HOMOSEXUAL LAW REFORM: A SECOND LOOK

by

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FOREWORD

The original impetus for this article came from this writer's negative reaction to a survey entitled "Reported Consequences of Decriminalization of Consensual Adult Homosexuality in Seven American States" by Geis, Wright, Garrett, and Wilson, which appeared in 1976 as a short article in issue no. 4, volume 1 of the _Journal of Homosexuality_, pp. 419-426. This precipitated a critical review of that article by the undersigned, which, however, never saw the light of day except for a reading in Columbus, Ohio in 1977, at the annual meeting of the National Committee for Sexual Civil Liberties. Recent legal developments, plus a widening interest in the subject of homosexual law reform, have made it appropriate to provide the interested public with some understanding of the important legal changes which have been made in the laws relating to homosexual behavior, many of which have occurred in the relatively short time since the report of the survey appeared in the _Journal_. With this end in view, the writer now offers these pages, for which his earlier review served as a starting point. Some of the material from that review has been incorporated into this paper, including the references to the survey report, which have become useful points of departure for discussing certain subjects. But most of the material is new.

Unlike the report of the survey, which was essentially an account of the investigation by those who had conducted it, no formal survey was made for the purposes of this paper. Rather it is based on accepted methods of information gathering, including in-depth personal interviews, which are described in the text, and which have been used extensively by the writer for more than twenty years in the course of his work as an attorney with the National Committee for Sexual Civil Liberties and its predecessor organizations.

The writer wishes to thank the hundreds of anony-

mous denizens of the homosexual underworld, as well as those who prey upon them -- some, like the police, lawfully, others, like the criminal elements, unlawfully -- for much of the information contained in these pages. But for the valuable insights gleaned from them, this article could not have been written. In addition, the writer's association with the National Committee for Sexual Civil Liberties has provided him with extensive experience in the areas explored by this paper -- experience which has convinced him of the need for a study of the consequences of homosexual law reform. The National Committee directed the litigation in a number of the cases instanced in this article, and it entered some of them as <u>amicus</u> <u>curiae</u>. Every one of the individuals whose valued assistance is acknowledged below have been colleagues of the writer on the Committee, and have drawn on their experience on the Committee for some of that assistance.

An especial debt is due to Thomas F. Coleman, Esq., sometime co-chairman of the Committee and continuing member, for defining some of the parameters of this study, for suggesting subjects for consideration, for bringing several legal cases to the writer's attention, and, in particular, for placing at the writer's disposal the important informational resources of the <u>Sexual Law Reporter</u>, of which he was the editor. The writer wishes to express his appreciation to Mr. Anthony J. Silvestre, a sociologist by profession and director of the Eromin Center, Philadelphia, Penna., for pointing out some sociological errors and for insuring that the writer's sociological conclusions were formulated in accordance with accepted canons of that discipline. The writer is also in the debt of Mr. William B. Kelley, long-time Chicago resident, who employed his broad knowledge of the law in supplemental legal research, particularly in the area involving the relationship of the ordinances of the city of Chicago to the statutes of the State of Illinois. He also edited the entire manuscript. Professor Wayne Dynes of Hunter College, New York City served as editorial mentor. He made the task of writing much easier by many fruitful suggestions, and he generously shared his wide-ranging erudition with the writer, an example of

which is note 9, which he wrote. Finally, the writer must thank Dr. Laud Humphreys of Pitzer College, Claremont California and Mr. Joseph M. DeLisa of the University of Michigan for giving him the benefit of their thoughts in many of the areas covered by this paper and for providing helpful criticism. As members of the National Committee, all of the above have long devoted their talents to promoting the Committee's work, so much of which has been relevant to what is here discussed.

Princeton, New Jersey
November, 1981

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I

Introduction

In the Summer of 1976 there appeared in the Journal of Homosexuality an article entitled "Reported Consequences of Decriminalization of Consensual Adult Homosexuality in Seven American States" by Geis, Wright, Garrett and Wilson.[1] The article reported "results of a survey of police officials, prosecuting attorneys and members of homosexual groups in the seven states that had [as of then] decriminalized private homosexual behavior between consenting adults."[2] The authors stated that "questionnaires were sent to police departments in cities in each of these states with populations of 50,000 or more persons . . . Similarly, the prosecuting attorneys for the counties in which the cities were located received a pair of questionnaires." Finally, questionnaires were sent to "47 homosexual groups" requesting "that they be distributed to members."[3] The report concluded that "the responses indicate that, among other things, decriminalization has had no effect on the involvement of homosexuals with minors, the use of force by homosexuals, or the amount of private homosexual behavior."[4]

The survey was apparently conducted at a time when only seven states had reformed their sodomy laws by decriminalizing private sexual behavior between consenting adults, that is, between persons at or above the statutory age set for sexual consent. In most American jurisdictions, this age -- which can be referred to as the sexual age of consent -- is lower than the age at which one legally reaches one's majority. The seven jurisdictions involved, listed in the chronological order in which they reformed their sodomy laws, with the years in which the reform took effect, are: Illinois (1962), Connecticut (1971), Oregon (1972), Colorado (1972, Hawaii (1973), Ohio (1973), and Delaware (1973). The article reporting on the survey does not disclose the actual questions which were asked of respondents, nor is any information provided as to the specific sexual behavior

which was the subject of the enquiry. Since, as we shall presently see, the sodomy laws are only one of three kinds of statutes under which private homosexual behavior is customarily proscribed in this country, and since, in no American jurisdiction has private homosexual conduct between consenting adults been prosecuted under the sodomy

laws except on the most rare occasions, it is difficult to understand just what, if any, information those who conducted the survey expected to elicit except to demonstrate the errors of those who had opposed homosexual law reform by predicting an upsurge of homosexuality once the reform had been enacted. This is important information, useful in furthering reform of sodomy statutes in unreformed jurisdictions, but information which, one had supposed, was already known and accepted. Similarly, since sodomy-law reform, or reform of the two other types of statutes which punish homosexual behavior, does not involve any decriminalization of homosexual relations between adults and persons under the statutory age of sexual consent -- just as reform of these three kinds of statutes has made no change in the continuing criminality of homosexual conduct involving force -- it should be evident without any survey that the legalization of one kind of sexual conduct is hardly likely to affect the incidence of a different kind of sexual conduct which remains criminal. Once again, if the only purpose was to prove that the prophets of doom who originally opposed sodomy-law reform were wrong when they predicted that reform would increase the number of homosexual child molestations or homosexual rapes, then the survey would appear to have involved a questionable expenditure of effort for the purpose of reaffirming what most people probably already knew.

In all American jurisdictions, the laws which continue to criminalize, or which once did criminalize, various forms of homosexual behavior are subsumed under one or more of three different kinds of penal statutes -- (1) sodomy laws, (2) sexual solicitation laws, and (3) open or public lewdness laws.[5] However, in terms of actual arrests, prosecutions, and/or convictions, the sodomy laws have almost never been used for the purpose of suppressing consensual homosexual acts between adults in private. As far as actual sexual behavior is concerned, the sodomy laws have been dead letters. It has been estimated that, for every sodomitical act which comes to the attention of the police in this country, a million others take place undetected. Detection of these offences is ordinarily quite impossible unless

(1) a <u>particeps criminis</u> delates his erstwhile companion, (2) a police officer or some other third person stumbles upon the parties while <u>flagrante delicto</u>, and decides to report them to the authorities, or (3) some form of entrapment or blackmail is deliberately employed -- all infrequent occurrences. The situation in this country is thus somewhat different from that which prevailed in England until the enactment by Parliamanet in 1967 of the so-called Wolfenden recommendations.[6] Because of the persevering diligence of the English police, some offences of this type were occasionally discovered in that country through intensive police surveillance, and, prior to the Wolfenden reform, were prosecuted. There are also reports of cases in England where defendants were convicted on the basis of incriminating letters written years before.[7] But the kind of surveillance which this entailed has almost never been used in this country except against persons in the military establishment and employees of the Federal Government suspected of homosexuality. Furthermore, where the suspicion proved to be true, the result was a discharge from the military or Government service, not a criminal prosecution. For this reason it is fair to say that prosecutions in the United States for sodomy occurring in private between consenting persons above the sexual age of consent are virtually unknown, unless, as already noted, there is a complaint by someone or blackmail is involved.[8]

Proof of the absence of arrest and/or prosecutions for such conduct under the traditional form of sodomy law is confirmed by the near impossibility of finding cases with which to challenge the constitutionality of these laws. Every sodomy prosecution which comes to light almost invariably involves conduct which was either (1) public in character, or (2) involved someone under the sexual age of consent, or (3) was not consensual. Hence, for the purpose of constitutional challenge, lawyers have sometimes "manufactured" cases by inducing volunteers to go into court as complainants in civil proceedings with admissions that they engage in the proscribed conduct and with requests for judicial relief against supposedly threatened

criminal prosecution. This has proved to be an uncertain and unproductive method of constitutional challenge at best.

Under these circumstances, any investigator who uses sodomy-law reform as a talisman for measuring changes or absence of change in the amount of private consensual homosexual behavior is engaging in an exer-

cise in futility, even were he to question more knowledgeable respondents than policemen and prosecutors. If, prior to their reform, the sodomy laws almost never resulted in arrests for private consensual conduct between persons above the sexual age of consent, <u>pari passu</u>, after their reform one can hardly expect a reduction in arrests which never took place. If, then, the number of arrests is of no account as a measure of the law's inhibitory role, what other index do we have? We are left with only the dissuasive effect wielded by laws which are not enforced and are virtually unenforceable. This means their only force stems from their perdurance on the statute book. The near impossibility of enforcing the sodomy laws all but eliminates any minatory effect such laws might otherwise have. As for any moral power which they may exert in reducing the prohibited conduct, the current ineffectiveness of the churches as custodians of private morality strongly suggests that the law is even less capable of acting as a force for moral suasion.

