclusively heterosexual.<sup>44</sup> Conduct precedent to the commission of the act or evidence of a purely heterosexual orientation are viewed as irrelevant in such a hearing. This view fails to see any gradations in the commission of the crime; all offenders are lumped into the same classification without regard to motivation.

Great variance is present in the sentences for violation of certain sexual statutes. Uniformity in attitude is nonexistent among the states. The penalties are therefore dependent upon the sophistication of each state legislature in its consideration of sexual crimes. For example, New York has by statute made homosexual acts between consenting

<sup>39</sup> CLEVELAND, OHIO, CODIFIED ORDINANCES § 13.1305 (1951).

<sup>40</sup> COLUMBUS, OHIO, CITY CODES § 29.52 (1959).

<sup>41</sup> *Roth v. United States*, 354 U.S. 476, 488-89 (1957).

<sup>42</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 284 (1952).

<sup>43</sup> See note 21 *supra*.

<sup>44</sup> *Bowman & Engle*, *supra* note 5, at 287.

adults a misdemeanor<sup>45</sup> while Nevada treats any homosexual act—without consideration of the ages of the parties involved or any consensual factors—as a felony punishable by life imprisonment.<sup>46</sup> Such a great disparity is unknown in any other area of the criminal law. It should be noted that in the majority of American jurisdictions, including Ohio, all sodomitic acts are subject to punishment as great or greater than forcible rape.<sup>47</sup> The law to this extent depends not upon the injury, potential or real, but rather on the intolerance of the drafters to acts motivated by a drive viewed as sinful or disgusting.

The lack of uniformity in the law should not in itself be an element of concern. However, it ends in making crime geographical. Whether one is a major felon or a misdemeanant depends not upon the act committed, but upon the state one is in at the time. This is not a case of having to draw a line somewhere, for in most states, including Ohio, no effort has been made to deal with the gradations of the act. Rather all acts are condemned as felonies free of any external considerations.

What can be the justification for allowing the laws as they are now drafted to stand? Do these laws actually act as a deterrent to the exhibitionist or voyeurist? Will they encourage a homosexual to seek psychiatric treatment for his illness?

Laws are effective in so far as they are enforced, not in a manner of capricious selection, but with uniformity. If such enforcement were present then the sexual deviate's actions could be deterred and he might often seek treatment. But there are currently insufficient facilities for real enforcement of all the sexual laws on the books, and small chance of an appreciable increase in enforcement agencies numerous enough to make stringent enforcement a reality.<sup>48</sup> The public act and the act of violence are subject to constant enforcement. A reconsideration of the sexual laws would still treat these activities as criminal. In this present atmosphere of selective enforcement a no-man's-land is created; the law is converted to the tool of the blackmailer.<sup>49</sup> Thereby the unrealistic laws compound the problem of the legal agencies by facilitating a criminal activity as reprehensible as the proscribed sexual conduct.

The real deterrent to sexual deviation is public exposure rather than punishment. The social and religious condemnation of such activity, not legal chastisement, acts to brake unacceptable sex inclinations.<sup>50</sup>

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<sup>45</sup> 66 N.Y. PENAL LAWS § 690 (1958).

<sup>46</sup> NEV. REV. STAT. § 201.190 (1957).

<sup>47</sup> See OHIO REV. CODE §§ 2905.01, .44 (1953).

<sup>48</sup> MODEL PENAL CODE § 207.5, comment (Tent. Draft No. 4, 1956); Note, 17 U. CHI. L. REV. 162 (1949).

<sup>49</sup> MODEL PENAL CODE § 207.5, comment (Tent. Draft No. 4, 1956).

<sup>50</sup> Glueck, *supra* note 24, at 201, 203.

Many of the shortcomings of the substantive laws seem answered by statutes dealing with psychopathic offenders.<sup>51</sup> These laws appear to be based upon an educated desire to get away from the time-honored manner of dealing with sexual criminals. To the extent that they do provide for psychiatric examination of offenders they are an advancement over the regular penal statutes. But examination of this legislation raises questions as to their utility.

