This was written to explain why the sodomy laws should be repealed, or rather, as one should say, reformed. It deliberately eschewed all legal and constitutional considerations, and confined itself to a discussion of the social and political reasons for such reform. Under the title "Why Reform the Sodomy Laws?", and with Prof. Walter Barnett's name added, it was subsequently submitted to the sub-committee of the Judiciary Committee of the U.S. Senate -- the McClellan Committee -- then considering the proposed federal criminal code. Under that title it appeared in one of the several volumes of the committee's hearings which were published by the U.S. Government Printing Office.

All serious efforts to remove sodomy between consenting adults in private from the criminal statute book in the English-speaking world begin with the seminal production of Kinsey, Pomeroy, and Martin, Sexual Behavior in the Human Male, the so-called "Kinsey Report," which first appeared 22 years ago.[1] The then-startling conclusions which that mammoth piece of investigation produced -- conclusions subsequently buttressed by further studies -- shattered once and for all the assumptions on which had rested our laws having to do with sex and morals. The Kinsey Report made its greatest impact in the field of homosexuality, and, together with related studies, played a central role in destroying the mass of myth and superstition which had, until then, surrounded our knowledge of the subject since Biblical times.

The sodomy laws which we are asking the legislature to repeal are a 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 assimilated to the common law the entire criminal jurisdiction which had hitherto been the prerogative of the so-called courts Christian, that is, the ecclesiastical tribunals of the Roman Church. Like perjury, blasphemy, adultery, and numerous other offenses, homosexuality had been an offense against the ecclesiastical law until the statute of 25 Henry VIII, cap. 6 was enacted in 1533 for "the punishment of the vice of buggery" in the King's courts. The very term "bugger" betokens the fact that the laws against homosexuality form part of the dark history of heresy and persecution.

In mediaeval times, the most heinous crimes were heresy, homosexuality and witchcraft, the punishment for any of which was death.[2] Anyone suspected of heresy was automatically believed to be a homosexual and vice versa. 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 [and] 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] The common name for both heretic and homosexual was "bugger," which is a corruption of "Bulgar," since the Cathari, an important mediaeval heretical sect, originated in Bulgaria.[4]

As G. Rattray Taylor has pointed out, "heresy became a sensual rather than a doctrinal concept; to say a man was a heretic was to say he was a homosexual, and vice versa."[5] 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 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 mediaeval doctrine is still strong. It is still true that anyone openly associating with known homosexuals or protecting them from harassment -- and, until very recently, those who advocated abolition of the penal and social sanctions against homosexuality -- themselves ran the risk of falling under the suspicion of being homosexual.

There is another legacy of the Church's attitude toward homosexuality 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. On the contrary, any crime he might commit against a heretic was deemed by the

Church a praiseworthy act. To assault and rob a heretic or a homosexual -- and the two, as we have seen, were considered synonymous -- was held to be a positive good, and to murder a heretic or homosexual was the supreme virtue. The Church not only absolved the perpetrator of any crime against a heretic or homosexual; it encouraged such crimes by holding them to be spiritually meritorious. 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." It is no exaggeration to say that homosexuals continue to be treated as heretics today.

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 the etiology of homosexuality. Two of these myths, in particular, should be noted. The first is the notion, fostered by mediaeval ecclesiastical writers on sex, that homosexuality is a perversion of the so-called "normal" mode of sexual relations, that is, that homosexuality is "unnatural." The evidence we now have is overwhelming that homosexuality, like heterosexuality, is a natural part of the human condition. No one with any claim to veracity can today maintain that homosexuality is a rare or unnatural phenomenon. In truth, studies such as those of Ford and Beach have conclusively demonstrated that homosexuality is not only an integral part of man, but that it is prevalent amongst all mammals.[6]

