NATIONAL COMMITTEE
FOR
SEXUAL CIVIL LIBERTIES
18 OBER ROAD
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Co-Chairmen:
Prof. Walter E. Barnett
Albuquerque, New Mexico

Dr. Arthur C. Warner
Princeton, New Jersey

July 29, 1971

Dear Committee Member:

Enclosed is a copy of the memorandum and accompanying letter sent this date to the Senate Subcommittee on Criminal Laws and Procedures, which is conducting hearings on the proposed new federal criminal code.

In view of the time element, it did not seem practical to send this around for every member to sign individually. With summer vacations and all, it might get delayed so long as to reach the Subcommittee too late for consideration. Personally, I am very pleased with the end product and believe it is about as forceful and comprehensive a statement as we can come up with. I want to express the personal appreciation of myself and Arthur Warner to all of you who submitted comments and suggestions for improvement.

Sincerely,

Walter Barnett

Walter Barnett
Co-chairman

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Senator John L. McClellan, Chairman
Subcommittee on Criminal Laws and Procedures
Committee on the Judiciary
United States Senate
Senate Office Building
Washington, D. C.

Dear Senator McClellan:

The National Committee for Sexual Civil Liberties wishes to go on record in support of the provisions on sodomy (sections 1643-1644) of the proposed new federal criminal code, as contained in the Final Report of the National Commission on Reform of Federal Criminal Laws (1971).

Enclosed is a statement of the reasons why we believe the sodomy laws of this country ought to be reformed. As it indicates, the trend both in America and in the rest of the western world is towards elimination of consensual adult conduct from the scope of such laws. In view both of the reasons and of the trend, it would be most unfortunate if the proposed new federal code were to criminalize such conduct.

Admittedly, in the realm of sexual offenses, the proposed code, if enacted, will have only a negligible effect in terms of actual prosecutions and convictions, because the incidence of such conduct which is amenable to federal criminal jurisdiction is far less than that which is amenable to state jurisdiction. However, the overall impact of the proposed new code is likely to be considerable, as many states contemplating revision of their substantive law of crimes will probably use it as a model. We believe the national Congress should take the lead in rectifying the injustice perpetrated by present laws, and enactment of the proposed sections on sodomy would be an important first step in this direction.

In your recent article in the American Bar Association Journal entitled The Challenge of a Modern Federal Criminal Code, you noted that the proposed sections on sodomy, in failing to criminalize adult consensual behavior, would make licit conduct now generally illicit under state law adopted and applicable in federal enclaves. We fail to perceive what harm could possibly flow from such a disparity between federal and state law. If the entire concept of a federal substantive law of crimes is to be adopted, as the new code

proposes, there are bound to be many instances where state law criminalizes conduct that would not be criminal under the federal code. We believe that the only proper inquiry in molding the federal law is whether the conduct in question is seriously detrimental to society. We submit that adult consensual sodomy is totally harmless. The fact that, within a year from now, five of the fifty states will be managing to get along without making it criminal is persuasive evidence that there is no need for federal sanctions. On the other hand, making such conduct criminal in federal enclaves could have very unfortunate consequences in the growing number of states in which it is not criminal under state law. A disparity in this direction is much more likely to result in misleading the public than one in the other direction. If laymen are at all knowledgeable about laws attempting to regulate their sexual behavior, they are much more likely to know about the laws of their own state than about the provisions of a federal criminal code that would be only rarely applicable to their conduct. Thus, in states where adult consensual sodomy is legal, it is perfectly understandable that laymen might commit the federal crime without the slightest inkling that they were in violation of law. This we regard as a far greater miscarriage of justice than letting a few persons go free for engaging in federal enclaves in conduct that would be criminal in the surrounding state.

For your information, I have attached to this letter a list of the members of the National Committee for Sexual Civil Liberties.

Very sincerely,

Walter E. Barnett

Walter E. Barnett
Co-chairman

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WHY REFORM THE SODOMY LAWS?*

All serious efforts to remove sodomy between consenting adults in private from the criminal statute book in the English-speaking world began with Kinsey's, Pomeroy's and Martin's Sexual Behavior in the Human Male, the so-called Kinsey Report, which first appeared in 1949.[1] Its then-startling conclusions--subsequently buttressed by further studies--sharply challenged the assumptions on which had rested our laws having to do with sex and morals. The Kinsey Report made a temendous impact in the field of homosexuality, and, together with related studies, played a central role in undermining the mass of myth and superstition which had, until then, surrounded our knowledge of the subject since Biblical times.

The sodomy laws are the product of an age which knew nothing of modern biology, psychology, or sociology. They entered our jurisprudence at the time of the Protestant Reformation, as part of the process whereby the royal courts in England began assimilating to the common law the jurisdiction over certain offenses which had previously been the domain of the so-called courts Christian, that is, the ecclesiastical tribunals of the Roman Catholic Church. Like perjury, blasphemy and adultery, sodomy (or "buggery") had been an offense against the canon law until the statute of 25 Henry VIII, c. 6, was enacted in 1533 for "the punishment of the vice of buggery" in the King's courts.