The problem with attempting to determine the effect of sodomy-law revision on the amount of private homosexual behavior is that it requires a prior determination as to whether there has in fact been any change in the amount of such conduct quite apart from any legal changes. Only after this has been determined can one address the question whether any changes which may have occurred are the result, in whole or in part, of sodomy-law revisions. For reasons which will presently be enumerated, it is not unreasonable to conclude that private sexual behavior of all kinds, homosexual as well as heterosexual, has increased, is increasing, and is likely to continue to increase. If this be so, is it not also reasonable to believe that sodomy-law reform may have played some part, if only indirectly, in the increase of homosexual conduct? The reasons for supposing that, in recent years, there has been a significant increase in sexual activity of all kinds are too numerous to discuss in detail, but an attempt is made below to list some of the more salient developments of the last generation or two which strongly point to their having had the effect of increasing human sexuality in all its

forms. These are: the wide-spread use of contraceptives; the waning ability of religion to enforce the Judeo-Christian sexual ethic; the growing public acceptance of sexual conduct widely divergent from traditional sexual norms, the legitimacy of which has been fortified by extensive investigation and research in the field of human sexuality carried on in a wide range of disciplines; the vast increase in social mobility, epitomized by the automobile, which has emancipated millions of people from the geographic confines of home and work-place and has provided them with sexual opportunities that even the aristocracy of former ages never enjoyed; the great increase in leisure time enabling people to take advantage of these tremendously enhanced sexual opportunities; the phenomenal reduction in the fear and risk of venereal infection resulting from cheap and readily-available antibiotics; the decline in the age of puberty; the breakdown of the walls traditionally separating men and women, thus providing further opportunities for sexual contacts between them; the tremendous increase in divorce and in the number of working mothers, with its consequent loosening of family bonds and of the family's ability to enforce traditional sexual mores; the proliferation of pornographic materials and of establishments where they are vended and where a not inconsiderable amount of clandestine sexual activity also occurs; the disappearance of the sexual censor, whose pervasive presence was once felt across the entire spectrum of American life, whether in the form of the film censor who prohibited the release of movies considered pornographic, the postal official who banned such materials from the mails, or the customs inspector who seized them at ports of entry; the social adulation of the young and the growth of a youth culture with lowered sexual inhibitions; the appearance of "swinger" groups and the concomitant rise of gay organizations, which have helped to create a sense of identity and personal worth amongst all those who engage in sexually deviant conduct. The list could go on, but to no purpose.[9] The point to be made from the concatenation of all these factors is that they lead to conclusions diametrically opposed to those reached by the authors of the survey. It must be remembered, too, that the legal changes which have

taken place -- changes which have affected both homosexual and heterosexual behavior -- have contributed to this changed sexual panorama. Here, however, there is a chicken-and-egg relationship; no one can pretend to know to what extent legal reforms have been a product of changed sexual attitudes and to what extent the reforms have helped to produce these changes.[10]

In any event, to conclude, as does the report of this survey, that there has been no increase in homosexual conduct as a consequence of sodomy-law reform is to tread on dangerous ground. And to maintain this merely on the basis of responses from police and prosecutors -- whose only sources of information are likely to be arrest records and their own hunches -- and on speculations from random members of homosexual groups with no legal knowledge, is to place far too heavy a strain on the reader's credulity. Despite the survey's conclusions, there is solid evidence that sodomy-law reform <u>does</u> have very important consequences, both legal and social, as the pages which follow hope to demonstrate. And, although there is no statistical way in which the recognized increase in homosexual behavior can be specifically attributed to any of the consequences associated with sodomy-law reform, those consequences must be recognized as constituting important new elements within our contemporary social fabric which have played a part in this increase.

Notwithstanding the foregoing, one must recognize that those who conducted the survey made an important contribution by demonstrating that the morbid predictions of the bigots who opposed homosexual law revision were never fulfilled. However, readers of their report will undoubtedly question the need for sodomy-law reform if they are allowed to think that its results have been nothing but a continuation of the status quo ante. For the truth is quite the opposite. Sodomy laws have been the traditional buttress on which the entire edifice of criminality surrounding private homosexual conduct between consenting adults has rested, and their existence has provided virtually the entire rationale for all the other inequitable criminal sanctions and discriminatory administrative regulations. In addition, there is the social role which the sodomy laws have played as the keystone in the perva-

sive pattern of public and private discrimination and injustice to which homosexuals have traditionally been exposed. The purpose of these pages is to demonstrate that sodomy-law reform has had numerous and important legal consequences, and that, like most legal changes, it has had important social consequences as well. For this reason the reform must be recognized as one of the numerous elements -- though not necessarily the most important -- which have contributed to the increase in homosexual behavior in our society.

II

Sodomy Law Reform and the British Experience

Those who think that sodomy-law reform is little more than a symbolic gesture are quite mistaken. In truth, it is central to the dismantling of the entire penal structure surrounding homosexuls and homosexuality. As such, it provides the quintessential legal underpinning for implementing everything from anti-discrimination laws in the area of employment and housing for homosexuals to insuring equitable treatment in child-custody cases or in those involving visitation rights. The effects of sodomy-law reform cannot be discovered through an examination of arrest records or from an investigation of the incidence of private homosexual conduct between consenting persons above the sexual age of consent. Almost all the legal effects are to be found in the operation of other statutes, or in administrative or judicial rulings in cases quite unconnected with sodomy. In most reformed jurisdictions, therefore, the first consequences of reform are to be found in changed enforcement procedures with respect to other laws or in actual changes in the legal interpretation of those other laws. Some of these changes can be said to be legally mandated, because they follow as a necessary legal corollary to sodomy reform, but many of them are not legally required and merely reflect a change in attitude on the part of administrative and law-enforcement officials toward homosexuals and homosexuality in the face of reform.[11]

One of the several important ancillary effects of sodomy-law revision is that, while it does not affect arrest patterns for homosexual behavior between consenting adults in private, it does have a substantial effect on cases involving homosexual conduct between consenting adults in public. This apparent anomaly results from the fact that decriminalizing the conduct when private has the effect of reducing the same conduct when open to public view from what was in most jurisdictions a very serious felony, punishable by long imprisonment, to a minor misdemeanor, usually denominated "open" or "public lewdness". Consequently, after reform of a state's sodomy

law, persons above the sexual age of consent apprehended <u>flagrante delicto</u> in sodomitical acts in public places are subject only to light fines or, at most, to short jail terms, rather than to years in prison. Here it should be noted that, had those who conducted the survey interrogated the police and prosecutor respondents regarding arrests for sodomy occurring in <u>public</u>, they might well have elicited some valuable information.

Sodomy-law reform also produces changes in other legal areas. Some conduct -- not all -- which, prior to reform, constituted the crime of child molestation or impairing the morals of a minor, is sometimes decriminalized by these reforms. This is not to say that the crimes of child molestation or impairing the morals of a minor are abolished by sodomy-law revision, only that <u>certain</u> conduct which formerly fell within the scope of these criminal categories becomes licit. This arises from the fact that sodomy-law reform involves the setting, for the first time, of a homosexual age of consent, something which does not exist under the old-type sodomy statutes, since they punish all forms of sodomy, regardless of the age of the actors. Thus private consensual homosexual relations between an adult and a minor above the sexual age of consent become legal after sodomy-law reform, whereas the same conduct might have constituted either child molestation or impairing the morals of a minor prior to the reform.[12] Here again the police and prosecutors used in the survey might have provided information in this regard.

The setting of a homosexual age of consent is important in other ways. In every American jurisdiction which has reformed its sodomy laws, the legal age of consent for homosexual conduct has been assimilated to the heterosexual age. This is crucial. It means that, in the course of reforming their sodomy laws, every American jurisdiction so far has rejected one of the central postulates of the Wolfenden Committee in England, which recommended a legal age of consent for male homosexual acts in England of twenty-one -- five years above the legal minimum for the equivalent heterosexual behavior. The Committee's rationale for this disparity, which was

reflected in the Sexual Offences Act adopted by Parliament in 1967, is inte-esting.[13] At no time did the Committee so much as consider assimilating the male homosexual age of consent to that set for women, which stands at 16 years whether the conduct be heterosexual or lesbian. In the Committee's view, "a boy is incapable, at the age of sixteen, of forming a mature judgment about actions of a kind which might have the effect of setting him apart from the rest of society."[14] The Committee reasoned that, because homosexual conduct is condemned by much of society at large, immature boys of 16 who engage in homosexual acts cannot be expected to understand the personal or social implications of their conduct.[15] Thus existing ignorance of, and prejudice toward, homosexuals was used to justify setting a higher age of consent. The Wolfenden Committee, which was a departmental committee within the British Home Office, then went on to consider fixing the age of male homosexual consent at 18, but it rejected this in favor of an age of 21,

> "not because we think that to fix the age at eighteen would result in any greater readiness on the part of young men between eighteen and twenty-one to lend themselves to homosexual practices than exists at present, but because to fix it at eighteen would lay them open to attentions and pressures of an undesirable kind from which the adoption of the later age would help to protect them, and from which they ought, in view of their special vulnerability, to be protected."[16]

These attitudes have weakened only slightly in the quarter of a century since the Wolfenden Committee completed its work. Only recently the British Home Office appointed a new departmental group, known as the Criminal Law Revision Committee, with a broader frame of reference than the one given the Wolfenden. Whereas the older committee had been charged with examining the laws relating to homosexual offences and prostitution, the new one is presently looking into the entire body of law having to do with sexual offences. Its "preliminary views" have already been published in the form of a Working Paper.[17] Of relevance here is the insight this provides to

those who continue to suppose that sodomy-law reform in the United States involves nothing but the simple process of legalizing private consensual conduct between adults of the same sex. The British experience limns quite starkly the weight of the centuries-old incubus which must first be removed before full legal reform becomes possible in any Anglo-American jurisdiction. The new British Criminal Law Revision Committee makes it very clear that it subscribes to the same body of misinformed opinion as did its predecessor, however commendable the original Wolfenden recommendations were at the time they were made. The new committee proposed to lower the homosexual age of consent for males to 18, but is still unwilling to assimilate it to the 16 years of age applicable to females. And the reason it adduces for maintaining this disparity is the same myth that this is necessary "in order to protect those young men between 16 and 18 whose sexual orientation has not yet become firmly settled."[18] This in the face of authoritative scientific information -- some of it antedating the Wolfenden Committee -- that the sexual orientation of the vast majority of males is fixed long before 16.[19]

Other anomalies abound. The English Sexual Offences Act of 1967 legalized only private homosexual conduct between males 21 years of age or more. Lesbianism was not touched, since it had never been a crime in England. And since the age of consent for lesbian conduct has always been the same as that for heterosexual relations, namely 16, the question arises, why not the same age for male homosexuality? The reasons were best put by the Policy Advisory Committee on Sexual Offences, another Home Office body. That Committee stated that

> "the considerations which led them provisionally to recommend a minimum age of 18 for male homosexual conduct do not have the same force in the case of females. . . . homosexual relationships tend to arise later in life among women than among men, and . . . there is no comparable group of 16 to 18 year old girls whose sexual orientation has not yet become fixed and who are consequently in need of special protection. . . . adolescent girls do not seem especially attractive to older women in search of a partner of the same sex and . . . there is not the same emphasis as in male homosexual culture on this age group."[20]

