Sex and the Law

Thomas F. Coleman

During the past decade, our legal system has been confronted with a revolution. The sexual mores and behavior of Americans have changed drastically, but the body of sex law, both legislative and judicial, is based on the politics of another era. Judges, legislators, and administrators have been faced with the task of closing the gap between "what is" and "what should be." They have also reevaluated the fundamental principles upon which many laws regulating sexual behavior have been based. Some of the areas undergoing reanalysis in legal circles are rape, transsexualism, abortion, contraception, homosexuality, alternative love relationships, and prostitution.

Sexual law seems to be a narrow specialty. But a closer look shows that it is an area so broad that it will be impossible to discuss fully all the major developments over the past ten years. I will give an overview of certain areas, spotlighting major court cases or legislative development. However, consensual sexual behavior and homosexual civil rights have created the most controversy and initiated the most change and will be discussed in detail.

Rape, Prostitution, and Transsexualism

The traditional rape case usually involves two witnesses—the male defendant and the female victim. While courts have dealt with cases of homosexual rape, the overwhelming majority are heterosexual. In most cases the only prosecution witness to the crime is the female victim. The trial becomes a credibility battle between the female victim and the male defendant. The jury usually has two issues to decide: whether sexual intercourse has occurred and whether the sex act was committed against the will of the victim. Since the trial is a credibility contest, the defense attorney uses every lawful tactic to discredit the female victim. The two devices used most frequently are the introduction of evidence about the past sexual history of the victim to show that she is immoral or promiscuous and the invocation of "cautionary instruction." The law in most states requires the judge to instruct the jury at the close of the case to "examine the testimony of the complaining witness with caution." However, the testimony of other witnesses is not to be viewed in this way. The law also allows the defense attorney to ask the female victim about her past sexual life—the number of sexual experiences she has had, with whom she has had them, and other similar details. The law assumes that if she is of unchaste character that it is likely that she consented on this particular occasion.

Feminists have developed an organized effort to change the law with respect to the cautionary instruction and cross-examination of the rape victim about her past sexual history. Legislation has been introduced in many states to shift the focus of rape cases from victim to defendant. Challenges have been made in court as well. After legislative debates over the past four to five years, more than one-third of the states have enacted laws prohibiting use of cautionary instruction and cross-examination of the rape victim about her past sexual conduct.

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Efforts to decriminalize prostitution have met with little or no success despite the efforts of civil libertarians. Although some state bar associations have adopted resolutions calling for decriminalization of prostitution, the American Bar Association narrowly defeated such a resolution. Every state in the country has laws regulating prostitution, soliciting for prostitution, or loitering for the purpose of prostitution. Nevada is the only state in which municipalities are given the option to allow prostitution. Numerous court challenges have been made attacking either the prostitution laws themselves or the methods of police enforcement. So far the existing laws

and police procedures have survived most attacks.

With the refinement of surgical techniques, more persons are undergoing sex-reassignment surgery than ever before. The courts and legislatures have not been prepared for the legal implications of male-to-female or female-to-male changes in gender. Transsexuals have demanded the right to change the gender indication on their birth certificates, to be free from employment discrimination, and to be entitled to a name change. They have called for an end to police harassment. In the case of *M. T. v. J. T.*, the New Jersey Supreme Court was faced with the question of determining a person's gender identity for purposes of marriage. A postoperative male-to-female transsexual had married the male defendant.

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Although the latter knew of the gender change prior to the marriage, the defendant attempted to avoid support when the couple separated. He alleged that the marriage was void because the plaintiff was "really a man." In upholding the validity of the marriage, the court stated that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche, or psychological sex, then identity by sex must be governed by the congruence of these standards."

In recent federal cases, however, transsexuals have not received judicial recognition of their civil rights. In two such cases, federal judges have held that discrimination against transsexuals in private employment is not a violation of the federal civil rights statute's prohibition against sex discrimination. The earliest reported appellate case dealing with transsexualism that I could find was decided by a New York court in 1966. That court upheld the refusal of the City Board of Health to change the sex designation on a transsexual's birth certificate. Since that decision, an additional fifteen appellate cases have discussed and often expanded the rights of transsexuals.