The very term "buggery" betokens the fact that the laws against "unnatural" sex acts form part of the dark history of religious heresy and persecution. In medieval times, the most heinous crimes were heresy, "the crime against nature", and witchcraft, and those guilty were

said to deserve death.[2] Anyone accused of "the crime against nature" was also likely to be accused of heresy, and both crimes, in the Church's view, were associated with the diabolical arts. As Pollock and Maitland have stated in their History of English Law, "Sorcery is a crime created by the measures which are taken for its suppression. The crime against nature seems to have had a somewhat similar history. It was so closely connected with heresy that the vulgar had but one name for both."[3] This common name was "bugger", which is a corruption of "Bulgar". It referred originally to the members of an important medieval heretical sect who had moved into northern Italy and southern France from Bulgaria.[4]

Closely associated with heresy was the crime of fautorship of heresy, i. e., any manifestation of sympathy for or support of the heretic or his heresy. Thus anyone who assisted, or extended protection to, a heretic was a fautor of heresy even though his own orthodoxy was not otherwise questioned. The punishment for fautorship of heresy was the same as for heresy itself. The concept of fautorship remains only vestigially in our society today except in the area of homosexuality, where the rationale of the medieval doctrine is still strong. It is true even today that anyone openly associating with known homosexuals or protecting them from harassment himself runs the risk of falling under the suspicion of being homosexual.[5] Until recently, those who advocated abolition of the penal and social sanctions against homosexuality ran the same risk.

There is another legacy of the Church's attitude towards homosexual acts which we retain today. Everyone knows that the Church preached to its believers the common virtues of honesty, compassion, charity, kindness and benevolence. What many of us do not know is

that the Church made an exception to these rules of human conduct where a heretic was involved. The Christian was not required to keep faith with a heretic, to deal with him honestly, or to treat him humanely. This attitude of virtual outlawry which the Church encouraged towards heretics inevitably carried over to those who committed "unnatural" sex acts and to homosexuals in particular, because of the close association we have already noted existed between the two "offenses" in the popular mind. As a consequence, anyone who robbed or assaulted a homosexual considered himself a public benefactor and expected public acclaim for his deed. Herein lie the roots in today's society of the frequent unprovoked assaults and muggings in which homosexuals are the victims. The perpetrators of these deeds often justify their crimes on the ground that their victim was a "fag" or "queer". It is no exaggeration to say that homosexuals continue to be treated as heretics today. The equation of homosexuality with communism during the McCarthy era of the early 1950's is a curiously revealing instance of how the two continue to be associated in the popular mind even in recent times.

The Kinsey Report led to the opening of the campaign to end the persecution of homosexuals in the United States. As indicated above, that report, together with subsequent research, exploded some of the continuing myths regarding homosexuality. Two of these myths, in particular, should be noted. The first is the notion, fostered by medieval ecclesiastical writers on sex, that homosexual acts are a perversion of the "normal" mode of sexuality, i. e., that they are "unnatural". This notion led to the use of the euphemism "crime against nature" in many of the American sodomy statutes, and these writings account to a large degree for the ferocity of the penalties

adopted: Acts against persons are crimes, to be sure, but acts against the order of God's creation are crimes against God, beside which crimes against mere humans (such as rape) pale into insignificance![6] The evidence we now have is overwhelming that homosexuality, like heterosexuality, is a natural part of the human condition, that it has existed in every culture and in every age. To assert that homosexual acts are a rare or unnatural phenomenon in the scientific sense is absurd. Studies such as those of Ford and Beach have demonstrated that homosexual activity is not even a phenomenon peculiar to mankind, but that it is also found among other mammals (though it is never the predominant sexual pattern, whether in any given human society or in any particular animal species). They concluded that "human homosexuality is the product of the fundamental mammalian heritage."[7] In view of this evidence, it is equally untenable to assert that homosexuality is a manifestation of mental illness or psychopathology. Such an assertion is merely the resurrection in a new form of the old "sinful-unnatural" value judgment, and is not entitled to credibility as an assertion of scientific fact.[8]

Sexual conduct which, according to the never-refuted evidence of Kinsey, has occurred at least on one occasion among more than a third of the male population of this country and is an exclusive lifelong pattern for 4 per cent of that same population cannot be dismissed as occasional. Among females, the proportions, though smaller, are nonetheless equally significant. When to these figures are added the Kinsey statistics for those who have sometimes had homosexual urges, but without ever having experienced overt homosexual contact to the point of orgasm, we are then talking about roughly

half the male population of this country. (A comparable figure for females was not given by the Kinsey studies.) To describe these feelings and conduct as "unnatural" is to indulge in fantasy, not reality. As Wainwright Churchill, the eminent psychologist, has stated:

> In referring to sexual phenomena, it is common for people to use...such expressions as 'natural', 'unnatural', 'normal', 'abnormal', and the seemingly endless list of synonyms that, in recent times especially, have been invented to replace the more obviously conventional jargon. But we should not attempt to skirt the important issues by inventing new clichés for old prejudices. It is necessary to be absolutely clear about this. However desirable or undesirable from some other standpoint a given type of sexual behavior may be, it may not, from a scientific standpoint ever be described as 'unnatural'. ... Kinsey...is reported to have said, 'The only kind of abnormal sex acts are those which are impossible to perform.'[9]

This is not to say that all humans experience sexual attraction towards persons of their own sex, or that among those who do, homosexual relations must become the pattern of their lives. Heterosexual intercourse will always remain the majority phenomenon, but there will always exist a significant homosexual minority.