Sexual conduct which, according to the never-refuted evidence of Kinsey, occurs among more than one-third of the male population of this country cannot be dismissed as occasional. When to these figures are added the Kinsey statistics for those who have had manifest homosexual urges, but without ever having experienced overt homosexual contact to the point of orgasm, the immensity of the

number of persons in some way involved in homosexuality can be appreciated, for we are then talking about half the male population of this country. To describe their conduct as "unnatural" is to indulge in fantasy, not reality. As Wainwright Churchill, the eminent psychiatrist, 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.'"[7]

As D. J. West stated, homosexual "behavior arises out of a natural biological propensity."[8]

Even this does not exhaust the matter, because sodomy is not exclusively a homosexual phenomenon. If to those who engage in homosexual sodomy -- about one third of the male population -- are added those who engage in heterosexual sodomy, which is equally against the law, one can appreciate how the law's attempt to punish this form of sexual conduct makes criminals at some time or other of the majority of Americans. This is true even though we exclude from consideration all those, mentioned earlier, who are homosexual in orientation but have never engaged in overt homosexual contact, plus those whose homosexual contacts involve conduct short of sodomy, which is generally not against the law of most states when it takes place in private.

The second myth which we should note is the belief, still prevalent, that homosexuals have a peculiar penchant for proselytizing others and for corrupting the young. This myth is particularly wide-spread amongst police officers and other law enforcement officials, who frequently justify their sordid entrapment of homosexuals under existing laws as necessary to protect children from molestation by "perverts." Today, in our post-Kinsey world, informed people know, and

law enforcement officers should know that the propensity to engage in sexual acts with children has no connection whatsoever 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 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 having sex with young boys than are male heterosexuals prone to having sex with young girls.[9] 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 has no connection with the fact that such men are heterosexuals. Both are pathological conditions, which homosexuality is not. Our very language recognizes the difference; sexual attraction by men for boys is known as paederasty or paedophilia, not homosexuality. There is no connection between the two. That is why there is no more justification for barring male homosexuals as teachers in boys' schools than there is for excluding male heterosexuals as teachers in girls' schools.

The Kinsey Report and its sequelae have caused a thorough re-examination of the law and its relations to morals. The most prestigious enterprise was the report in 1957 in England of the 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 in ringing terms 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."[10]

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."[11] The committee's recommendations were carried out by Parliament a decade later by the repeal of the English sodomy laws to the extent necessary.

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:

> "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."[12]

In 1961 the state of Illinois not only adopted these recommendations by removing all criminal sanctions against private homosexual conduct between consenting adults, but went beyond them by repealing its sexual solicitation statute. There is no evidence that the heavens have fallen in Illinois since this reform nine years ago. On the contrary, there is ample evidence that the blackmail and extortion which had frequently attended these quondam Illinois 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. However, this repeal will not take effect until

later this year. More recently, the penal code revision commissions of Oregon and Hawaii recommended to their respective legislatures that sodomy between consenting adults in private be legalized, a recommendation which was made by the Temporary State Commission on Revision of the Penal Law and Criminal Code in New York almost seven years ago.

In September, 1967, Dr. Stanley Yolles, Director of the National Institute of Mental Health, appointed a so-called "task force on homosexuality." The fifteen members of this group, which was composed of 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."[13] The final report of this task force, commonly known as the "Hooker Report" from the name of its chairman, Dr. Evelyn Hooker, research psychologist at the University of California, Los Angeles, appeared in 1969. It had this to say regarding the sodomy laws:

> "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 /National Institute of Mental Health/ support ongoing studies of the legal and societal implications of such a change . . . ."[14]

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 dis-

agree with the majority's recommendations just quoted. They merely "maintain[ed] that consideration of social policy issues should be deferred until further scientific evidence is available. . . ."[15]

The Hooker Report is not the only recognition at the Federal Government level that existing sodomy laws should be repealed where they punish private sexual conduct between consenting adults. The recently drafted Federal Criminal Code, proposed by the National Commission on Reform of Federal Criminal Laws -- a body established by Congress in Public Law 89-801 -- specifically omits sodomy as a crime when it occurs in private between consenting adults.[16] These recommendations have now been submitted to Congress for adoption.