Then there is the matter of heterosexual sodomy. Incredible though it may seem, sodomitical relations between husband and wife remain a crime in England because the act of 1967 legalized only "homosexual act[s] in private."[21] The Criminal Law Revision Committee cited five recent cases, involving "three husbands, one common law husband, and a former cohabitee" who were arrested and convicted for having engaged in sodomy with their wives or mistresses. While none of these defendants remained in prison after their convictions, all of them were in custody pending trial, one of whom was sentenced to a term of four months, representing the time "he had already spent in custody awaiting trial."[22] The Committee has now proposed to legalize heterosexual sodomy, but it is still undecided whether to recommend an age of consent of 16, the same as that for other heterosexual relations, or 18, the age it has proposed for male homosexual behavior. And even this recommendation is made in the face of objections from a number of people who wrote the Committee "that the present law should be retained in the interest of the dignity of the individual and of the marital relationship."[23]

At this point the reader should be reminded that, where sodomy is a crime, both of the parties to the act are guilty under the law. This means that, where one of the participants is under the sexual age of consent, he, as well as his partner, may be prosecuted if he is old enough to stand trial. Similarly, where both of the participants are under the sexual age of consent, both may be prosecuted if they are old enough to stand trial. The Criminal Law Revision Committee recommends no change in the law in this regard. It notes, however, that, under its proposal to decrimianlize heterosexual "buggery", a girl under the legal, i.e. sexual, age of consent who had been sodomized would not -- because of an 1894 court decision -- be open to prosecution "as an accomplice to the man's offence."[24]

The definition of the words "in private" as used in the English act need also to be considered here. The law states that male homosexual conduct is not to be considered private "when more than two persons take part or are present."[25] There is no heterosexual equivalent of this provision. Under it a homosexual was reported to have been con-

victed a few years ago for having same-sex relations with a third person in his private apartment while his roommate, who did not participate, was present.[26] The Criminal Law Revision Committee is presently considering the whole subject of open lewdness, both homosexual and heterosexual, but it has still not decided whether to retain this restricted definition of "in private" for male homosexual conduct or to subsume all such homosexual behavior under a more general open-lewdness statute which it is draughting for heterosexual conduct.[27] Consistent with its thinking on these matters, the Committee has refused to merge "non-consensual buggery" with rape, since it considers the former "a distinctive form of wrongdoing", the victims of which have undergone "an especially humiliating and distressing experience."[28]

The foregoing should make it easier to understand something of the ethos within which sodomy-law reform must operate in every jurisdiction within the English-speaking legal tradition. This is reflected in the Home Office Committee's frequent use of the term "buggery" instead of sodomy. The central bugaboo is the act of anal intercourse, which is held to involve the misuse of the male organ for an "unnatural" and an unproductive purpose. Everything, including the law, centres on the male penis, and its use in this particular manner, for legally there can be no anal penetration without a penis. Consequently, lesbianism is not a crime, and all other homosexual acts, whether they involve interfemoral intercourse, oral sodomy, mutual masturbation, or anything else do not rise to the enormity of the original ecclesiastical sin of anal intercourse, from which all the others derive their criminality.

Only within the British context can one appreciate the true significance of the American accomplishment in sodomy-law reform, for every one of the reformed American jurisdictions has repudiated the reasoning of the Wolfenden Committee and its successors. By assimilating the homosexual to the heterosexual age of consent, they seem in every instance to have recognized the now-generally-accepted view that sexual orientation, male and female, is determined much earlier in life than 18 or 16.[29] In doing so

they have gone a long way toward establishing the principle that a person's sexual orientation is no more appropriate a subject of the law's concern than is his race or religion, thus opening the way for legal reform in other areas involving homosexuality, based on the tenet that what is "sauce for the goose is sauce for the gander." Where, as in England, Scotland, and Canada, there exists a substantial difference between the law's treatment of same-sex conduct and its treatment of opposite-sex behavior, to the disadvantage of the former, the road is left open for retaining other legal inequities between the two forms of sexual conduct, inequities which are reflected judicially and administratively. These carry with them the unwritten premise that, even though homosexuality is no longer punishable when confined to private behavior between consenting adults, it is nevertheless noxious, and, like cigarette smoking, should be discouraged and strictly limited, particularly when young people are involved.

III

The Sexual-Solicitation & Open-Lewdness Laws

Here it becomes necessary to consider in more detail the sexual-solicitation and open-lewdness statutes, since these are the two types of laws which, between them, account for almost all arrests for private homosexual conduct between persons above the sexual age of consent.[30] It should be noted that the open-lewdness laws, despite their name, frequently include conduct which, _de facto_, is quite private in character. Together with the sexual-solicitation laws, they must be contrasted with the sodomy statutes which are almost never the vehicle for punishing private conduct of this kind.[31] Regrettably, those who conducted the survey ignored the relationship between the sodomy laws on the one hand and the sexual-solicitation and open-lewdness statutes on the other. While it is true that sodomy-law reform produces no change in arrest patterns because there are hardly ever any arrests before reform for the kind of conduct the reform legalizes, the revision _does_ work a significant change in arrests of homosexuals for soliciting or for open lewdness. This is because decriminalization of private consensual conduct produces fundamental changes in attitudes on the part of law-enforcement personnel toward homosexual solicitations and acts of open lewdness.

But before attitudinal changes can be discussed, the sexual-solicitation and open-lewdness laws must be understood in their legal setting, and the legal impact on them of sodomy-law reform -- particularly on the sexual-solicitation laws -- must be examined. There are three types of solicitation statutes: (1) general solicitation laws, (2) laws punishing solicitation for purposes of prostitution, and (3) simple sexual-solicitation laws. Our concern in this article will be almost entirely with the third type of solicitation statute, the kind which involves requests to engage in some form of sexual activity, but without any money or other consideration being tendered or requested. A few words are necessary to distinguish simple

sexual solicitations of this kind from the other two. All solicitation laws, no matter of what type, like the laws which proscribe conspiracies and those which punish attempts to commit crimes, belong to a class of offence known as "inchoate" crimes. This is because they punish conduct which has not been consummated. Not until the eighteenth century did the common law begin to accept the concept of inchoate crimes, which was essentially an importation into England from the Continent through the influence of Lord Chief Justice Mansfield.

The purpose in punishing inchoate offences is to discourage planning or preparation for certain criminal acts. For obvious reasons the preparations which inchoate offences are intended to punish are those to commit serious crimes, such as felonies or serious misdemeanors. We do not hear of indictments for conspiracy to litter the street, nor of prosecutions for attempting to jaywalk. The same is true of solicitations. Virtually every state has a solicitation statute of the first type, that is, a general solicitation law, the scope of which is limited to requests to commit certain offences, which offences are almost always serious ones. So too, just about every state except Nevada has a law prohibiting prostitution, and, wherever there is a law against prostitution, there will be found a companion law punishing solicitations for the purpose of prostitution. But many states do not have sexual-solicitation laws of the third type, and a few, like New Mexico, have never had them. Thus the sexual-solicitation laws are a very special type of solicitation statute, which, to the extent that they punish requests to commit very minor offences, such as open lewdness or no offence at all, are anomalies.[32]

It is in connection with the sexual-solicitation laws that some of the most important consequences of sodomy-law reform are to be noted. This is because, after sodomy-law revision, the homosexual conduct for which these solicitations are made becomes legal under most circumstances. Hence, to retain a system of jurisprudence which allows persons to

engage in certain conduct, yet imprisons them for asking someone to engage in the self-same conduct, is not only the height of irrationality, but certainly appears to violate constitutional canons of due process. On the morrow of sodomy-law reform, the only form of homosexual solicitation which can justifiably be punished involves requests for sexual acts intended to take place in public -- this on the ground that these solicitations are requests to engage in conduct violative of the open-lewdness laws and hence are proposals to commit illegal acts. Even so, a solicitation statute limited to the punishment of requests to engage in conduct intended to take place in public would run into a hornets' nest of interpretative problems involving the meaning of the term "public" and its applicability to the facts of each particular case.

Normally courts have no difficulty determining whether conduct is public or private in character. But this is because, in all such cases, they are dealing with conduct that has been consummated. Here there are no acts at all, merely speech linked to putative conduct, the public or private character of which depends not infrequently on the words the solicitor used. Numerous problems arise in this connection, even when the solicitation appears to be unambiguous. A defendant may propose that the acts take place in a park, one section of which is public, the other private. Which section did he have in mind? Some statutes use terms such as "exposed to public view". In that case, what about an area which is exposed to public view during the day but not at night, and the solcitor gives no indication as to what point in time he means? Then there are the truly ambiguous solicitations where no actual location is even mentioned. Even when such interpretative problems are surrmounted, the question arises as to whether the the criminal law should permit the difference between legality and criminality to turn on such fine distinctions, particularly when nothing but peaceful words are involved.

The same considerations apply to heterosexual solicitations as to homosexual ones. Some sexual-solicitation laws punish only homosexual solicitations. Others are pan-sexual and punish both heterosexual and homosexual solicitations, but are almost invariably enforced only against homosexual ones. Whatever the case, in the absence of a fornication statute, the heterosexual equivalents of the quondam homosexual conduct proscribed before sodomy-law reform are also licit, and, since every state which has reformed its sodomy law has used the occasion to repeal its fornication law wherever such a statute had existed, the same objections to those just raised apply to efforts to punish heterosexual solicitations.[33] The foregoing explains why enlightened jurists have always considered repeal of the sexual-solicitation laws a necessary corollary of sodomy-law reform, and why this has occurred in a substantial number of states which have revised their sodomy statutes

In a few reformed jurisdictions which retained their sexual-solicitation laws, the equivalent of sexual-solicitation-law repeal came about by judicial decision. Following sodomy-law revision there is a strong judicial tendency either to emasculate or to invalidate these laws. In two of the seven states which were the subject of the study under discussion, state courts struck down sexual-solicitation statutes which had not been repealed, on the ground that, once consensual sodomy between adults in private had been legalized, punishing requests to commit these acts would mean punishing proposals to engage in lawful behavior, thus violating First Amendment rights to free speech. On this and other grounds the Colorado Supreme Court struck down that state's homosexual-solicitation law and the Oregon Court of Appeals invalidated an Oregon statute of the same type.[34] The same result was reached by an appellate court in Ohio, but its ruling was subsequently overturned by the Supreme Court of Ohio, so that Ohio remains a reformed jurisdiction with a sexual-solicitation statute on its books.[35]

Sodomy-law revision also has an impact on the open-

lewdness laws. One of the problems with many open-lewdness statutes is that they punish the prohibited conduct whenever it occurs in a public place regardless of whether there is any likelihood of its being seen by anyone. These statutes also ignore the question whether any adventitious viewer was alarmed or affronted by what he saw. With this in mind, under the criminal codes of several states, an open-lewdness offence is committed only if the actor knew or reasonably should have known that his conduct was likely to be observed by others who would be affronted or alarmed.[36] This is also the position taken by the American Law Institute in its Model Penal Code, which it recommends for adoption by every state.[37]