Even this does not exhaust the matter, because sodomy is not exclusively a homosexual phenomenon. If to those who have ever engaged in homosexual sodomy are added those who engage in heterosexual sodomy, which in the great majority of states is equally against the law, one can appreciate how the law's attempt to punish these forms of sexual conduct (i. e., forms other than penile-vaginal intercourse) makes criminals of the majority of Americans.

The second myth which we should note is the belief, still prevalent, that homosexuals have a peculiar penchant for proselytizing others and corrupting the young. This myth is often propounded by law enforcement officials as a justification for their sordid en-

entrapment of homosexuals under existing laws. Today, in our post-Kinsey world, informed people know, and these officials should know, that homosexuals almost never approach another person without first receiving a clear indication of "interest" on his part, and that the propensity to engage in sexual acts with children has no connection whatever with a person's sexual orientation, whether that be homosexual or heterosexual. Through the research of such men as Michael Schofield, we know that there are male homosexuals who are sexually attracted to young boys, just as there are male heterosexuals who are sexually attracted to young girls, but there is not a shred of evidence to suggest that male homosexuals are more prone to seeking out young boys than are male heterosexuals prone to running after young girls.[10] Sexual attraction to young boys by grown men is a phenomenon quite distinct from homosexuality, in the same way that sexual attraction by grown men to young girls does not derive from the fact that such men are heterosexuals. It is a relatively rare condition (termed "pedophilia"), which homosexuality is not.

The Kinsey reports and subsequent studies have caused a thorough reexamination of the law and its relation to sexual morals. The most prestigious enterprise was the report in 1957 in England of the Departmental Committee on Homosexual Offences and Prostitution, commonly known as the Wolfenden Report, after the committee's chairman, Sir John Wolfenden. The fifteen members of this committee, with only one dissenting voice, declared that "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 which is, in brief and crude terms,

not the law's business."[11] Accordingly, they concluded that "the function of the criminal law" in matters of sexual conduct should be limited to that which would "preserve public order and decency, ...protect the citizen from what is offensive or injurious, and... provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[12] The committee's recommendations were carried out by Parliament a decade later in the enactment of the Sexual Offences Act, 1967, which removed from the purview of the criminal law of England and Wales all "unnatural" sex acts committed between consenting adults in private. In 1969, the national parliaments of Canada and West Germany enacted similar reforms. The same reform took place in East Germany in 1968 and in Finland in 1971. Austria is planning to follow suit, which will leave only Scotland and Ireland, among all the countries of western Europe, continuing to penalize such conduct.

Even before the Wolfenden Committee had completed its report, the American Law Institute had, in 1955, recommended similar sodomy law reform in this country. It made the following comment at that time in its Model Penal Code draft:

> As in the case of illicit heterosexual relations, existing [sodomy] law is substantially unenforced, and there is no prospect of real enforcement except against cases of violence, corruption of minors and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interest of blackmailers.... Further, there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others. Lastly the practicalities of police administration must be considered. Funds and personnel for police

> work are limited, and it would appear to be poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved. Even the necessary utilization of police in cases involving minors or public solicitation raises special problems of police morale, because of the entrapment practices that enforcement seems to require, and the temptation to bribery and extortion.[13]

In 1961 the state of Illinois not only adopted these recommendations by removing all criminal sanctions against sodomy committed in private between consenting adults, but went beyond them by repealing its sexual solicitation statute. There is no evidence that fire and brimstone have consumed Illinois since this reform. On the contrary, the blackmail and extortion which had frequently attended these offenses have virtually disappeared in that jurisdiction. In 1969, Connecticut became the second state to repeal its sodomy law to the extent recommended by the American Law Institute's Model Penal Code, effective October 1, 1971. More recently, Idaho, Colorado and Oregon became the third, fourth, and fifth states to do the same, their new criminal codes scheduled to become effective in 1972. The penal code revision commissions of Alaska, Hawaii, Maryland, Michigan, Ohio, Vermont and Washington have recommended to their legislatures that sodomy between consenting adults in private be legalized.