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 of Mental Health, the most important and prestigious organization in the field, recently stated unequivocally "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]

Amongst 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 for the need for sodomy law reform. What must now be considered is why anyone should insist on repealing these statutes since, 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.

The reasons are cogent and pressing. To maintain on the statute book laws which are not intended to be enforced and incapable of enforcement violates every rational principle of jurisprudence. It not only brings the law itself into general 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 has frequently been pointed out in the case of sodomy, there are at least 100,000 offenses for every prosecution, the law itself becomes a mockery and is frequently employed as an instrument for private vengeance. The occasional prosecution which does take place can serve no social purpose because laws which are unenforceable can have no legitimate social purpose. To suggest that, even though unenforceable, the law should remain on the statute book for purposes of moral suasion is to subscribe to the fiction that morality can be inculcated by unenforceable sanctions. For what, indeed, are the occasions when the private homo-

sexual 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, or where a police officer accidently stumbles upon the participants and apprehends them _flagrante delicto_, 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 -- and private consensual sodomy between adults is _the_ crime without victims _par excellence_ -- 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 the attempt be the prohibition laws or the sodomy laws.

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 criminal. But what kind of rehabilitation can result from placing a homosexual in a prison, which, by definition, is rife with homosexuality? This makes as much sense as rehabilitating 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, the sodomy laws perpetuate a host of evils. Law, like religion, is one of the most important educative forces within society. The law shares responsibility with other agencies, such as the church, the schools, and the family for shaping public attitudes and mores. 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 reason but their private sexual conduct, thus exposing them to all forms of black-

mail 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 prosecutions -- which blights the life of every homosexual and from which he asks to be relieved.

There is another and equally compelling reason why the sodomy laws should be repealed. As long as homosexuals are branded as criminals, any attempt to eliminate the gross discrimination with which homosexuals are confronted when they seek employment will rest on parlous grounds. It will continue to be possible to bar a homosexual from a job by pointing to his criminal conduct as reason for refusing to hire him. Anti-discrimination ordinances without sodomy law reform may or may not be able to cure the problem, but questions stemming from the fact of criminality are bound to remain. In countless other ways the stigma of criminality prevents homosexuals from becoming first-class citizens.

One further reason remains to be mentioned. This is a sociological 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 deviant subculture best described as the homosexual ghetto, a phenomenon to be found in all of the very large cities of this country. Like all ghettos, the homosexual one has its distinctive argot, its peculiar dress, its own mannerisms -- in short, its own general life styles. Where a ghetto is the result of linguistic, religious and/or other cultural differences unconnected with any legal discrimination, the way is always open for members -- or at least their children of the new generation -- to leave the ghetto, and through the process of acculturation, to join the mainstream of American life. In this manner the American melting pot served to dissolve the earlier Italian, Jewish, and other ethnic ghettos which once existed in many American cities. The

inhabitants of those ghettos were objects of open economic and social discrimination at the time of their existence, but there were never any legal barriers to the disappearance of these separate enclaves.

The same is not true, however, where a ghetto is reinforced by specific legal discrimination. There the process of acculturation becomes difficult, if not impossible. The history of the black ghetto is impressive witness to the need for affirmative legal action if these barriers are to be broken, 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, and there rises a subculture which is not only distinct from the general society, but one which is alienated, disgruntled, and disaffected. The members of such a ghetto do not and cannot contribute their full potential to the larger society to which they belong. 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 in the case of the homosexual ghetto only because the white homosexual, unlike the black man, is not indelibly marked by color with the raison d'être for the discrimination against him. Because he can "pass," he can escape the ghetto or need never live in it, but to do this he must, in most instances, be prepared to live a life of deviousness, duplicity, and deceit. Outside of 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, inquisitive neighbors, and all the other organizations whose presence involves some form of investigation, do not probe too deeply.