Events in California provide one of the best examples of how sodomy-law reform can affect an open-lewdness statute. Sodomy-law reform came about in California in 1976, through the enactment of a special bill, known as the Brown Act.[38] Scarcely more than three years later, in 1979, the California Supreme Court handed down a landmark decision, Pryor v. Municipal Court, which involved a defendant who had been charged with soliciting a plainclothes officer to engage in a "lewd or dissolute" act, namely, oral sodomy. The statute under which the defendant had been charged combines the offences of sexual solicitation and open lewdness in a single provision, with the result that the California Supreme Court's decision had the effect of drastically limiting the scope of both of these offences. Through a masterpiece of judicial legislation, the court produced what amounted to a new statute. Before the decision, the law had punished anyone who, "in any public place or in any place . . . exposed to public view," solicited "anyone to engage in . . . lewd or dissolute conduct." It also punished anyone who actually engaged in the prohibited behavior under the same circumstances.[39] In short, the law contained the features typical of most sexual solicitation laws and unreformed open-lewdness statutes. After the court's decision, which came as a direct result of the Brown Act, the statute's scope was sharply reduced, so that it was limited to solicitations for the proscribed conduct intended to be consummated in public and under circumstances where the solicitor "knows or

should know of the presence of persons who may be offended by the conduct." Similarly, for open lewdness to be a crime in California, the court held that the defendant must know or should have known of the presence of others who would be offended by the prohibited behavior.[40]

The Pryor decision has already had a wide-spread influence nationally. It furnished the direct precedent for a recent decision of the Supreme Judicial Court of Massachusetts, that state's highest tribunal. Massachusetts is one of a handful of states which have what may be describe as two sodomy laws. One punishes the historic "crime against nature", which, in England and in some American jurisdictions, such as Massachusetts, has retained its narrow, common-law meaning, and is therefore limited exclusively to penile acts of anal penetration. What commonly goes by the name of "oral sodomy" or "oral copulation" in many jurisdictions is punished in Massachusetts by a second statute prohibiting "unnatural and lascivious acts."[41] Massachusetts achieved partial sodomy-law reform juridically in 1974, when its Supreme Judicial Court held in Commonwealth v. Balthazar that the second statute did not apply to private consensual behavior between adults -- a reform which those who conducted the survey failed to note.[42]

With that ruling in mind, the same court, in 1980, reversed the conviction of a defendant who had solicited a plainclothes police officer for an act of oral copulation whilst the latter was sitting in his unmarked car, parked at a public rest area along a main state highway. Following the Pryor decision, from which it quoted, the Massachusetts court proceeded to rewrite judicially the entire state solicitation provision, which had formed part of a catch-all collection of archaic prohibitions dating back to colonial days. It held that, for a sexual solicitation to be criminal, it must involve "the public solicitation of conduct to be performed in a public place . . . by a person who knows or should know of the presence of a person or persons who may be offended by the conduct."[43] This language is particularly significant, for the Balthazar case which had limited the scope of the "unnatural and lascivious acts" statute, and on which this case also relied,

had involved a heterosexual defendant in a rape-like situation, while the instant case was a homosexual one. For this reason alone, the solicitation case would seem to provide hope that the Massachusetts courts may perform the same judicial surgery on the state's basic sodomy law, the one that punishes the "crime against nature". Here it should be noted that, in Bal-thazar itself, the court had specifically avoided the question of the constitutionality of the state's underlying sodomy law by stating:

> ". . . we conclude that sec. 35 [the unnatural and lascivious acts statute] must be construed to be inapplicable to private, consensual conduct of adults . . . on the ground that the concept of general community disapproval of specific sexual conduct, which is inherent in sec. 35, requires such an interpretation. We do not decide whether a statute which explicitly prohibits specific sexual conduct, even if consensual and private, would be constitutionally infirm."[44]

Further support for the belief that the Massachusetts "crime against nature" statute is vulnerable to legal attack came this year in a new case, decided under the same "unnatural and lascivious acts" law by the same Supreme Judicial Court. As in Balthazar, the conduct here was also heterosexual, but it was participated in voluntarily. Thus, where the court in Balthazar had been able to limit the scope of the statute while still affirming the defendant's conviction because of the rape-like circumstances, the court in this latest case had to reverse the conviction so as to prevent the statute's application to private conduct between consenting adults. This, in the face of the fact that the conduct involved oral sodomy in a car parked at night in a public parking lot in the city of Worcester. The court stated:

> ". . . the statute is not designed to punish persons who desire privacy and who take reasonable measures to secure it. . . . A place may be public at some times and under some circumstances, and not public at others. . . . The essential query is whether the defendant intended public exposure or recklessly disregarded a substantial risk of exposure to one or more persons. . . . Conduct is not established as public merely because another person actually observes the conduct. The Commonwealth must prove that the likelihood of being observed by casual passersby must have been reasonably foreseeable to the defendant, or stated otherwise, that the defendant acted upon an unreasonable expectation that his conduct would remain secret."[45]

In short, what occurred in Massachusetts was a juridical reform of its "unnatural and lascivious acts" statute -- its secondary sodomy law -- as a consequence of which its sexual-solicitation and open-lewdness provisions were sub-

sequently reformed by judicial reinterpretation.[46] So much for the judicial responses to sodomy-law reform.

IV

The Non-Statutory Impact of Reform

Even if a state's sexual-solicitation or open-lewdness statutes remain untouched by the courts, sodomy-law reform almost always leads to more even-handed law enforcement against homosexuals. This is because it attenuates the professional zeal with which these laws are enforced against homosexual violators. For example, many solicitation laws and all open-lewdness statutes are pan-sexual in character, so that the conduct they prohibit is equally punishable whether it occurs in a same-sex or opposite-sex context. Sodomy-law reform frequently brings an end to the practice of arresting only homosexual offenders and not heterosexual ones for certain minor offences. In practice this may mean arresting no one for certain types of conduct, some of which continues to be illegal.

Extra-legal factors of this kind were certainly at work in California long before the Pryor decision. The evidence is clear that they came into play on the morrow of the Brown Act's passage, and that they were a direct consequence of its enactment. Shortly thereafter all prosecutions in San Francisco for sexual solicitation ended, except, of course, for those involving prostitution. The Los Angeles city attorney announced that he would not prosecute cases of soliciting for an act intended to be consummated in private, even if the police continued to arrest for such offences. Even in conservative suburban areas of the state, passage of the Brown Act provided more liberal-minded prosecutors with justification for not prosecuting cases of homosexual solicitation or open lewdness. At the very least, the act disposed them to consent to defendants' plea bargaining for some lesser charge, one which would have no sexual overtones, so that defendants would not be left with the scarifying effects of a conviction on a "morals charge" -- as any sex-related offence is euphemistically designated in our society. Attorneys for homosexual defendants in California were virtually unanimous in stating that juries were much less willing to convict for same-sex soliciting when the soli-

cited conduct had become lawful.[47]

These California developments occurred after the survey was conducted, but the changes in Cleveland, now to be instanced, antedated the survey, inasmuch as Ohio was one of the seven then-existing reformed states which were the subject of examination. Prior to sodomy-law revision in Ohio, homosexual violators of the old Ohio open-lewdness law were virtually the only ones the Cleveland police arrested for that offence. This, in view of the fact that the Ohio statute, like all open-lewdness laws, was applicable to heterosexual and homosexual conduct alike. After sodomy-law reform in Ohio, which was accompanied by reform of the state's open-lewdness statute, unequal enforcement of open-lewdness violations ended. That this change seems to have been the direct consequence of sodomy-law reform, and was not connected with the new open-lewdness statute, was confirmed by this writer during a long interview he had in 1977 with a lieutenant who had served for many years on th Cleveland police force. The latter stated that, before sodomy-law revision in Ohio, he had never arrested anyone he caught in heterosexual conduct violative of the open-lewdness law. In such cases he had invariably told the couple to move on. Only when homosexual conduct had been involved had he made any arrests. He stated, however, that, after the Ohio sodomy-law reform in 1973, he and his fellow officers had stopped arresting people for homosexual behavio in public -- conduct that corresponded to the heterosexual conduct for which no arrests were made. Thus the Cleveland police were then, and, presumably, are continuing, to treat homosexual and heterosexual offenders on a basis of perfect equality. The lieutenant further stated that he was unaware that ther was a new open-lewdness law on the Ohio books, and that the only change in the laws involving sex of which he was aware was the big change in the sodomy law.[48] The respondent made clear that the changes in his own enforcement practices were entirely the result of sodomy-law revision, not because of any change in the open-lewdness law, of which he had been ignorant until this writer raised the subject. In fine, these examples from California and Cleveland demonstrate the different ways in which sodomy-law revision can affect

enforcement of solicitation and open-lewdness statutes.

Whatever the consequences of sodomy-law reform on arrests and prosecutions under sexual-solicitation and open-lewdness laws, there is no doubt that the greatest impact is likely to come where there has been repeal of the solicitation and reform of the open-lewdness statutes in addition to sodomy-law revision. Sodomy-law reform by itself can improve the social climate so as to lessen substantially the repressive effects of these two laws, but only outright repeal of the one and reform of the other together with sodomy-law reform can remove entirely the inequitable burden of criminality surrounding homosexual behavior. Conversely, even where the solicitation laws have been repealed and the open-lewdness statutes revised, without sodomy-law reform the situation remains essentially unchanged so far as homosexual conduct is concerned.[49] Sodomy-law reform appears to be the essential talisman without which the penal system will not respond to changes in the solicitation or open-lewdness statutes if homosexuality is involved.

Proof of the foregoing comes from Pennsylvania, which repealed its sexual-solicitation law and reformed its open-lewdness statute in 1972 in the course of enacting a new Crimes Code.[50] This code, however, contained a provision entitled "Voluntary Deviate Sexual Intercourse", a misdemeanor for which up to two years' imprisonment could be imposed. The provision punished private homosexual conduct between consenting persons above the sexual age of consent, and remained on the statute book until it was invalidated by the Pennsylvania Supreme Court in 1980.[51] Voluntary deviate sexual intercourse was a separate crime from sodomy, the latter being reserved for cases involving force or relations between adults and those under age. Like other crimes, voluntary deviate sexual intercourse fell within the purview of the state's general solicitation statute, so that, even in the absence of a sexual-solicitation statute, homosexual solicitations could still be prosecuted as requests to commit a crime.[52] Thus the absence of a Pennsylvania sexual-solicitation statute made no difference so far as homosexual solicitation were concerned, and arrests and prosecutions for this offence

continued as before. But after the invalidation of the Pennsylvania voluntary deviate sexual intercourse law, the climate appears to have begun to change. While it is too early to know what the full effects will be, in Philadelphia at least, there is already evidence of a reduction in arrests for homosexual conduct under the open-lewdness law, and, of course, there are no longer any arrests for solicitation since the behavior itself is no longer a crime.[53] The conclusion is rather inescapable that repeal of a state's sexual-solicitation law and revising its open-lewdness statute will have little or no effect on arrests or prosecutions for same-sex conduct without sodomy-law reform.