In September 1967, Dr. Stanley Yolles, then Director of the National Institute of Mental Health, appointed a "task force on homosexuality". The fifteen members of this group, persons whom the federal government considered to be "outstanding behavioral, medical, social and legal scientists", had each "had extensive research and study experience in the areas of sexuality and sexual deviation." They were requested "to review carefully the current state of knowledge regarding homosexuality in its mental health

aspects and to make recommendations...in this area."[14] The final report of this task force appeared in 1969. It had this to say:

> Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives. The existence of legal penalties relating to homosexual acts means that the mental health problems of homosexuals are exacerbated by the need for concealment and the emotional stresses arising from this need and from the opprobrium of being in violation of the law. On the other hand, there is no evidence suggesting that legal penalties are effective in preventing or reducing the incidence of homosexual acts in private between consenting adults. In the United States such persons are so seldom brought to trial that to all intents and purposes such laws are dead letters, and their repeal would merely officially confirm a situation that already exists.... A majority of this Task Force accepts and concurs with this recommendation and urges that the NIMH support ongoing studies of the legal and societal implications of such a change....[15]

For the record, it should be noted that the majority of the task force consisted of twelve of its fifteen members, and that the three-member minority did not disagree with the majority's recommendations just quoted. They merely maintained "that consideration of social policy issues should be deferred until further scientific evidence is available...."[16]

The fact is that the great weight of informed and educated opinion has now come down flatly in favor of sodomy law reform. The National Association for Mental Health, the most important organization in the field, recently (October 17, 1970) issued a position statement that "the law should not impose criminal sanctions for homosexual conduct committed in private between consenting adults." After declaring that "such behavior does not constitute a specific mental or emotional illness", the Association concluded:

> Such acts do not present any danger to society that

> justifies making them criminal, nor is there any evidence that persons engaging in such acts progress to more dangerous sexual behavior or to violent aggression that would justify resort to criminal punishment.[17]

In similar vein was the recommendation of the thirty-seventh American Assembly which met at Arden House, Harriman, New York, in April, 1970, to discuss "The Health of Americans". This assembly, an affiliate of Columbia University, is a national educational institution incorporated in New York State. The April, 1970 assemblage was composed of professional representatives from "the field of health (practice and administration), the legal profession (bench and bar), the communications media, the academic and business worlds, several professional and public affairs organizations, and government."[18] Among the twenty "recommendations for national action" which that gathering made was an itemizing of the concrete steps which need to be taken by government "to diminish mental anguish and improve mental health of segments of society." Heading this list was a recommendation for "the abolition of all existing laws concerning sexual behavior between consenting adults, without sacrificing protection for minors or public decorum."[19]

No purpose would be served by further review of the register of those who have spoken out in favor of sodomy law reform. But if, as has already been indicated, the present sodomy laws are, for the most part, unenforced and unenforceable so far as private adult conduct is concerned, why should anybody be so insistent on reforming them? Why not leave them as they are? The reasons for reform are cogent and pressing. To maintain on the statute book laws which are not intended to be enforced and are incapable of all but capricious enforcement violates every rational principle of jurisprudence. It

not only brings the law itself into disrepute, fostering contempt for the law generally, but it stands as an open invitation to blackmail, extortion and other corruption. Laws are supposed to be enforced even though no criminal statute ever succeeds in reaching all of its violators. So long as there is some reasonable connection between the number of offenses and the number of prosecutions, the equitable sense of the community is not outraged and public respect for the law is not corroded. But where, as in the case of consensual adult sodomy in private, there may well be 6,000,000 offenses for every 20 convictions,[20] the law itself becomes a mockery and in its rare employment simply an instrument for private vengeance or blackmail. Older members of the voting public may find nothing very shocking in all this, but the younger generation simply will not stomach such hypocrisy--and the lowering of the voting age to 18 will add millions of new voters at <u>this</u> end of the age spectrum.

To suggest that, even though largely unenforced and unenforceable, the law should remain on the statute book purely for purposes of moral suasion is to subscribe to the fiction that an individual's deepest emotional drives can be altered by state fiat. Without stringent and universal enforcement, the words of the statute book are certain to be ignored by all and sundry. And what, indeed, are the occasions when the private acts of consenting adults can ever come to the attention of the authorities and thus lead to a prosecution? Only where one of the parties develops a grudge and offers to turn state's witness against his partner, or where a police officer accidentally stumbles on the participants and apprehends them in the very act, or where some form of entrapment or blackmail is deliberately employed.

There are also reports of cases in England where defendants were convicted on the basis of incriminating letters written years before, but no one has ever suggested that, where there exists a crime without victims, the law can be enforced except on a highly fortuitous basis. This must inevitably be the case when the law attempts to intrude into the sphere of private morality, whether that attempt be the prohibition laws or the sodomy laws. Even when enforcement does take place, there is grave doubt that it has any lasting effect on the offender. The National Association for Mental Health has put the matter succinctly: "It /deviational sexual behavior/ appears to be as deeply motivated as normal heterosexual behavior; it has not been prevented or cured by the harshest punishment."[21]

In the case of the sodomy statutes, the law is brought into even greater contempt than would ordinarily be the case of an unenforceable law because of the singular inappropriateness of the penalties it imposes. Imprisonment, for all its retributive and deterrent aspects, is, in the final analysis, supposed to work some measure of reformation and rehabilitation in the offender. But what kind of rehabilitation can result from placing sexual deviants in prisons that are segregated by sex and therefore, almost by definition, rife with homosexual activity? This makes about as much sense as trying to rehabilitate alcoholics by sentencing them to distilleries!