At this point we are not considering the obvious human toll which such a twilight existence involves. What needs to be noted is the social cost to the community, the cost in terms of human potential unrealized, which such discrimi-

nation 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 what they are capable of achieving and what they are in fact able to achieve if they are to maintain their precarious place within our persecuting culture. Cases to confirm this are legion. No actual legal conviction is necessary; just a stranger's knowledge that a man is homosexual and that homosexuality is against the law is sufficient to destroy him. All walks of life are represented -- the would-be lawyer who, upon passing his state bar examinations, is turned down by the character committee of the bar association and finally finds a job in a law office helping with briefs, 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 field of expertise is one of those in greatest demand, unable to obtain a security clearance, and hence denied gainful employment for most of his working life.

The question to be considered is whether the law's unsuccessful efforts to suppress private manifestations of homosexuality are worth the serious social consequences which 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 a quintessential element for such cohesion. Long after the Protestant Reformation the political doctrine of <u>cuius regio, eius religio</u> remained. This stood for the principle that the religion of any country was to be determined by its prince -- that is, imposed by the secular state -- and was to be uniform throughout his realm. We have long since abandoned any attempt at religious conformity. 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. They also cause the same kind of social harm as did heresy hunting. By helping to main-

tain a class of sexual heretics, the sodomy laws create conditions of social instability, produce political disaffection and alienation, and prevent the full utilization of human resources. In sum, by contributing to social division, they help to undermine the very social stability and cohesiveness which the laws are supposed to foster.

In this connection, it should be noted that removal of criminal sanctions against private homosexual conduct between consenting adults would not make for an increase in homosexuality. The sexual drive is so powerful that present laws clearly have no effect on the incidence of homosexuality. Because there is as much homosexuality now as there would be without the sodomy laws, their repeal would lead to no significant increase.

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 explain this seeming paradox, whether in terms of penance for their mediaeval past or a sincere desire to come to terms with the ineluctable facts of modern science, 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. This has obviously required a great deal of questioning and soul-searching on the part of the different churches, but we need not concern ourselves here with the particular philosophic route by which they have reached their now widely-shared opinion that the laws against private homosexual acts between consenting adults should be repealed. It is significant that, when the Wolfenden Report was presented to 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.

We mention this because the spokesmen for the Roman Catholic Church in this state who constituted the chief lobbyists against a similar repeal of the New York sodomy law in 1965 -- it will be remembered that the New York law was repealed but then immediately re-enacted out of deference to what was primarily Roman Catholic opposition -- conveyed the impression that they represented the official position of the Roman Catholic Church when, in fact, they spoke only for certain ecclesiastical officials. The argument they used to support their position was peculiar indeed. Sodomy in private between consenting adults, they maintained, must continue to be punished in order to preserve the family. This was certainly a novel argument. It suggests that, after having for centuries considered sodomy a rare and "unnatural" vice, these churchmen were now fearful that sodomy held such wide-spread appeal that it threatened the marriage bed. We submit that it is a pretty far-gone marriage indeed -- clearly one not worth saving -- if one or both of the marriage partners can be held to their nuptial vows only by the threat of imprisonment if they indulge their homosexual propensities.

Certainly these ecclesiastical representatives could not have been serious when they offered such specious reasoning. Everyone knows that, if the institution of marriage does in fact require legal protection from competing sexual attractions, then it is against heterosexual lures in the shape of adultery laws where that protection lies. This was clearly recognized by the New York legislature when, in enacting its present adultery law, section 255.17 of the penal code, it placed adultery under title "O" of the code, where are to be found all the "offenses against marriage, the family and the welfare of children." By contrast, the sodomy law, section 130.38, was placed under article 130, under which are subsumed all "sex offenses", thus proving that it was the character of the sexual act which caused the legislature to punish sodomy, and not any claim that it constituted a threat to the family. We ask the legislature to recognize that it is not the state's province to punish sin.