Critics of these laws find them an expression of two distinct attitudes.

Mental illness is to be recognized as a condition that requires special treatment somewhat different from the customary penal law enforcement procedure.<sup>52</sup>

This reliance upon scientific aid in legal determinations and a desire to be humane is often coupled with a contradictory position.

The demands of the "people's voice" occasionally couched in rational argument but more often expressed with hysterical fervor for more restrictive measures against sex criminals had to be met somehow by the various legislatures, since important groups seemed to feel that ordinary legislation was not sufficient to protect the community from the perpetration and repetition of heinous crimes by sex fiends. The sexual psychopath laws seemed to serve admirably this purpose of added protection.<sup>53</sup>

Too often these acts were passed with high expectations as to their utility, but without a complete study of their application in practice or much heed to the caution urged by the psychologists and sociologists.<sup>54</sup> "The present formulation does not permit evaluation of deviation to be made according to objective legal, medical, or common-sense standards."<sup>55</sup>

No attempt is made in Ohio's act for "psychopathic offenders" to distinguish the dangerous sexual offender from the private offender or the nuisance. Any violation "involving a sexual offense, or in which abnormal sexual tendencies are displayed" suffices for classification under the sexual psychopathic provisions. Inherent in such reasoning is the assumption that one illegal sexual act makes one a "psychopath." It is clear from the reading of the statute that no allowance is made for adolescent experimentation, or a one time "thrill," or acts under alco-

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<sup>51</sup> OHIO REV. CODE § 2947.24-.29 (1954).

<sup>52</sup> Hacker & Flynn, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766, 767 (1955).

<sup>53</sup> *Ibid.*

<sup>54</sup> GUTTMACHER, *op. cit. supra* note 6, at 121; PLOSCOWE, *op. cit. supra* note 23 at 237; Fahr, *Iowa's New Sexual Psychopath Law—An Experiment Noble in Purpose?*, 41 IOWA L. REV. 523, 524 (1956).

<sup>55</sup> Hacker & Flynn, *supra* note 52, at 771.

holic influence, or acts that are part of the marital relationship. It is difficult to see these acts, without additional factors, as psychopathic.

The word "psychopathic" is itself ambiguous. The attempt at definition in the Ohio act is preferable to total silence.<sup>56</sup> However, no objective standard is provided: "emotional immaturity" or "instability" or "deficient powers of self discipline" are criteria applicable to a large percentage of the population—these are traits which hardly suffice to make one a criminal "psychopathic offender." The word "psychopath" has been abandoned in psychiatric circles as unacceptable due to its generality and inexactitude.<sup>57</sup> Yet it continues to be used in the law as though it had some exact meaning.

Indefinite commitment provided by the statute can often result in removal of the offender for a period longer than the sentence under the applicable criminal statutes.<sup>58</sup> This makes the statute a useful device for ridding a community of an offender for a long period of time. With this possibility in mind it is convenient to insure that the sexual psychopath statute is applied to social undesirables without regard to the gravity of the offense. In Ohio there is at least the requirement that there first be a conviction under the applicable penal statute before the sexual psychopath provisions come into play.<sup>59</sup> The offender is guaranteed the right of a formal trial and conviction. But after conviction who is to judge whether the defendant represents a "menace" to the community?

After the commitment of the offender to an institution for treatment, he remains subject to the penal sentence upon his release after "cure." Since the psychopathic offender does not meet Ohio's legal test for insanity, he is fully responsible for all acts committed while he was "psychopathic."<sup>60</sup>

The sexual psychopath laws are based upon scientific premises that are not supported by psychological investigation.<sup>61</sup> Primarily, the special classification of sexual offenders as "psychopaths" assumes a conscious choice to be possible in the selection of activity by the offender, that is, the offender is not to be viewed as "insane." Ohio's criteria for insanity remains the *M'Naghten* rule, *i.e.*, a knowledge that the act is wrong. Acceptance of this standard narrows the area of activities that might be classed as insanity under the broader tests of "irresistible impulse" (total incapacity for self-control) or the *Durham* case ruling ("that the accused is not criminally responsible if his unlawful act was the product of mental disease or defect").