Private Sexual Behavior

Most of the laws in existence in the mid-1960s that regulated sexual behavior had been enacted at the turn of the century or in the early 1900s. While these codes were probably reflective of societal attitudes when they were adopted, there can be no doubt that over the years these attitudes have changed drastically.

In the late 1950s the American Law Institute, with the assistance of judges, lawyers, and legal scholars, drafted a "Model Penal Code" as a guide for the various state legislatures that were about to embark upon a wholesale revision of their penal codes. One of the most controversial recommendations of the A.L.I. was the decriminalization of private sexual acts between consenting adults. In 1960 Illinois became the first state to adopt this A.L.I. recommendation. The age of sexual consent was set at eighteen years. In addition, Illinois decriminalized noncommercial sexual solicitations between adults.

Since the decriminalization in Illinois, an additional nineteen legislatures have voted to decriminalize private sexual acts between consenting adults: Arkansas, California, Colorado, Delaware, Hawaii, Idaho, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Washington, West Virginia, and Wyoming. In Idaho decriminalization never took effect because the legislature repealed the sexual provision before the effective date of the new code. In Arkansas, sexual reform was operative for one year, and then its legislature reenacted felony provisions for private homosexual behavior, retaining decriminalization for heterosexuals. The Arkansas legislature adopted decriminalization in the same session that it commended Anita Bryant for her campaign against homosexuals in Dade County, Florida. As of this writing, the reforms in Iowa, Indiana, and Nebraska have not gone into effect although passed by their legislatures. So we presently have sixteen states that have completely decriminalized private sexual behavior among consenting adults, and in three states reform will be effective soon.

At first glance one might interpret these legislative changes as being reflective of important changes in popular attitudes. However, this is not necessarily so. The methods by which these changes have occurred must be examined before drawing a conclusion as to how reflective they are of popular attitudes. In only one of these states was a bill specifically designed to decriminalize private sex for adults. In two states decriminalization was accomplished through reform of rape laws. In the remaining states decriminalization was hidden in the general penal code reform package. Usually the chances for passage of sexual-law reform are greatly enhanced when it is part of a bill containing hundreds of other statutory changes. The chances of the public, the church, or conservative legislators opposing the bill are thus greatly diminished.

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California is the only state in the country that has decriminalized by way of a special bill. In 1975 the vote in the state senate was a tie. When conservative senators threatened to leave the senate floor to break the quorum, they were locked in the room for several hours until the lieutenant governor was flown back to Sacramento from Denver to cast the deciding vote in favor of decriminalization.

In the mid-1960s the New York legislature passed a general penal code revision. The proposed decriminalization of private sex was strongly opposed by the Catholic Church. As a result, the legislature compromised and decriminalized for married couples only. Acts of oral copulation or sodomy between consenting single persons remain criminal to this day. Special bills to further reform the law have met with defeat each year in Albany.

The Texas legislature reformed its sex laws when it revised its entire penal code in the early 1970s. It decriminalized for all consenting heterosexuals but retained homosexual conduct