This is not to say that sodomy-law reform invariably affects the way in which these other two statutes are enforced. There are places where sodomy-law reform, even when combined with repeal of the state's sexual-solicitation law and reform of its open-lewdness statute, has made no discernible difference. This is most likely where none of the three statutes were ever enforced prior to legal reform, so that the legal changes merely made official what had always been the practice. This appears to have been the situation in the Wilmington area of Delaware, which may be representative of the entire state. Delaware reformed its open-lewdness law at the time it reformed its sodomy law. It retained, however, a sexual-solicitation statute.[54] None of these changes, however, seem to have affected actual enforcement practices because the old Delaware laws had rarely been enforced. Thus there was little to change except the legal labels. One of the most active homosexual "cruising" areas in the state is located a few miles south of Wilmington at a point along the main highway leading to Cape Charles, Virginia. For longer than anyone can remember, it appears to have been the scene of wide-spread homosexual soliciting and sexual activity. This takes place on both sides of the highway, with a focus at an interstate bus station with a waiting room and cafeteria. The large parking lot for buses and passenger cars alongside the bus depot is reputed to be a rendezvous for assignations and for sexual relations in the cars. The men's room within

the bus station is reported to be honeycombed with "glory-holes". These amenities are said to be supplemented by two adult bookstores across the highway. Activity goes on twenty-four hours a day, openly and nonchalantly, although there is no evidence of any "hustling".[55] There appears to be a substantial amount of socializing on the basis of easy intimacy between some of the known homosexuals who frequent these establishments and the ostensibly heterosexual employees and supervisory personnel of the bus station -- male and female -- who apparently accept the scene. All this goes on right next door to a unit of the Delaware State Police, whose headquarters building is situated alongside the bus station parking lot.[56] No one appears to have heard of any arrest in the area for sexual reasons, either before the legal changes or after. As for the proximity of the police, the attitude appears to be that they are there to protect what goes on as they protect any other legal activity.

The Delaware situation, however, is not typical. It is more usual, as we have seen, for sodomy-law reform to have an important impact on any solicitation or open-lewdness statutes within a reforming jurisdiction. Unfortunately, this interconnection does not appear to have been recognized by those who conducted the survey. As a consequence, they treated each of the seven states they examined as comparable jurisdictions because all of them had reformed their sodomy laws. Evidently they did not understand that valid comparisons of patterns of arrests and prosecutions for homosexual conduct can only be made between states which have not only reformed their sodomy laws, but which are similarly positioned with respect to solicitation and open-lewdness statutes. At the time the study was conducted, three of the seven states surveyed -- Connecticut, Illinois, and Hawaii -- had repealed their sexual solicitation laws in the same penal code which had reformed their sodomy laws. In addition, Colorado, as we have seen, achieved the same result judicially.[57] Thus four of the seven states had no sexual-solicitation statutes at the time of the survey. Furthermore, three of the seven -- Delaware, Hawaii and Ohio -- had revised their open-lewdness laws in conformity with the recommendations of the <u>Model Penal Code</u>.[58] Hence all of the

seven states except Oregon had either repealed their sexual-solicitation laws or had reformed their open-lewdness statutes, and Hawaii had done both.[59] Clearly neither Oregon nor Hawaii was suitable for comparison with any of the other five states or with each other, inasmuch as the former still retained its solicitation law and an unreformed open-lewdness statute, while the latter had repealed the first of these and had reformed the second. Of the remaining five states, three -- Colorado, Connecticut, and Illinois -- had no solicitation laws but had not reformed their open-lewdness statutes. Thus they were not comparable with the other two, Delaware and Ohio, which had retained their solicitation laws, but had reformed their open-lewdness statutes.

The same legal confusion on the part of those who conducted the survey seems to have impelled them to repeat uncritically a statement by another writer that some people "believe that removal of sodomy from the Illinois code caused the police to become more intense in their pursuit of homosexuals under the state's solicitation law."[60] The facts are these. Illinois repealed its simple sexual-solicitation law in 1961, effective the following year. This was part of the same, newly-enacted criminal code which reformed the state's sodomy law. What those responsible for the survey were apparently alluding to is the provision punishing soliciting for purposes of prostitution, also part of the Illinois code.[61] Ever since this code went into effect, the police in Chicago -- apparently nowhere else in Illinois -- have used the solicitation-for-prostitution law in lieu of the repealed sexual-solicitation law in many instances of simple sexual solicitation, not merely for solicitations which continue to be illegal because money is involved. Thus the law against soliciting for prostitution has been illegally extended in Chicago to cover what the police know are lawful sexual solicitations. Some of these cases are dropped after they reach court, but many are prosecuted, with the arresting officer falsely claiming that money was either offered or requested by the defendant. However, the important point here is that the actual conduct involved has been legalized by repeal of the Illinois solicitation law, _not_ by sodomy-law reform. There seem to be fewer instances of this police illega-

lity now than in former years. As reprehensible as this perjurious conduct by law enforcement officers is -- regrettably this is not unknown in other large cities also -- it provides no ground for the assertion that, since sodomy-law reform in Illinois, the state's sexual-solicitation law has been used more widely, if only because there has been no sexual-solicitation law to use. What happened was that, since repeal of the state's sexual-solicitation law, the solicitation-for-purposes-of-prostitution law has been used more widely -- and quite often illegally -- in the city of Chicago. This deplorable situation has no connection with the Illinois sodomy-law reform.

The foregoing calls attention to the fact that the elimination of arrests for simple sexual solicitation sometimes does have the effect of increasing the number of arrests for soliciting for purposes of prostitution; but, unlike the situation in Chicago, this increase is not the result of any illegality on the part of the police. Some increase of this kind was noted in California after that state's supreme court severely limited the ambit of its solicitation provision.[62] This increase arises because the circumstances of some of the cases in which homosexual offenders were arrested in the past for simple sexual solicitation during the time when that conduct was illegal, would have warranted prosecution for soliciting for the purpose of prostitution. These defendants were not charged with the latter offence because it is considerably harder to prove that money or some other consideration was involved than merely that a simple sexual solicitation was made. With repeal of the sexual-solicitation law, this easier prosecutorial route was foreclosed, and so some of these cases are now prosecuted for what they always in fact have been, solicitations for the purpose of prostitution. It should be noted in this connection that, by comparison with the reduction in the number of homosexual arrests occasioned by repeal of the solicitation laws, the increase in arrests for soliciting for prostitution is quite small.

So far virtually the entire discussion has centred on the consequences of sodomy-law reform on the solicitation and open-lewdness statutes. In truth, the consequences are much more wide-spread, and go far

beyond these two statutes or any other laws. One important change is the reduction in police entrapment and the lessened harassment of gay people. This has been repeatedly confirmed over the past several years by on-the-spot investigations by members of the National Committee for Sexual Civil Liberties, who have examined public homosexual "cruising" areas in cities wuch as Columbus and Cleveland, Ohio, Denver, Los Angeles, San Francisco, Chicago, and several New Jersey communities. Areas such as the Mall in Cleveland and "Sodomy Circle" in Denver -- to use names familiar to the cognoscenti -- which once were scenes of much police entrapment and general harassment of homosexuals, with frequent arrests, now present the still-novel picture of police acting to maintain the smooth flow of traffic or to protect cruisers from the predatory young roughs who sometimes frequent such areas to rob or assault those present.

Law enforcement practices are very much subject to popular myths and prejudices. Traditionally Western society has reserved its supreme hatred for the male who is penilely penetrated, whether orally or anally. For reasons which run deep in our psyche, the active partner in anal homosexual intercourse and the passive partner in same-sex oral copulation have traditionally escaped much of this opprobrium. No doubt this stems from the belief that the male fellator or the man who allows himself to be anally penetrated is something less than a man, someone who is defiling his maleness by acting in the role of a female -- conduct which is inherently thought to violate the "natural" order of things. On the other hand, the penetrator is is conceived of as engaging in behavior which has been sanctified as "normal" for a male by our folk-mores, the only significant difference being that he is performing it with someone of the same rather than the opposite gender. Furthermore, the act of anal intercourse gives the penetrator that same sadistic sense of power and domination which has characterised this form of "sexual" behavior since its use in ancient times by conquering armies against those they had defeated. These attitudes are reinforced when the penetrator receives some monetary consideration in the process, thereby providing the rationale for the belief that the penetrator does not really enjoy the con-

duct, but indulges in it only because of the grinding pressure of poverty. Such a male does not lose the esteem of his peer group when it is known that he engages in homosexual intercourse of this kind. The real contempt is reserved for the hated "cocksucker" or for the male who allows himself to be "screwed".

Police practices, particularly in unreformed jurisdictions, have not infrequently reflected these popular distinctions. As members of organizations which, by necessity, habitually make use of force, policemen, as individuals, can readily identify with the power role played by the anal or oral penetrator. Hence it should come as no surprise to learn that, when two men are caught in same-sex behavior, it is not unusual for the police to arrest only the fellator or the one being anally penetrated, for only he is the "fag". And it is only he who will be the subject of police abuse. Thus, in terms of arrests or of negative encounters with the police, homosexual law reform has a greater beneficial impact on fellators and on those who are the objects of penile penetration than on the penetrators, since they are the ones who have customarily borne the brunt of the unreformed laws' rigor.

Law reform, together with changes in the social climate, have helped to eliminate the grossest forms of police brutality, even in unreformed states. This brutality was all-too-common in police encounters with homosexuals a generation ago. One such example comes to mind, a case that involved the filing of a civil liberties complaint in Newark, New Jersey, about thirty years ago. Two police officers apprehended in the act two men, one of whom was orally copulating the other. In this instance the police drew no distinction between fellator and fellated. One policeman took one man inside the patrol car, the second policeman took the other. Each policeman the insisted that each man perform oral sodomy on him. This proved to be no problem for the fellator, who complied, but the other man -- who, in common homosexual parlance, had merely been "done" by the fellator "for trade" -- remonstrated, whereupon he was beaten with a night-stick until his skull was fractured, after which he acquiesced. Afterwards both men were robbed of all

their money, bodily ejected from the patrol car, and told that they should consider themselves lucky for not having been arrested.