Fortunately, most enlightened churchmen now recognize the inequity of the present sodomy laws, so much so that it is probably not too much of an exaggeration to say that, if the matter of sodomy law reform were left to the clergy, the sodomy laws of most states would be repealed promptly. This does not mean that the churches no longer consider sodomy to be a sin; it means only that they recognize that sin is not the business of the criminal law. The most vigorous opponents of reform are no longer the churches, but law enforcement officers and vice-squad men, who obviously have a vested interest in maintaining the status quo. It is the police who have now taken over the former role of the clergy as protectors of public morals. In this connection, it is not without significance that the sole dissenter on the Wolfenden Committee was James Adair, Procurator-Fiscal of Scotland, that is, Scotland's chief prosecutor. The burden of Adair's objections to the Wolfenden recommendations was that, if they were adopted, "the moral force of the law will be weakened." [20] We think the public interest is ill served when police substitute for clergymen as advisors on morals.

As indicated previously, when the sodomy laws were originally enacted, men believed that the conduct which they were proscribing was not only immoral, but also unnatural, a rara avis, or rare bird. The supposed rarity of homosexuality constituted good warrant for its punishment. Today, in our post-Kinsey era, it is merely a truism to state that homosexuality is a natural part of the human condition. Modern psychology and biology have also demonstrated that reasonable sexual expression is as necessary an element to the maintenance of a viable life as is food.

Here again, the churches now recognize what scientific investigation has demonstrated. All of them have in some measure modified their older views as to the role of sex in human life. In former ages, the Church justified sexual relations for one purpose only -- procreation. Today every Christian denomination recognizes as a positive good in itself sexual intercourse between married

couples when engaged in solely for pleasure and without prospect of pregnancy. True, this recognition is limited to heterosexual forms of expression between married couples, but the principle itself is far broader. Many people are incapable of obtaining the necessary satisfaction from heterosexual relations. Laws which deny them the right to private homosexual expression with other willing adults deny them an integral part of their own personality. In short, to deny any adult the means of private sexual expression with other willing adults in the manner dictated by his own personality is to deprive him of a part of his own life. What more blatant violation of a man's life and liberty than to condemn him to a lifetime of sexual continence and then to send him to prison if he refuses to submit!

No doubt this is what H.L.A. Hart, Professor of Jurisprudence at Oxford, had in mind when, while delivering the Harry Camp lectures at Stanford University, he stated that the existing sodomy laws constituted one of those "attempts to enforce sexual morality which may demand the repression of powerful instincts with which personal happiness is intimately connected."[21] 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 as recognized in all supposedly free societies.

At the very least, one has a right to expect that the state of New York, which has always been in the van in the enactment of progressive legislation, will do at least as much as Illinois and Connecticut, where sodomy law reform is now on the statute book. This is particularly relevant because, alone among the states, New York has for years regarded sodomy as a relatively minor offense, treating it as a misdemeanor, the maximum penalty for which was reduced to three months' imprisonment by the present penal code. This is in marked contrast to the situation in every other jurisdiction which retains its sodomy laws, in almost all of which sodomy remains a serious felony.

In conclusion, permit us to quote from the report of the aforementioned

Roman Catholic Committee, which we believe puts the whole matter better than it can be found in most places. This committee "was charged with the task of presenting to the . . . /Wolfenden/ Committee a reasoned account of Catholic moral teaching upon the subject . . . and for this purpose the members of the committee were chosen so as to include as wide a range of professional opinion as possible, consisting of a Professor of Moral Theology, a parish priest, a queen's counsel, a doctor of medicine specializing in psychiatry, a psychiatric social worker and a welfare officer, under the chairmanship of Mgr. G. A. Tomlinson, Catholic Chaplain to London University."[22] This committee concluded "that penal sanctions are not justified for the purpose of attempting to restrain sins against sexual morality committed in private by responsible adults" because:

"(a) they are ineffectual;
(b) they are inequitable . . . ;
(c) they involve severities disproportionate to the offence committed;
(d) they undoubtedly give scope for blackmail and other forms of corruption."[23]