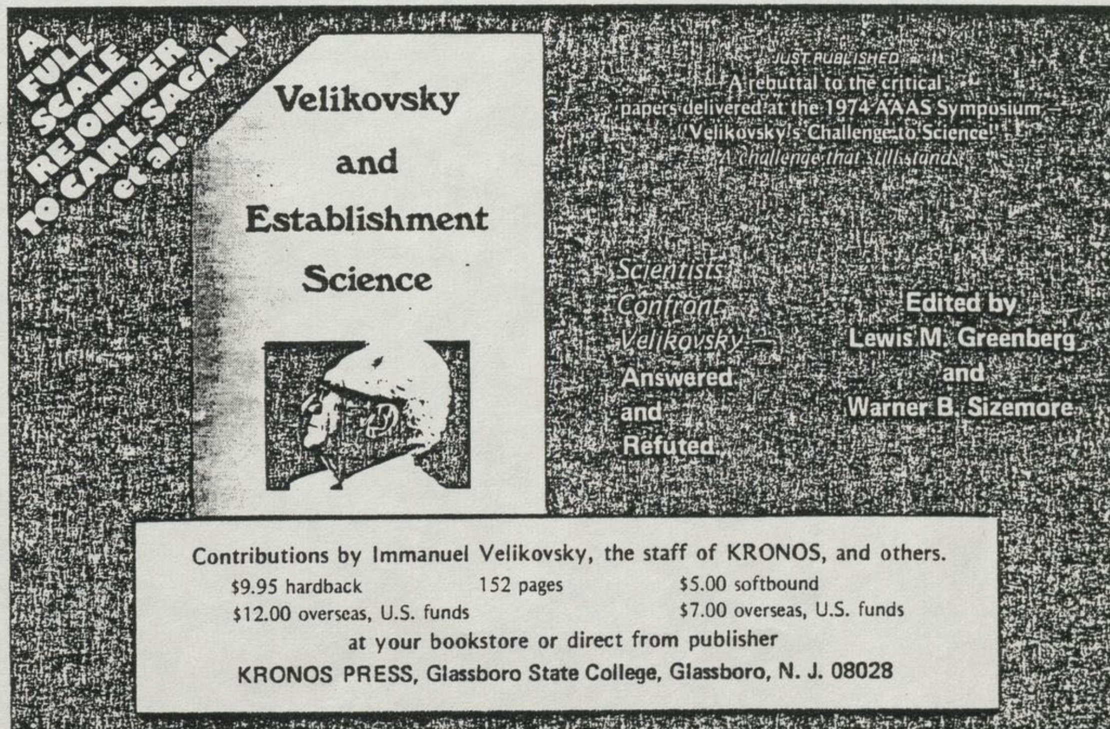
as an infraction.

In order to get a proper perspective on attitudes toward sex within the legal system, developments within the courts, administrative agencies, and the executive branch of government should also be examined.

Ever since its landmark decision regarding *Griswold* v. *Connecticut* in 1965, the United States Supreme Court has been developing the constitutional right of sexual privacy. In *Griswold*, the Court voided a law that infringed on the rights of married couples to use contraceptives. The Court acknowledged that a right of marital privacy existed and told the government to stay out of the marital bedroom. A few years later the Court expanded this "marital right of privacy" in the case of *Eisenstadt* v. *Baird*. In this case the Court said that single persons also have a right to privacy and that the state could not forbid their use of contraceptives. In the early 1970s the Court again expanded the right of privacy in the series of abortion cases beginning with *Roe* v. *Wade*. The right of privacy was held to be so fundamental that the state could not prohibit abortions during the first trimester.

Sexual civil libertarians are hoping that someday this sexual right of privacy might actually be extended by the Court to include the right to engage in private sexual behavior by consenting adults without interference by state regulations. Relying on the *Griswold*, *Eisenstadt*, and *Roe* cases, several appellate courts and federal courts have indicated that statutes prohibiting such private behavior are unconstitutional. Proponents of decriminalization seemed to be gaining momentum in the courts—and then came *Doe* v. *Commonwealth's Attorney*. Two anonymous homosexuals filed suit in federal district court in Virginia attacking that state's sodomy law. The Virginia law forbids engaging in oral or anal sex, whether married, single, heterosexual, or homosexual. The federal court, in a two-to-one decision, upheld the state law. The anonymous homosexuals appealed to the U.S. Supreme Court. Without even granting a hearing or permitting oral arguments, the Supreme Court summarily affirmed the lower federal court. Justices Brennan, Marshall, and Stevens were of the opinion that the Supreme Court should have granted a hearing. This decision made headlines in newspapers across the country and was considered by civil libertarians as a serious setback.

In the areas of contraception and abortion the U.S. Supreme Court has extended the right of privacy to juveniles. In *Planned Parenthood of Central Missouri* v. *Danforth*, the Court declared as unconstitutional laws that required parental consent prior to an abortion for a minor. On June 9, 1977, in the case of *Carey* v. *Population Services International*, the Court declared as unconstitutional laws that made it a crime to distribute contraceptives to minors under sixteen. Arguments were made that this prohibition was necessary in order to discourage premarital sex among teenagers. The Court held that it would not allow this type of indirect approach to curb teenage promiscuity. Noting that it had not yet definitively decided to what extent states may regulate private sexual behavior among adults, it declined to decide which constitutional rights minors may have regarding



sexual behavior.

Although legislative and judicial development of sexual privacy has been somewhat slow, proponents gained considerable leverage when, in 1973, the American Bar Association adopted a resolution urging all state legislatures to decriminalize sexual activity among consenting adults.