Because the existing sodomy laws are unenforceable does not mean that they have no effect; it simply means that their effect is very different from what legislators contemplate. In truth, these laws perpetuate a host of evils. The law shares responsibility with

other agencies, such as the family, the schools, the churches, and the information media, for shaping public attitudes. As the law now stands, it strengthens the treatment of the homosexual as a heretic. It brands millions of otherwise law-abiding and responsible citizens as criminals for no other reason but their private sexual conduct, thus exposing them to all forms of blackmail and extortion. Repeal of these laws is necessary not only as a matter of simple justice, but to remove from these harassed people the crushing burden of fear and the pervading sense of guilt and insecurity which continually dogs their steps because they are criminals in the eyes of the law. It is this psychological toll--and not the rare criminal prosecution --which blights the life of every homosexual and from which he asks to be relieved.

A second reason is that as long as homosexuals are branded as criminals, any attempt to eliminate the gross discrimination with which they are confronted when they seek employment will rest on unsure footing. It will continue to be possible to bar a homosexual from a job by pointing to his supposed criminal conduct as reason for refusing to hire him. And the risk of dismissal from a lifelong position, with the consequent total ruin of one's career, is even more important to protect against, and equally difficult to, so long as these criminal laws remain on the books. In countless other ways the stigma of criminality reduces homosexuals to virtual outlaws.

One further reason remains to be mentioned. This is a social one, and is quite distinct from any of the other reasons previously adduced. The sodomy laws--together with their attendant social sanctions--are one of the strongest factors responsible for the existence of that phenomenon best described as the homosexual ghetto,

which is to be found in all of the large cities of this country. Presumably, the existence of such subcultures, whose adherents are alienated and disaffected from the general society, is to be deplored. (The blacks are a similar case in point.) Now whenever a ghetto is reinforced by specific legal discrimination, the process of assimilation of its members into the larger society becomes difficult, if not impossible. The history of the black ghetto is impressive witness to the need for affirmative legal action if the psychological and social barriers to assimilation are to be broken down, because they exist as the minority's response to the discrimination against it. Where the law serves to perpetuate rather than eliminate the ghetto, its members feel trapped. They do not and cannot contribute their full potential to the larger society to which they belong. Indeed, they can hardly be expected to feel any sense of belonging to it. Sullen and discontented, they are open to the siren calls of every visionary and revolutionary who promises them some improvement in their lot. This is recognized today in the case of the black ghetto. It is less true of the homosexual ghetto only because the homosexual, unlike the black man, bears no physical mark of the characteristic on which the discrimination against him is based. Because he can "pass", he can escape the ghetto or need never inhabit it, but to do this, he must, in most instances, be prepared to live a life of duplicity and deceit. Outside the ghetto--and sometimes even within it--a viable existence is possible for most homosexuals only within the interstices of society, where the prying eyes of employment agencies, police, draft boards, the F.B.I., insurance agents, credit investigators, inquisitive neighbors, and all the other organizations who "snoop" on people, do not probe too deeply.

Most individuals simply do not possess the ability to live such a "lie" every minute of their lives, so they have to retreat occasionally into the ghetto, where they can "be themselves" at least part of the time.

At this point we are not considering the obvious human toll which such a twilight existence involves. What needs to be emphasized is the social cost to the community--the cost in terms of human potential unrealized--which such discrimination entails. Homosexual ranks are littered with blighted careers, with people of ability and talent unable to put their abilities to best use, whose actual occupations represent tactical compromises between their real potential and what they believe they can achieve while still maintaining their precarious place within our persecuting culture. No actual legal conviction is necessary; just a stranger's knowledge that a man or woman is homosexual and that homosexual acts are against the law is sufficient to destroy him, or at least to dry up within him the wellsprings of ambition and creative energy. All walks of life are represented: the would-be lawyer who, upon passing his state bar examination, is turned down by the character committee of the bar association and finally lands a job in a law office as a clerk; the teacher discharged and subsequently offered a job in the maintenance department of the same institution; the automobile mechanic refused a driver's license; the Ph. D. in astronomy, whose expertise is in great demand, unable to obtain a security clearance and hence denied gainful employment for most of his working life.

The question is whether the law's unsuccessful efforts to suppress private manifestations of homosexuality are worth the

serious social consequences they produce. All societies rest on certain common bonds. These form the cement of social cohesion, which the law is intended to promote and without which no viable society is possible. At one time, uniformity in religion was deemed an essential element for such cohesion. We have long since abandoned that position. It is time to recognize that state efforts to impose sexual conformity are equally odious, and make for the same kind of persecution and misery. By helping to maintain a class of sexual heretics, the sodomy laws create conditions of social instability, produce disaffection and alienation, and prevent the full utilization of human resources. In sum, by contributing to social division, they help to undermine the very cohesiveness which the laws are supposed to foster.