The committee rested its conclusions on the following reasoning:

> "The existing law treats all homosexual acts committed between male persons of whatever ages as criminal offences. Bearing in mind the principle that to be just the criminal law must be based upon the moral law, <u>but avoiding the false logic of the conclusion that therefore all moral offences may rightly be the subject of civil legislation</u>, the Committee agreed that the end of the civil law was to maintain and safeguard the common good. Moral offences therefore which of their nature tend to subvert the common good are rightly the subject of criminal enactments and this principle logically implies the conclusion that while homosexual acts which include the corruption of young persons or which constitute an offence against public decency are justly punishable as crimes, acts committed in private by consenting adults do not themselves militate against the common good of citizens and are therefore not justly subject to the criminal law. Admittedly the present law is an expression of detestation of such acts by the normal public, but such a motive is not sufficient reason for making them crimes at law, mortal sins though they are. The witness of the history of certain Puritan States is sufficient warning against the idea that individuals can be made morally good by Act of Parliament."[24]

But to leave matters here would be to leave them unfinished. One cannot pass over the fact that the churches themselves are no longer unanimous in con-

demning homosexuality as sinful. The views of the Roman Catholic Committee just quoted were an expression of religious opinion fifteen years ago. The majority of clergymen, it is true, continue to hold that homosexual conduct is a sin, even though they believe it should not be criminal. But a growing minority of the clergy of all denominations go further, and maintain that homosexuality per se is not a sin. Their views reflect the revolution in religious thought which has taken place in the entire area of sex, from birth control through abortion to homosexuality. Their position is best put by Dr. Norman Pittenger, the eminent Episcopal clergyman and church scholar, whose writings on a host of different religious subjects have earned him world wide acclaim. An American, now resident in England as a senior member of King's College, Cambridge, Dr. Pittenger asks and answers the following question: "Granted that homosexual acts are not criminal, are they sinful? . . . My belief is that in and of themselves they are not."[25]

Dr. Pittenger states:

> "But, it may be said, historically the Christian tradition has regarded homosexuality as in fact a perversion or distortion. I know that perfectly well. But it does not lead me to change my view. This is not because I have the foolhardiness or the presumption to claim that some new revelation of truth has been given to me and to the hundreds of Christian clergymen and laypeople who have written to tell me that they agree with me. The reason for my contradiction of the generally accepted position in past ages is based on something else. It is the consequence of the honest recognition that we today possess many more facts about the subject, hence are able to make a saner and more balanced judgement, than our forbears. To say this is simply to state a fact. . . . It is not at all difficult to see how that traditional attitude developed, out of what earlier ideas, in what circumstances, and in the light of what views of human nature were then naturally accepted -- indeed taken for granted. But we may feel obliged to disagree; many of us do."[26]

In speaking of the "accumulated wisdom of great Christian thinkers," Dr. Pittenger cautions us to remember that their

> "wisdom and insight is never to be trusted as if it were the utterance of God from on high. . . . we need also to see that even the wisest of them was not infallible. . . . it may be that we shall have to disagree with those ancient worthies in this or that, perhaps in many, of their views."[27]

This means that even in the area of morals, the sodomy laws no longer reflect a unanimous body of ecclesiastical opinion. To this we would only add that, with the recent repeal of such laws in England, East and West Germany, Austria, and in Canada, the United States now shares with Russia the dubious distinction of standing virtually alone amongst those nations of the world with Judeo-Christian traditions that perpetuate such legal barbarities.