<sup>56</sup> OHIO REV. CODE § 2947.24(B) (1954). See note 22 *supra*.

<sup>57</sup> DAVIDSON, FORENSIC PSYCHIATRY 318 (1952).

<sup>58</sup> The maximum sentences applicable to the sexual crimes considered: OHIO REV. CODE §§ 2903.01 (up to ten years), 2905.02 (life imprisonment), 2905.30 (up to six months), 2905.44 (up to twenty years) (1953).

<sup>59</sup> OHIO REV. CODE § 2947.25 (1954).

<sup>60</sup> OHIO REV. CODE § 2947.27 (1954).

<sup>61</sup> BROMBERG, *op. cit.* *supra* note 7, at 81-84; Bowman & Engle, *supra* note 5, at 279.

Secondly, the sexual psychopath laws assume that the sexual criminal is a habitual offender who progresses from one stage of sexual violation to another, more antisocial, stage. They also assume that by checking the early activity through removal of the individual, society is safeguarding itself from some flagrant sexual crime. In short, the sexual offender is thought to be highly recidivistic. Examination of cases does not support this assumption.<sup>62</sup> Quite the contrary appears to be the case.

Our investigations, as well as others, indicate first, that there is a low degree of recidivism among sexual offenders, and second, that there is no basis for the common belief that sex criminals engage in sexual crimes of progressive malignancy.<sup>63</sup> It therefore becomes hard to justify the treatment of conduct which is merely annoying by the same standards as are applied to violent conduct. This, however, is the present status of the law which sees no degree in sexual deviation and imagines every sexual transgression to contain the roots of brutal sexual acts.

There is probably the greatest amount of disagreement in this area regarding the prognosis of cure of the sexual deviate through treatment.<sup>64</sup> If medical and psychological therapy can aid the deviate, and there is no certainty that it can, there arises the problem of facilities available for such therapy. There is no public institution in Ohio, at the present time, designed to cope with this problem. The sexual criminal must therefore seek treatment in a private institution or be committed to some institution with neither the facilities nor personnel for such specialized treatment. Confinement of sexual offenders in ordinary penal institutions may result in an aggravation of the condition of homosexual prisoners<sup>65</sup> while other classes of deviate prisoners would often be subject to physical abuse.

The end result is that we presently have legislation that looks progressive and will therefore be pointed to as exemplary of far-sighted legal treatment of the deviate, but legislation which, behind the facade of progress, is ineffective, inefficient, unenlightened, and positively unfair. It is time for a change.

#### RECOMMENDED IMPROVEMENTS

The area is rife with emotional reactions and it is vain to hope that it can be approached free of these subjective preconceptions. It is also essential to note that the law can never move too far ahead of the

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<sup>62</sup> CALIFORNIA SUBCOMMITTEE ON SEX CRIME, PRELIMINARY REPORT 43 (1950); COMMITMENT AND RELEASE OF SEXUAL DEVIATES (ILLINOIS LEGISLATIVE COUNCIL) 36-38 (1951); MAYOR'S COMMITTEE REPORT FOR THE STUDY OF SEX OFFENSES (NEW YORK CITY) 38, 94 (1941).

<sup>63</sup> GUTTMACHER, *op. cit. supra* note 6, at 113, 114.

<sup>64</sup> MACDONALD, *op. cit. supra* note 31, at 148; MODEL PENAL CODE § 207.5, comment, app. C (Tent. Draft No. 4, 1956).

<sup>65</sup> PLOSCOWE, *op. cit. supra* note 23, at 213; Bowman & Engle, *supra* note 5, at 280.

accepted standards of the community or communities of which it is a part.