There are two main arguments advanced for retention of the criminal sanctions against private adult homosexual conduct. One is that removal would make for an increase in such conduct and in the numbers of people who engage in it. This is inherently improbable. Countries that lack repressive laws like ours apparently have no higher an incidence of homosexuality than we do, and those which have repealed such laws seem not to have experienced any noticeable increase. The sexual drive is so powerful and its direction so impervious to reasoned "choice" that present laws have very little effect on the incidence of homosexuality. One's predominant sexual orientation is generally fixed at least by the time he reaches adulthood, and in many cases far earlier; and anyone who thinks that repeal of the sanctions would lead to more young people drifting into a homosexual orientation must possess little faith in the appeal of heterosexuality! Except for the rare individual who is truly bisexual, homosexuality is either dominant in a person's make-up or not.

The other argument is that sodomy is inconsistent with a wholesome family structure, and repeal of the criminal sanctions would therefore contribute to the deterioration of the family as a social institution. This argument is demonstrably only a cover for blind prejudice. As far as heterosexual sodomy is concerned, there is not the slightest shred of evidence that married couples who engage in it weaken the ties that bind them. Indeed, marriage manuals are replete with statements that <u>any</u> type of sexual activity which gives pleasure to either partner and is inoffensive to the other is likely to heighten, rather than diminish, the intimacy and warmth of the relationship. In other words, where both partners are consenting, not only is "all fair in love", but "variety is the spice of life". Where the partners are unmarried heterosexuals, engaging in the prohibited acts constitutes no more of a threat to the institution of marriage than simple fornication. And prohibition of either fornication, or of sodomy in this context, assumes that stable marriages are promoted by imposing wedlock as a condition on people who merely want to go to bed together--a stupid assumption, to say the least! To employ this rationale against homosexual acts is an even greater nonsequitur, because that approach makes either of two assumptions, both of which are obviously false: (1) that the person who is predominantly heterosexual will be lured away into a life of homosexuality if ever allowed to experiment with it; and (2) that the person who is predominantly homosexual will make a good wife or husband to someone of the opposite sex, if only he is barred from homosexual expression. To put the matter bluntly, these laws, if anything, contribute more to the <u>instability</u> of marriages in our society than they do to their stability.

No account of the growing campaign for homosexual law reform would be complete without explaining that the churches themselves are now in the forefront of the reform movement. However one attempts to account for this seeming paradox, the fact remains that Christian thought throughout the West as well as that of contemporary Judaism is in the process of renouncing its anti-homosexual past. While many of these religious groups continue to consider homosexuality a sin, they no longer believe it to be a sin which the law should punish. When the Wolfenden Report was presented to the British Parliament, it was accompanied by two strong supporting memoranda, one from the Anglican Church and the other from a special Roman Catholic Advisory Committee appointed for the purpose by the Cardinal Archbishop of Westminster, the English Roman Catholic primate.[22] The other major Protestant denominations also supported the reform. In 1963, the Home Service Committee of England's Religious Society of Friends published Towards a Quaker View of Sex, which urged that homosexuality as a condition is no more to be deplored than lefthandedness and is not necessarily morally worse than heterosexuality.[23] Also in the 1960s the Roman Catholic Church of the Netherlands issued a New Catechism, which states that homosexuals are not at fault for their condition and are often hard-working and honorable people, and that the Biblical injunctions against homosexuality must be read in the context of the ancient world in which they were formulated.[24] In America, in 1969 the Council for Christian Social Action of the United Church of Christ adopted a resolution on homosexuals and the law, declaring its opposition to all laws which make private homosexual relations between consenting adults a crime and thus urging their repeal. In 1970, the Council of Church and Society of the United

Presbyterian Church in the United States, in the section of its report to the 182nd General Assembly of that denomination, entitled "Sexuality and the Human Community", said, "It is our opinion...that laws which make a felony of homosexual acts privately committed by consenting adults are morally unsupportable, contribute nothing to the public welfare, and inhibit rather than permit changes in behavior by homosexual persons."[25] The Assembly, while declining to retract the traditional view that homosexual acts are a sin, voted a resolution in support of eliminating these laws. On July 2 of the same year, the Lutheran Church in America voted approval of the following statement on homosexuality at its Fifth Biennial Convention in Minneapolis:

> Scientific research has not been able to provide conclusive evidence regarding the causes of homosexuality. Nevertheless, homosexuality is viewed biblically as a departure from the heterosexual structure of God's creation. Persons who engage in homosexual behavior are sinners only as are all other persons--alienated from God and neighbor. However, they are often the special and undeserving victims of prejudice and discrimination in law, law enforcement, cultural mores and congregational life. In relation to this area of concern, the sexual behavior of freely consenting adults in private is not an appropriate subject for legislation or police action. It is essential to see such persons as entitled to justice and understanding in church and community.

Two days later the 1970 General Assembly of the Unitarian Universalist Association, meeting in Seattle, Washington, passed a resolution urging "all peoples immediately to bring an end to all discrimination against homosexuals, homosexuality, bisexuals and bisexuality, with specific immediate attention to the following issues:

> a. Private consensual behavior between persons over the age of consent shall be the business only of those persons and not subject to legal regulation.
>
> b. A person's sexual orientation or practice shall not be a factor in the granting or renewing of Federal security clearances, visas, and the granting of citizenship or employment or term of employment in armed services."