A frequent form of homosexual harassment involves the discriminatory enforcement of non-sexual laws or regulations when homosexuals or suspected homosexuals are the offenders. This is a subject so large that it can only be touched upon in these pages. A few examples from New Jersey, involving the traffic laws of that state, must serve as surrogates for similar cases in other jurisdictions, comprising all types of statutes, not only traffic laws. Prior to legal reform of its sexual laws, traffic laws in New Jersey -- as in other unreformed states -- were often enforced in a discriminatory manner in areas of homosexual cruising where violators were suspected of being homosexual. Traffic tickets were frequently issued to presumed homosexuals for technical violations which, but for the homosexual overtones, would have been ignored, or, at most, would have resulted in a warning. Similarly, motor vehicle laws and regulations were systematically stretched beyond their legitimate scope to justify giving summonses to persons considered homosexual. Several years ago a man was issued a summons in Newark for driving at night without his headlights on. It seems he had just emerged from a parking space alongside a city park, which is a well-known homosexual cruising locale. After driving only a few feet with his headlights off, he turned them on, at which point a police officer stopped him. Informed of his infraction, and seeing that the officer was in the process of writing a ticket, he inquired why this was being done for such a *de minimis* violation. Whereupon the officer candidly informed him that the summons was being issued only because "you shouldn't be driving around this area. You know what goes on here." The same man received a ticket on another occasion for walking across a main highway between two rest areas where homosexual cruising takes place.

Similar cases abound. At night the rest areas along certain main New Jersey highways have long been known as homosexual meeting places, with sexual activity not infrequently taking place both within the cars parked in those areas and in the woods which often lie alongside them.[63] Prior

to the reforms in the New Jersey sex laws, these highway rest areas were notorious as places for extensive harassment of homosexuals by the state police. This would take such unusual forms as the entering by the police of unattended cars parked in the rest areas, the occupants of which had left them in order to enter the wooded areas nearby. The police would then turn on the headlights of the vehicles they entered, so that, when their drivers returned, they would find their car batteries completely dead. If there were no one present with jumper cables to assist them in starting their cars, the drivers had to call a tow truck and pay an exorbitant amount to have their vehicles restored to service. Another form of harassment was the issuing of traffic tickets to cars parked in those rest areas, not for genuine violations, but for reasons which the police well knew could not stand up in court if they were ever challenged. Thus the police would give summonses for parking more than twelve inches from the rest area curb and for leaving an unattended parked car without any lights on at night. The police knew that these tickets would not be contested in court, because, if those to whom they had been issued did so, they would stand revealed as frequenters of those rest areas. The all-but-universal practice was for defendants to plead guilty and to pay their fines quietly to the violations clerk of the court, grateful that they were not required to appear for trial. The police found the procedure convenient, since it was difficult for them to discover sexual violations and the issuing of traffic tickets wrongfully provided an alternative method of badgering homosexuals. It also served their purpose of clearing the rest areas.

This was the situation when, in 1976, a unanimous New Jersey Supreme Court handed down an unusual decision, which had the effect of

decriminalizing most of the homosexual conduct taking place at the rest areas and making detection of any behavior which might have remained illegal all but impossible. The unusual feature of the decision was the incorporation of the language proposed for the state's revised open-lewdness law as found in the prospective penal code which had been draughted by the New Jersey Criminal Law Revision Commission, but which had not yet been enacted into law. The court's ruling followed the definition of open lewdness as proposed in the new code, which required that, to constitute the offence, the actor had to know that his conduct was "likely to be observed by others who would be affronted or alarmed."[64] While it could be argued that the justices were only guided in their decision by the language of the proposed penal code, it is difficult to avoid the conclusion that their holding was a form of judicial enactment of proposed legislation in anticipation of its later passage by the legislature.

In view of this, it is important to note that, with respect to the sexual provisions of the new code, the overriding objective of both the New Jersey Criminal Law Revision Commissioners as well as of a large majority in the legislature was to see that the criminal sanction did not obtrude upon private sexual conduct of consenting adults. With this in mind, two of the code's keystones in the area of sex were reform of the sodomy law and pro forma repeal of the state's fornication statute, since the latter had already been declared unconstitutional by the state supreme court about twenty months after the open-lewdness decision.[65] In keeping with this sentiment, the code, as finally adopted, also repealed the sexual-solicitation law and revised the open-lewdness statute in the sense just indicated.[65a] Thus the changes in the laws having to do with sexual behavior which the code proposed were, in a sense, all part of a package embodying the concept of protecting the sexual privacy of consenting adults. The decision of the state's supreme court in the open-lewdness case was but one example of that package's effect on government and private bodies in New Jersey both before and after the code's adoption by the legislature.

One of the direct results of the court's decision was

to embolden a few of the defendants who were being given traffic tickets at the rest areas to challenge them in court. This resulted in several victories in municipal court, which may have seemed like routine acquittals of defendants in minor traffic cases, but which were truly sensational when their real import was recognized. They were a harbinger of the process of dismantling the whole discriminatory enforcement edifice of the state police. The traffic decisions held that the statutes which set a maximum distance from the curb that a car might be parked and which required that a parked car have its lights on at night applied only to vehicles parked on travelled highways, not to those at rest areas.[66] An acquittal was also obtained subsequently by another defendant who had been given several tickets for allegedly having bald tires on his car which had been parked in another rest area known as a homosexual rendezvous.[67]

In addition to these municipal court rulings, the New Jersey Supreme Court decision created the climate for organizing a group of homosexual frequenters of the rest areas, who succeeded in obtaining a meeting with the chief of the state police in Trenton. At that meeting, which was also attended by two state deputy attorneys-general, the lawyer for the rest area patrons, and this writer, the Supreme Court's open-lewdness decision was the central focus of discussion. The final outcome was a promise by all the state officials present that harassment of any kind would cease forthwith, and that an intra-departmental inquiry of state police operations in the southern part of the state would be held to insure that the promises were kept.[68] And so they have been. Clearly, without sexual-law reform in New Jersey -- actual and prospective -- no change in police practices would ever have occurred; even the meeting itself might not have been possible.

V

Municipal Ordinances and the Doctrine of Preëmption

To return now to the survey. As noted at the beginning, questionnaires were sent to the police in cities with populations of 50,000 or more. Had the survey involved sexual-solicitation or open-lewdness laws only, this group of cities would have been broad enough for the survey's purpose. Urban areas must reach a certain critical size before they need, or can afford, a separate vice-squad, and vice-squad officers are about the only ones who enforce laws of this kind full time. But the sodomy laws are different, and, to the extent that prosecutions under them occur at all -- for conduct other than private acts between consenting adults -- their enforcement is not limited to members of vice-squads. Local or state police in communities of any size or in rural areas are as likely to arrest for sodomy as are the police in large urban locations. Hence, for the purpose of investigating the consequences of sodomy-law reform, limiting the survey to police in the larger cities may have produced a survey which was too narrow for its purposes.

More serious was the fact that the only prosecutorial authorities to receive the questionnaires were county attorneys. Most, if not all, cities over 50,000 in population are authorized by their states to have municipal courts of their own, in which event the town or city attorney is likely to be the prosecutorial authority for offences heard in these courts. Because municipal courts are generally limited in their jurisdiction to lesser offences, solicitation and open-lewdness cases are typical of the sexual judicial staple with which they are concerned. More serious crimes, including all felonies, are customarily tried in the county courts, and since, prior to sodomy-law reform, sodomitical conduct of any kind, whether between consenting adults in private or not, was usually a serious felony, municipal attorneys are not likely to have been involved in any sodomy prosecutions. Furthermore, because private homosexual conduct between consenting adults hardly ever gets into court, the only kinds of sodomy offences with which county prosecutors

are likely to be familiar are cases where the conduct occurred in public, or where it involved force or someone under the sexual age of consent. Hence, given a choice among respondents, municipal attorneys would have been a much more knowledgeable group, for, though they, like county attorneys, have little or no experience with sodomy cases involving conduct which is decriminalized by sodomy-law reform, they will certainly have had more experience with sexual-solicitation and open-lewdness cases. There is another reason for this. State offences, such as sexual solicitation and open lewdness, are often duplicated by local ordinances on the same subject. In that event, municipal police are more likely to arrest, and municipal prosecutors are more likely to prosecute, under their own local ordinances than under the state statute, assuming the conduct with which the defendant is charged gives them a choice between the two laws.

This opens up the entire subject of municipal government. The municipal judicial system is usually parallelled by a municipal legislative system, which, like the former, must be authorized by the state. This authority, which empowers cities and towns to enact local ordinances, is usually found in conjunction with a municipal court system. (Small or unincorporated communities are generally not granted authority of this kind.) Municipal power to legislate by ordinance is customarily limited to matters which are primarily of local concern; in the criminal field, this means minor offences. This is why sexual solicitation, loitering for sexual purposes, prostitution, and open lewdness are staples of municipal legislation in the sexual field. Where ordinances are little more than replications of similar or identical state laws, local police have the option of arresting under the municipal enactment or under the state statute.[69] A problem arises when a local ordinance is inconsistent with existing state laws on the subject. When such a conflict exists, it is usually resolved by recourse to the legal doctrine of preëmption, which rests on the fact that all municipalities are creations of the state, and that their ordinances must always yield to any incompatible state enactment. This doctrine or principle is applicable even when there is no specific state statute on the subject, since the state's

silence is often held to be reflective of state policy, and, under the doctrine of preëmption, any local ordinance which contravenes state policy, whether that policy be explicit or implicit, is also null and void.[70]

Although every state recognizes the doctrine of preëmption, there are wide differences in the way it is applied. One group of states applies the doctrine in the strongest possible manner. In those jurisdictions the highest court of the state has simply ruled that the doctrine is a continuing one which has always existed and requires no legislative implementation. Thus it is applicable automatically whenever the validity of local legislation is under consideration. In a second group of states the legislatures have done by specific statute what the judiciaries in the first group did *sua sponte*. These statutes expressly state that the doctrine of preëmption comes into play whenever the validity of a local ordinance is at issue. They are known as "general" preëmption laws to distinguish them from the ad hoc preëmption provisions found in certain of the

statutes of a third group of states, which provisions apply only to the specific laws to which they are attached. Jurisdictions comprising this last group are known as "weak preëmption" states. In them neither the courts nor the legislatures have done anything to establish the general principle of preëmption. Consequently, in those states it is necessary to include an express preëmption clause in any piece of state legislation intended to override local enactments; without such a specific clause, preëmption does not apply.

It is in this third group that problems arise, for, if any such state passes a law without an express preëmption provision, the way is always open for a municipality effectively to nullify a state statute by a municipal enactment or by continuing to enforce an existing ordinance incompatible with the state legislation. Difficulties can arise even in the first two groups of states -- the "strong preëmption" jurisdictions -- because the doctrine of preëmption does not operate automatically. Municipal statute books are filled with local ordinances which contravene specific state laws or state policy as expressed in state laws, yet they continue to be enforced. Many of these deal with sexual conduct. Some of them were unexceptionable at the time they were enacted, but became defective as a result of subsequent state legislation. Others were incompatible with existing state laws from the moment they were adopted. The problem is more likely to occur in the case of solicitation or open-lewdness laws than with sodomy statutes, since sodomy is usually a felony, or at least a serious offence, and municipalities in all states are generally prohibited from legislating with respect to serious offences. No matter how an ordinance's incompatibility with the state enactment arose, it is usually necessary to wait until there is a prosecution under it in order to challenge it and have it declared null and void by a court.[71] Years can pass waiting for such a case.