Homosexual Civil Rights

Discrimination against the homosexual minority has been a tradition in our country. Behind this discrimination are popular beliefs that homosexuals are sick, sinful, criminal—and molesters of children. After homosexuality was declassified as an illness by the American Psychiatric Association and the American Psychological Association, the sickness theory has been rapidly crumbling. Now that nineteen states have decriminalized private sexual acts, it is difficult to stereotype homosexuals as criminals. And recent studies in major cities such as Los Angeles and San Francisco show that the overwhelming number of child molestation cases are heterosexual in nature. No state or federal laws prohibit discrimination against homosexuals in housing, employment, or other business transactions, and only about forty municipalities have legislation *protecting* homosexuals in any of these areas.

Until recently the federal Civil Service Commission considered homosexuality a disqualifying factor in federal employment. But after years of litigation and several important victories in federal court, the Civil Service Commission has changed its position.

Homosexual teachers have had the most difficult time achieving employment protection. In California in the late 1960s a teacher was fired because of noncriminal private sexual acts with another consenting teacher. The sexual activity occurred in the privacy of a bedroom. The California Board of Education revoked his teaching credentials on the ground of immorality and moral turpitude. In *Morrison* v.

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Board of Education, a sharply divided California Supreme Court held that this action by the board was illegal because it had failed to show that the teacher was unfit.

In the early 1970s Joe Acanfora was involved in a gay student organization in Pennsylvania. After moving to Maryland, he applied for a teaching position. He failed to mention his connection with the gay organization when he filled out the job application. After working successfully as a teacher in the Maryland schools, he was fired because the school board discovered Acanfora was a homosexual. He sought protection in the federal courts but to no avail.

Peggy Burton taught school in Oregon. Although she was a "model teacher," she was fired when the school district was informed by someone that she was a lesbian. Ms. Burton filed suit in federal court. The United States Court of Appeals for the Ninth Circuit held that her termination was illegal and ordered that she be paid back wages. However, they did not order her reinstatement.

John Gish taught school in New Jersey. Gish was a gay activist and was involved in demonstrations and gay political organizations. Gish was taken out of the classroom when the school discovered his gay-rights involvement. The school board demanded that he submit to a psychiatric examination.

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John refused to submit to an exam and sought protection in the state courts. The New Jersey appellate court held that he must submit to the examination.

The latest setback for gay teachers was delivered by the state of Washington Supreme Court in *Gaylord* v. *Tacoma School District*. Gaylord had been a teacher for many years in the Tacoma area. He was not openly gay and certainly not involved in gay rights. When a former student told an administrator that Gaylord might be a homosexual, the administrator confronted Gaylord with the accusation. Gaylord admitted that he was a homosexual. Subsequently, he was fired and appealed the decision. Although he never admitted engaging in illegal sexual activity, and although private sex is no longer criminal in Washington, the Washington Supreme Court upheld his dismissal. Referring to the Catholic dictionary, the court held that although not illegal, homosexuality is immoral and therefore grounds for dismissal.

The homosexual battle for civil rights also continues in the areas of immigration, naturalization, military service, child custody, and marriage.

National attention was drawn to discrimination against homosexuals in the military in the case of Air Force Sgt. Leonard Matlovich. Matlovich was involuntarily discharged by the military because of his homosexuality. The federal district court judge who heard the case sustained the discharge but begged the military to reconsider its position on homosexuality. In a more recent case, a federal judge in California has declared that the military must prove, in each case, that the person's homosexuality makes him or her unfit for service. The judge declared as unconstitutional the automatic ban of all homosexuals from military service.

Many homosexuals have had their children taken away from them in child-custody proceedings. Some judges feel that homosexuality automatically makes a parent unfit. The law in this area is developing slowly; only a few appellate decisions are reported. The American Psychological Association has taken the position that homosexuality should not be the sole or even primary consideration in child-custody proceedings. Whether this recommendation will be followed by the courts remains to be seen.

The body of American law with respect to gay civil rights is in a very confused state. Whereas twenty years ago homosexuals had no civil rights, today they have some. The turbulence within the legal system during the past decade is bound to continue. Just as the issue of black civil rights gained national attention in the 1960s, gay civil rights seems to be one of the major issues of the coming decade. •