The most vigorous opponents of reform are no longer the churches, but prosecuting attorneys, police chiefs, and vice squad men, who obviously have a vested interest in maintaining the status quo. Apparently law enforcement personnel now feel compelled to take over the former role of the clergy as protectors of the public morals!

Modern psychology has demonstrated that reasonable sexual expression is necessary to the maintenance of a happy and fulfilling life for the great majority of mankind. Here again, the churches now recognize an ineluctable fact of science. All of them have in some measure modified their older views of the role of sex in human life. Formerly Christianity justified sexual relations for one purpose only--procreation. Today every Christian denomination recognizes as a positive good in itself sexual intercourse between married persons when engaged in solely for pleasure and without prospect of pregnancy. (Even in the strictest Catholic view, such a recognition is implicit in approval of the rhythm method of birth control.) True, this recognition is limited to heterosexual forms of expression between husband and wife, but the principle itself cannot be so confined. Many people are incapable of attaining emotional fulfillment in heterosexual relations; indeed, many are totally incapable of consummating such relations at all. Laws which deny them the right to private homosexual expression with other willing adults deny them an integral part of their own personality. What more blatant violation of a man's or woman's life and liberty than to condemn him to a lifetime of sexual continence and then to send him to prison if he finds it impossible to submit! No doubt this is what H. L. A. Hart, Professor of Jurisprudence at Oxford, had in mind when in the course of his lectures at Stanford University on "Law, Liberty and Morality",

he stated that the existing laws constitute one of those "attempts to enforce sexual morality which may demand the repression of powerful instincts with which personal happiness is intimately connected."[26] In short, the proscription of private homosexual conduct between consenting adults is an intrusion upon the inviolability of the human personality and repugnant to the concept of human liberty enshrined in the American Constitution and idealized in all supposedly "free" societies.

NOTES

* This memorandum was prepared for the National Committee for Sexual Civil Liberties by Professor Walter Barnett and Dr. Arthur C. Warner, with the advice and assistance of several other members of the Committee. Although the term "sodomy" in Britain has always meant only anal intercourse, its significance has been expanded in America by statute or judicial decision to include oral-genital contacts and other forms of sexual gratification as well.

1 A. C. Kinsey, W. B. Pomeroy and C. E. Martin, Sexual Behavior in the Human Male (1949). The companion study for the fairer sex is A. C. Kinsey, W. B. Pomeroy, C. E. Martin and P. Gebhard, Sexual Behavior in the Human Female (1953).

2 See Leviticus 18: 22-23, and 20: 13-16, which prescribe the penalty of death both for male homosexual intercourse and for bestiality. Compare Exodus 22: 18: "Thou shalt not suffer a witch to live."

3 F. Pollock and F. W. Maitland, History of English Law (1895), Vol. 2, p. 554.

4 See H. C. Lea, History of the Inquisition of the Middle Ages (1955), Vol. 1, note on p. 115; E. Westermarck, The Origin and Development of the Moral Ideas (1917), Vol. II, pp. 484-90; G. R. Taylor, "Historical and Mythological Aspects of Homosexuality", in J. Marmor (ed.), Sexual Inversion: The Multiple Roots of Homosexuality (1965), pp. 144-46.

5 For years the Air Force used a similar basis for discharging "suspected" homosexuals. Air Force Regulation 35-66 (17 March 1959) Section B 12 c (1) reads: "Class III /homosexuals/: Those cases where a member of the Air Force exhibits, professes, or admits to homosexual tendencies, or habitually associates with persons known to him to be homosexuals /emphasis added/, but there is no evidence that he has, while a member of the Air Force, engaged in one or more homosexual acts, or has proposed or attempted to perform an act of homosexuality." Class III cases were given either an honorable or a general discharge.

6 See St. Thomas Aquinas, Summa Theologica, II-II, Q. cliv, 1, 11, and particularly 12. The idea of the "naturalness" or "unnaturalness of different forms of sexual conduct is an ecclesiastical notion stemming from the Church's theory of natural law, which itself was built on antecedents in Greek and Roman philosophy, particularly Aristotle. "Natural law goes back to God. Its precepts derive their authority from the fact that they are confirmed and implemented by Revelation." A. P. d'Entrèves, Natural Law (1951), p. 34. Thus anything which is contrary to natural law, i. e., anything which is "unnatural" or "against nature", is against the will of God. Since it is presupposed that God had certain purposes in mind when he created the world, it is man's duty to act in accord with the divine intentions. Everything which is consonant with God's purpose is "natural" and anything contrary to his purpose is against nature or "unnatural". One of God's purposes for man is assumed to be procreation, in accordance with the Biblical

injunction, "Be fruitful and multiply." Genesis 1: 28. Hence any sexual act which defeats this alleged divine purpose is "unnatural" and sinful. The law of the "crime against nature" has its roots in this ecclesiastical construct. Even if one accepts the idea of a divine purpose, the fact remains that men have been arguing over what constitutes God's intentions since the beginning of time, and for the state today to continue lending its hand in the enforcement of any such presumed intentions constitutes a blatant form of government establishment of religion.