The continuing enforcement of ordinances involving matters which have been or should have been preëmpted by the state explains why sexual conduct which has been legalized by state legislation not infrequently continues to be proscribed in some cities within that state. A classic

continues to be proscribed in some cities within a state. A classic example where sexual law reform has, to a substantial degree, been defeated by a pre-existing local ordinance is the city of Chicago, where the police continue to arrest persons in factual situations and for conduct which, by any reasonable interpretation of the state legislation, was legalized by the Illinois Criminal Code of 1961. Illinois has always been a weak preëmption state, but the city of Chicago has been fortified in its efforts by a provision in the new Illinois constitution of 1970 which permits local governmental jurisdictions, defined as "home rule units", to legislate in extremely broad areas, encompassing subjects which, in virtually every other state except Alaska, are excluded from municipal regulation and are reserved to the state alone.[72] Thus, under an old Chicago ordinance, which punishes, amongst others, "inmates" of "houses of ill fame", people continue to be arrested in that city merely because they are present in an establishment where an offence, such as open lewdness or soliciting for prostitution, takes place. Under the ordinance, a single such violation has the potential effect of converting the entire premises where the violation took place into a "house of ill fame", and every person therein then becomes open to arrest as an inmate of a house of ill fame, even though he may never have known that any offence had taken place.[73] Compounding the situation is the frequency with which Chicago police officers fabricate cases of soliciting for purposes of prostitution by falsely alleging that offers or requests for money were made by defendants, a practice previously discussed. This enables the police, on the basis of false allegations of soliciting for prostitution against one person in an establishment, such as a gay bar, to arrest any or all of the other patrons as inmates of a house of ill fame.

By contrast, enforcement by the city of Newark of a sexual-solicitation ordinance which was clearly incompatible with the 1976 New Jersey Supreme Court decision that drastically reinterpreted the state's open-lewdness law did not continue beyond the enactment of the state's new Code of Criminal Justice two years later. The difference may lie in the fact that New Jersey is a very strong preëmption state.[74]

Questions raised by the existence of local ordinances go directly to the validity of the survey. When the questionnaires were returned from the city police departments in the seven states which had reformed their sodomy laws, there was no way to determine whether the absence of any discernible change reported by the respondents was attributable to the state's sodomy-law reform or to the enforcement of municipal ordinances, the effect of which was to suppress homosexual behavior. This is particularly relevant with respect to the police responses to the question as to whether they believed homosexual conduct had increased since sodomy-law revision. Because no prior research was done in any of the cities where the police were sent questionnaires -- for the purpose of determining which ordinances inconsistent with the state's sexual law reforms continued to be enforced, if any -- there was no way of knowing whether the reported absence of any significant increase in private homosexual behavior meant that the state's sexual law reforms had had no effect in this regard or that the absence of an increase was due to the continued enforcement of municipal ordinances serving as surrogates for the old unreformed laws.

VI

Executive Clemency

There is one aspect of criminal law reform which few people ever consider, and that involves those who remain in prison for offences which, after the legal changes, are no longer crimes. There is also the more numerous group of persons who, although not in prison, are branded for life with convictions for conduct which is no longer criminal. What, if anything can be done for those thus circumstanced? Here it must be pointed out that the legal issues raised by cases such as these are manifold and complex, and that ultimately each case has to be decided on the basis of its own particular facts. All that can be done here is to explain in general terms some of the legal principles involved and to discuss, again in general terms, some of the possible remedies. We start with a relatively simple situation, one where the statute which created the offence has been repealed by the legislature in its entirety and no other law has been enacted to replace it. Under our system of jurisprudence, persons convicted under the old law have no legal redress by which their convictions can be set aside, since, at the time they engaged in the prohibited conduct, it <u>was</u> illegal. This is a general principle of our law, applicable in every jurisdiction.

It does not follow, however, that such persons have no remedy at all. They may well be appropriate candidates for the exercise of executive clemency in the form of a pardon. It is precisely to redress legal inequities of this kind that the executive has the power of pardon. Unless they are personally involved, however, most people have only the most shadowy concept of the nature of the pardoning process, if only because it is one of the few -- perhaps the only -- vestige of the royal prerogative in its pristine form which still remains in our legal system. The royal power of pardon is kith and kin to the royal power to "suspend" or to "dispense with" a law, three powers which inhered in the King until he was shorn of the last two when the English Parliament enacted the Bill of Rights in 1689.[75]

Intrinsic as it is to the sovereign, the pardoning power, whether exercised by the King in the eighteenth century or by the governor of an American state today, is still almost plenary in its effect. As the modern manifestation of the exercise of royal grace, it is a supreme act of mercy. When exercised to the fullest, the power of pardon results in the complete remission of guilt so far as the law is concerned, and the restoration of the offender to where he stood immediately prior to the commission of the pardoned crime. A full pardon has the effect of expunging the criminal record in its entirety just as if the crime had never been committed. It can suspend any penalties which may have been imposed, remove any disabilities, and wipe the entire record clean so that, legally, there is no record. The recipient of a full pardon -- where the pardoned offence is the only one for which he was ever convicted -- is in no different legal position from anyone else who has never been convicted. That means he may swear that he has never been convicted of any offence without perjuring himself, and any official who so much as suggests to the contrary is himself committing an offence.

Inherent in the plenary power of pardon is the ability to grant lesser forms of amelioration, such as the power to commute punishments which have been imposed judicially, administratively, or by the military, to issue reprieves, and to issue conditional or partial pardons. Pardons may be individual, that is, applicable only to one person, or general, in which case they apply to an entire class or classes of persons. An amnesty is a form of general pardon, since it is rarely granted to an individual.

This writer has been involved as a consultant in two pardon cases. Both arose as a consequence of homosexual law reform in their respective states. The first was in Connecticut, and involved a

Bridgeport man who had thrice been convicted of "indecent assault", for which he had served respectively 9 months, 15 months, and 15 months in the state prison. This offence was one of several antique sexual crimes which were swept from the Connecticut statute book when that state's new criminal code took effect in 1971. Here we must pause to examine the kind of legal detritus of a sexual character which the new Connecticut code repealed, if only to appreciate the full import of sexual law reform. By concentrating our attention on sodomy-law reform and the modification of its attendant statutes, we lose sight of the all-embracing criminal apparatus involving sex which was dismantled in most jurisdictions through their adoption of modern penal codes. The old codes were intended to impose sexual celibacy on every person except those lawfully married, and to limit the latter to sexual relations with their spouses. Thus we find that, under the old Connecticut code, "indecent assault" was only one of several sexual offences, all of which were subsumed under an all-encompassing chapter entitled "Offences against Chastity", of which "bestiality and sodomy" constituted the first section.[76] The next section defined "indecent assault" and read as follows:

> "Any person who commits an indecent assault upon another person shall be imprisoned not more than ten years. The overt acts or acts of which such assault consists need not be otherwise described in a complaint under this section than as an indecent assault, unless the accused requests the court that it be particularly described in such complaint. It shall be no defense to a complaint under this section that the person assaulted consents to the act of violence or to the act of indecency, and this section shall not affect the penalty for sodomy."[77]

Thus, if a defendant had the requisite prurient frame of mind, a simple touching of another person on the shoulder could constitute an indecent assault.

This provision was followed by another which punished "fornication and lascivious carriage", the latter constituting any form of speech or deportment which could be considered indecent.[78] This, in turn, was succeeded by a further provision punishing "prostitution, lewdness [and] assignation", which were defined as follows:

> "As used in this section, 'prostitution' includes the offering or receiving of the body for promiscuous sexual intercourse <u>without hire</u>, 'lewdness' includes any indecent or obscene act and 'assignation' includes the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement."79

Bearing in mind that all the above offences carried with them the possibility of substantial prison terms, a careful reading of the so-called "prostitution" provision indicates that, under it, a young man could have been sent to prison for asking his girl-friend to kiss him. It is only when we are aware of what the old criminal system represented in terms of enforced sexual behavior -- all forms of sexual behavior -- that we can in some measure appreciate the enormity of the incubus which was lifted from all people by its disappearance. For homosexual law reform has never stood in isolation. It can be understood only as part of the much larger reform movement affecting all our sexual laws.

It is within this perspective that we now return to the case of the Connecticut man seeking a pardon. In Connecticut the gubernatorial power of pardon has, by statute, been delegated to an administrative Board of Pardons which functions in this regard as does the Governor in most other states.[80] The Board's procedures are long and drawn-out. Every petitioner appears before it and those opposed to the granting of a pardon may also appear. In this case, each of the three prosecutors who had convicted the petitioner appeared in opposition to a pardon. Several years elapsed between the time when the proceedings were first initiated and their final conclusion, during which period it appears that the Board twice denied the pardon informally. In the end, however, a full pardon was granted. Needless to say, the psychological impact on the petitioner was dramatic.

The second case arose in New Jersey, but it is not yet <u>sub lite</u>. At the time of his arrest for simple sexual solicitation -- no sexual contact of any kind, just words -- the principal was superintendent of schools in a medium-sized city in the state and father of nine children. Under the New Jersey criminal code of 1978, which took effect the following year, there is no crime of simple sexual solicitation. After his conviction

in 1977, defendant spent some $39,000 in unsuccessful legal appeals, during the course of which he lost his position as superintendent and was eventually forced to seek public welfare. Like many persons in similar circumstances, the defendant never thought in terms of a pardon, and the fact that his lawyer failed to suggest it testifies to the manner in which some attorneys discharge their professional duties to clients who have been charged with sexual behavior of which many people strongly disapprove. Only now, belatedly, does the defendant realize that good grounds for his seeking a pardon have existed ever since the state's new criminal code took effect in 1979.