Respectfully submitted,

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7 January 1971

NOTES

1. Alfred C. Kinsey, Wardell B. Pomeroy & Clyde E. Martin, Sexual Behavior in the Human Male (Philadelphia, 1948).

2. Compare Exodus 22:18, "Thou shalt not suffer a witch to live."

3. Sir Frederick Pollock & Frederic Maitland, The History of English Law (Cambridge, 1923), Vol. II, p. 556.

4. See Henry Charles Lea, A History of the Inquisition of the Middle Ages (New York, 1955), Vol. I, note on p. 115; Edward Westermarck, The Origin and Development of the Moral Ideas (London, 1917), Vol. II, pp. 484-490 passim; Gordon Rattray Taylor, "Historical and Mythological Aspects of Homosexuality," in Judd Marmor, ed., Sexual Inversion: The Multiple Roots of Homosexuality (New York, 1965), pp. 144-146. It is interesting to note that, if homosexuality and heresy were crimes without victims, then witchcraft was a crime without criminals. See Elliott P. Currie, "Crimes Without Criminals: Witchcraft and its Control in Renaissance Europe," Law and Society Review, Vol. III, No. 1 (August, 1968), p. 7 et seq.

5. G. Rattray Taylor, Sex in History (London, 1953), p. 131.

6. C. S. Ford and F. A. Beach, Patterns of Sexual Behavior (New York, 1951).

7. Wainwright Churchill, Homosexual Behavior among Males: A Cross-Cultural and Cross-Species Investigation (New York, 1967), p. 69. 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. We must remember that, whatever its later development, "natural law," as Professor d'Entrèves, the world-renowned Oxford authority on natural law, has pointed out, "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 (London, 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 accordance 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 attempts to defeat this alleged divine purpose is deemed by some churches to be "unnatural" and sinful. Obviously this whole ecclesiastical construct rests on acceptance of certain religious postulates, and, for the State today to lend its hand in the enforcement of such doctrines constitutes a blatant form of Government enforcement of religion. In truth, whenever the law speaks of the "crime against nature," it is subscribing to the religious doctrine that homosexuality is "unnatural." 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 Biblical times, and, for any human being or any church body to claim that he or it knows what the Almighty's purposes are is an act of sheer intellectual arrogance.

8. D. J. West, Homosexuality (3rd edition, London, 1968), p. 43.

9. Michael Schofield (pseud. Gordon Westwood), Society and the Homosexual (London, 1952), p. 147; M. Schofield, The Sociological Aspects of Homosexuality (London, 1965), p. 149; Edwin M. Schur, Crimes Without Victims: Deviant Behavior and Public Policy (Englewood Cliffs, New Jersey, 1965), p. 74.

10. Committee on Homosexual Offences and Prostitution, Report, command paper 247 (Home Office, London, 1957), p. 24. Hereafter cited as Wolfenden Report.

11. Ibid., pp. 9-10.

12. American Law Institute, Model Penal Code, Tentative Draft No. 4 (Philadelphia, 1955), comments on article 207.5 at pp. 278-279.

13. Task Force on Homosexuality, Final Report (U.S. Government Printing Office, Washington, 1969), p. 1. Hereafter cited as Hooker Report.

14. Ibid., pp. 18-19.

15. Ibid., p. 2.

16. See National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code (U.S. Government Printing Office, Washington, 1970).

17. National Association of Mental Health, Position Statement, 17 September 1970.

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

19. Ibid., p. 7.

20. Wolfenden Report, op. cit., p. 119.

21. Herbert Lionel Adolphus Hart, Law, Liberty and Morality (Stanford, California, 1963), p. 43.

22. Roman Catholic Advisory Committee on Prostitution and Homosexual Offences and the Existing Law, "Homosexuality, Prostitution and the Law," comprising the introduction to the Report of said committee in Dublin Review (London, Summer 1956), Vol. 230, No. 471, p. 57. Hereafter cited as Introduction to Report of Roman Catholic Committee.

23. Roman Catholic Advisory Committee on Prostitution and Homosexual Offences and the Existing Law, "Report," Dublin Review, op. cit., pp. 61-62.

24. Introduction to Report of Roman Catholic Committee, Dublin Review, op. cit., pp. 57-58. Italics the undersigners'.

25. Norman Pittenger, Time for Consent: A Christian's Approach to Homosexuality (London, 1970), p. 29.

26. Ibid., p. 21.

27. Ibid., p. 106.