7 C. S. Ford and F. A. Beach, "Homosexual Behavior" in Patterns of Sexual Behavior (1951), chapter 7.

8 T. Szasz, The Manufacture of Madness: A Comparative Study of the Mental Health Movement (1970). See also A. Karlen, Sexuality and Homosexuality: A New View (1971).

9 W. Churchill, Homosexual Behavior Among Males: A Cross-Cultural and Cross-Species Investigation (1967), p. 69.

10 See M. Schofield (pseud. G. Westwood), Society and the Homosexual (1952), p. 147, and The Sociological Aspects of Homosexuality (1965), pp. 147, 149, 208, and 212; E. M. Schur, Crimes Without Victims: Deviant Behavior and Public Policy (1965), p. 74. See also Note, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County," U.C.L.A. Law Review, Vol. 13, p. 664 (1966), and particularly pp. 738 and n. 315 on p. 738. The UCLA group also found (p. 787) that every psychiatrist interviewed, virtually all legal and medical authorities, and most of the judges sitting in the Criminal Division of the Superior Court of Los Angeles reject the argument that homosexuals are a menace to society in general and to children in particular. The Kinsey group found (1) that the homosexual offender against children is the least homosexually and the most heterosexually oriented of all homosexual offenders, (2) that the homosexual offender against minors (age 12 to 15) has retreated from competition with adult homosexuals or is a situational offender, and (3) that the homosexual offender against adults is not interested in prepubescent boys, prefers (76%) partners over 18, and especially partners of his own age bracket (25-34). J. Gagnon, P. H. Gebhard, W. B. Pomeroy and C. V. Christenson, Sex Offenders--An Analysis of Types (1965), pp. 285, 323, 345. M. Schofield, in Sociological Aspects of Homosexuality (1965), pp. 31-32, 81-82, and 109-111, found that only 18% of his subjects had had their first homosexual experience with an adult. Other investigations confirm that since people persist in the type of behavior in which they have discovered satisfaction, adults who have homosexual relations with other adults seldom turn to children and are unlikely to do so. Wolfenden Report, Report of the Committee on Homosexual Offences and Prostitution (authorized Amer. ed. 1963), para. 57; Slovenko and Phillips, "Psychosexuality and the Criminal Law", Vanderbilt Law Review, Vol. 15, n. 84 on pp. 823-24 (1962), quoting from the Report of the New Jersey Commission on the Habitual Sex Offender (1950). On this general subject,,see also J.

Gagnon and W. Simon, Sexual Encounters Between Adults and Children (a SIECUS booklet, #G11).

11 Wolfenden Report, supra note 10, at para. 61.

12 Id., para. 13.

13 American Law Institute, Model Penal Code, Tentative Draft No. 4 (1955), comments on article 207.5 at pp. 278-79.

14 U. S. Department of Health, Education and Welfare, National Institute of Mental Health, Final Report of the Task Force on Homosexuality (1969), p. 1. This is usually referred to as the Hooker Report, after the name of the task force's chairwoman, Dr. Evelyn G. Hooker.

15 Id., pp. 18-19.

16 Id., p. 2.

17 National Association for Mental Health, Position Statement on Homosexuality and Mental Illness, approved by the Professional Advisory Council on September 17, 1970, and by the Executive Committee on October 17, 1970.

18 American Assembly, The Health of Americans, being the Final Report of the 37th American Assembly, held at Arden House, Harriman, New York, 23-26 April 1970 (privately printed pamphlet), p. 3.

19 Id., p. 7.

20 See M. Ploscowe, Sex and the Law (1951), p. 209, quoting from a report of the Group for the Advancement of Psychiatry (No. 9, "Psychiatrically Deviated Sex Offenders," 1950). The Wolfenden Report, supra note 10, at para. 40 n., alludes to estimates in Britain running all the way from 2,500 to 1, to 30,000 to 1.

21 See note 17 supra.

22 The report of the Roman Catholic Committee appears in the Dublin Review, Vol. 230, No. 471 (Summer 1956), p. 57.

23 Friends Home Service Committee, Towards a Quaker View of Sex, An Essay by a Group of Friends (rev. ed. 1964), pp. 26-42.

24 De Nieuwe Catechismus, published in English translation as A New Catechism: Catholic Faith for Adults (N. Y., Herder & Herder, 1969). The statement is from this translation, Part IV, p. 384.

25 General Assembly of the United Presbyterian Church in the U.S.A., Sexuality and the Human Community (1970), p. 20. See also R. Weltge (ed.), The Same Sex--An Appraisal of Homosexuality (1969), and W. D. Oberholtzer (ed.), Is Gay Good: Ethics, Theology and Homosexuality (1971).

26 H. L. A. Hart, Law, Liberty and Morality (1963), p. 43.