Practicable suggestions are a change in the present substantive laws considered above. It is time that the prudish, hush-hush attitude that pervades thinking on matters sexual be abandoned; that the law attempt to spell out what it means with the maximum of exactitude. Parts of the New York code are exemplary of an enlightened attempt at specificity in detailing specific substantive offenses with punishments in proportion to the crime.<sup>66</sup> The American Law Institute's tentative drafts of the *Model Penal Code* illustrate this same educated approach to sexual offenses in legislative provisions.<sup>67</sup> It is time we realized that the criminal law is not a suitable medium for the expression of *moral* disapproval. There is no reason for the law to include matters which are generally ignored and seldom enforced. The goal of the substantive law should be to regulate those deviate sexual practices that do involve force, corruption of minors, and public offenses. The remaining sexual transgressions should be left to religious and social pressures.

The "sexual psychopath" law should be abandoned as an ill-advised experiment. In its place should be: legislation that is worked out through the cooperation of law and medical science; legislation which sets out specific criteria to aid the psychiatrist and the judge in reaching a determination regarding the mental state of the offender; legislation which provides for utilization of the available facilities for the treatment of those individuals who threaten, rather than annoy, the community, *i.e.*, the pedophile and the forcible assaulter; and criteria which make an indeterminate sentence possible should be formulated in terms of specific violations which are of a dangerous character.

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<sup>66</sup> "A person who carnally knows any male or female person by the anus or by or with the mouth against the will of such other person, or (1) When through idiocy, imbecility, or any unsoundness of mind . . . such other person is incapable of giving consent, or by reason of mental or physical weakness, or immaturity . . . such other person does not offer resistance; or, (2) When such other person's resistance is forcibly overcome; or, (3) When such other person's resistance is prevented by fear of immediate and great bodily harm . . .; or, (4) When such other person's resistance is prevented by stupor or weakness of mind produced by an intoxicating, or narcotic . . . agent . . .; or, (5) When such other person is at the time, unconscious of the nature of the act, and this is known to the defendant, . . . is guilty of sodomy in the first degree and is punishable with imprisonment of not more than twenty years or with imprisonment for an indeterminate term the minimum of which shall be one day and the maximum of which shall be the duration of his natural life. A person twenty-one years of age or over who carnally knows by the anus or by or with the mouth any male or female under the age of eighteen, under circumstances not amounting to sodomy in the first degree is guilty of sodomy in the second degree and punishable with imprisonment of not more than ten years. A person who carnally knows any male or female person . . . under circumstances not amounting to sodomy in the first degree or sodomy in the second degree is guilty of a misdemeanor." 66 N.Y. PENAL LAWS § 690 (1958).

<sup>67</sup> MODEL PENAL CODE § 207.4, comment; § 207.5, comment; § 207.6, comment (Tent. Draft No. 4, 1956).

Finally, all is in vain unless facilities are established, with adequate personnel, to deal with the sexual offender committed for therapy. Existent medical institutions and prison facilities are unacceptable for this purpose. We cannot abandon all sexual deviates to an indeterminate sentence which is nothing more than custodial. Whatever his violation he cannot be isolated and forgotten—he is not a “moral leper.”

#### CONCLUSION

This examination of our moral standards in the area of sexual deviation points up the realization that some of the views of the past are invalid in a world grown more wise through scientific investigation. In some communities the law has begun to reflect these refinements, in others it remains unmodified. Ohio's law can no longer wear a mantle of moral respectability—it has become immoral to refuse to recognize the stagnation present in the existent laws on sexual deviation. A revision of Ohio's sex laws is badly needed, and acceptance of the findings of the psychiatrist, psychologist, and sociologist must not be ignored. Expediency and bias can no longer be the basis of our treatment of the sexual violator.

*Although the criminal fails in his duty to society, we are not thereby relieved of our duty to him.*—Norwood East

*Phillip E. Stebbins*