The same principles apply to those in prison when homosexual law reform takes effect. If the offence for which they were convicted no longer exists, they are appropriate subjects for a full pardon, which would have the immediate effect of releasing them from incarceration. In addition, there may be a few persons imprisoned who fall into a different category, which, though small in number, is also deserving of some form of executive clemency. These are adults who were convicted of consensual homosexual behavior with other adults in <u>public</u> situations, offences which, as we have noted, become nothing but open-lewdness after sodomy-law reform.[81] Because sodomy carries far more severe penalties than open lewdness, those serving prison terms for public sodomy between consenting adults in jurisdictions which have since reformed their sodomy laws deserve to have their sentences commuted to terms consistent with those imposed for open-lewdness. In many cases, this may mean commutation to time already served. There are, however, unlikely to be many prisoners of this class because, even in unreformed states, when confronted with a choice of prosecuting for open lewdness or sodomy, prosecutors will almost invariably opt for the former. One reason is that, where the crime of sodomy retains its common-law definition -- so that it is limited to penile acts of anal intercourse -- proof of penetration is absolutely required to establish the offence, which is difficult to do. But even in states which hold oral copulation to be a form of sodomy, so that there is less problem of proof, prosecutors are likely, given the choice,

to charge a defendant with open lewdness rather than sodomy, sometimes out of a sense of compassion, but more probably in the belief that a jury will be more ready to convict for the lesser offence.[82]

So much for the relatively simple situation involving an

offence which has been removed completely from the statute book by legislation. We come now to where a statute has been struck down judicially instead of having been repealed legislatively. Here much depends on why the law was invalidated. The strongest case would appear to be one in which the law was struck down because of its unconstitutionality. Logic would seem to dictate that, if a statute is unconstitutional, its unconstitutionality must have existed ab initio, in which case equity would appear to require that all those convicted thereunder should have a legal right to have their convictions reversed. Regrettably, logic is not always the handmaiden of the judicial process. No such automatic right exists. Each conviction must be examined on its own facts, with the outcome dependent on numerous legal considerations quite independent of the issue of unconstitutionality. These considerations can rest on such factual questions as whether defendant was convicted as a result of his plea of guilty, or was found guilty after a non-guilty plea followed by a trial. Again, if defendant were found guilty after a trial, much may depend on whether he raised the issue of unconstitutionality himself at his trial or whether he is doing so now for the first time and only after he learned of the statute's invalidation by some higher court in an unrelated case. In the latter event, it may be too late to reopen his case. These are but samples of the numerous and complex legal issues which abound in this area of the law. It follows that, if there be no certainty of overturning a conviction where a statute has been declared unconstitutional, the chances of doing so are no better where a statute has been invalidated for some other reason, and may, in fact, be poorer.

What we really are dealing with here is a determination whether or not a case is res judicata or res adjudicata, as the legal expression goes. That is, whether "the matter has been [finally] decided." There is an underlying legal principle that, for every case, criminal or civil, there must come a time when the proceedings come to an end, and the judgment is considered final. This is necessary for the public weal in order that people who relied on the final decision may have the assurance that the

issues which were adjudicated to their ultimate conclusion in those proceedings will not be reopened unexpectedly in another proceeding at a later date, to their detriment or injury. This also applies to the Government after a conviction it obtained has been upheld by the court of last resort. For a defendant in a criminal case, the final stage is ordinarily reached when he has exhausted all his appeals. Thus, what we have been discussing here is whether, after a ruling that a statute is unconstitutional or that it is defective for some other reason, attempts to relitigate a case through new proceedings will be allowed after it had supposedly reached a final judgment.

As a general rule, courts are loath to give retroactive effect to decisions holding a statute invalid; they tend to restrict the consequences of their rulings to prospective cases only. The same is true where a statute is not struck down, but is fundamentally altered and limited in scope through judicial interpretation. Yet this is not always true. The Pryor court specifically ruled that its holding was to be applied retroactively to cases which had involved conduct that, by the court's redefinition, were no longer illegal. That decision was also made to apply to all cases then on appeal.[83]

To sum up. No understanding of the consequences of homosexual law reform is possible without an appreciation of the fact that it creates a large class of quondam offenders with penal records for crimes which are no longer crimes. Only a small number of these offenders are aware of what remedies may be available to them and fewer still are prepared, financially or otherwise, to embark on the lengthy procedures -- judicial, administrative, or both -- which are necessary in order to have their convictions reversed. We are led, then, to the ineluctable conclusion that homosexual law reform does not bind up all the wounds nor heal the scarifying and traumatic legacy left by the Draconian statutes it erases.

This leads us naturally to a discussion of the sociological consequences of homosexual law reform, which is the subject of the next chapter. But, before doing this, a few words are necessary regarding unre-

formed jurisdictions, for, only be contrasting the situation in states which have had no homosexual law reform with those which have, can one fully appreciate the significance of these reforms, particuarly where non-sexual matters involving homosexuals are concerned. Child-custody cases confirm this frequently. One such case was decided in California a year before the state reformed its sodomy law.[84] The lesbian mother in that case was denied custody of her child, one of the grounds being that sodomy was still a crime in California.[85] Denial of official university recognition to a gay student group was upheld in 1976 by a Federal court in Missouri on the same ground.[86] The converse is also true. Within months after New York reformed its sodomy law through a decision of its highest court holding the state's consensual sodomy law unconstitutional, a young man, an acknowledged homosexual, was legally permitted by a New York court to adopt his male lover. The court specifically cited the decision overturning the consensual sodomy law in support of its adoption ruling.[87]

The legal and administrative impact of sodomy-law reform is an entire subject of its own, too large to be discussed further here. Only one other aspect should be mentioned in passing, and that is the effect of sodomy-law revision on the enactment of laws prohibiting discrimination for reasons of sexual orientation in such matters as housing, employment, licencing, child-custody, and in many other relevant situations. Although a substantial number of municipal ordinances of this kind have been passed, both in reformed and in unreformed states, and though bills along these lines have been introduced into several state legislatures, no statewide law has been enacted anywhere as of this writing.[88] It would seem fair to say that sodomy-law reform should make the task of passing state antidiscrimination statutes easier.

VII

Some Sociological Consequences of Reform

Turning now to some of the sociological consequences of homosexual law reform -- another subject which could comprise an entire article of its own -- we note that the survey reported that "a notable finding was that a sizable proportion of each group /i.e., the police, prosecuting attorneys, and homosexuals/ responded that social condemnation of homosexuals had decreased after the law's revision."[89] This statement may well be true, but it is misleading. The same poll, conducted amongst a similar group of respondents in jurisdictions which had not reformed any of their sex laws, might also have reported a decrease in the social condemnation of homosexuals. This is because it is less any specific legal changes than the change in the entire social climate -- in unreformed states as well as in reformed -- which has reduced the deep-seated antipathy toward homosexuals. Obviously, the legal changes have contributed to this change in the social climate, but the converse is also true, namely, that the change in social climate has had its influence on the law and has helped to fashion it. As indicated earlier, we have here a chicken-and-egg relationship. Social change exerts its influence on the law, but the law itself, when changed, exerts an influence on social attitudes.[90] Because this process occurs in both sexually-reformed and sexually-unreformed jurisdictions, it is too much to claim that the reduction in "social condemnation of homosexuals" can be ascribed to any specific legal measure, like sodomy-law reform.

This does not mean that the survey's conclusions are necessarily erroneous. Occasions do arise, although infrequently, when it is possible to trace changes in attitudes or altered conduct directly back to sodomy-law revision. One of the largest gay bars in Denver employed as a security guard a "moonlighting" member of the Denver police force. This officer personally informed the writer that he would never have considered

working there if Colorado had not revised its sodomy law two years before, nor would the police department have allowed him to take the job before legal reform. He stated that his work at the bar had caused a complete change in his own attitude toward homosexuals, from what once had been feelings of hatred and contempt to a gradual recognition that homosexuals are really no different from other people. He stated that he liked his job at the bar, and had made some good friends from among the patrons. Originally, he had had to endure some ridicule from his fellow police officers because of his work, but that had now ended.[91]

If the above can be considered an effect of sodomy-law reform, the following may be looked upon as a small contribution to future reform. The situation is almost a duplication of the one in Denver, except that it took place in Atlanta, Georgia, which remains an unreformed state. Until its closing for financial reasons a few years ago, a gay Atlanta discotheque, one of the largest in the country, employed as security guards several "moonlighting" members of the Atlanta police department. The close camaraderie which this writer witnessed between these policemen and the clientele was something to see. He was told that the social climate in Atlanta had reached the point where the police department was actively attempting to employ one or two gay persons as police officers to patrol certain homosexual cruising areas in the city's parks, and that recruiters for this purpose had been sent to gay bars and discotheques in the city. No doubt the changes in social attitudes toward homosexuals in the country at large have made the Atlanta situation what it is, and sexual law reforms in other states have undoubtedly contributed to these attitudinal changes. It is reasonable to suppose that the cumulative social effects in Georgia of changed attitudes and practices, such as those described, can, over time, lead to reform of the Georgia sodomy law. The lesson here is merely that these two identical factual situations, one in a reformed, the other in an unreformed state, provide a rare insight into the actual working of the cause-and-effect relationship, a phenomenon which is ordinarily difficult to pinpoint.

There is a further sociological consequence of homosexual law reform which remains to be considered, and that is a very broad one, carrying important psychological sequelae for all homosexuals. The unreformed 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 many of the very large cities of this country. Like all ghettos, the homosexual one has its distinctive argot, its idiosyncratic garb, its own mannerisms -- in short, its own particular life styles. Where a ghetto is the result of linguistic, religious, and/or cultural differences unconnected with any legal discrimination, the way is always open for its members -- or at least their children of the next generation -- to leave the ghetto, and, through the process of either acculturation or assimilation, 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 residents of those ghettos were objects of open economic and social discrimination at the time, but there were never any legal barriers to the disappearance of these separate enclaves.

The same is not true where a ghetto is reinforced by specific legal discrimination. There the process of acculturation or assimilation becomes difficult, if not impossible. The history of the black ghetto is impressive witness to the need for specific 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 homosexual, unlike the black man, is not indeliby 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 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 entails. What needs to be noted is the social cost to the community, the cost in terms of human potential unrealized, which such discrimination involves. Homosexual ranks are littered with blighted careers, with people of ability and talent unable to put their abilities to best use, whose actual occupations often 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 discriminating society. Cases confirming this are legion. No actual legal conviction is necessary; 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 his bar association and ends up 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 licence, 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.

Homosexual law reform constitutes a powerful step toward dissolving the homosexual ghetto by slowly altering the psychological outlook of homosexuals. It undermines their perceived need for the ghetto as a shelter against the outside world, and points to the time when, with their homosexuality known but no longer relevant, they will be able to become part of the American mainstream. In this sense, therefore, homosexual law reform contains a psychological dimension for homosexuals. Although it affects all homosexuals, for obvious reasons its impact is most manifest in the case of those who have some brush with the legal system, either criminal or civil. These psychological changes are particularly evident where homosexuals have been victims of crimes which occur as an ancillary consequence of their homosexual relations, often with strangers. The vast majority of such crimes go unreported by their victims in unreformed jurisdictions, if only because they fear criminal prosecution for their illegal sexual conduct, which is likely to be revealed in the course of reporting the crime against them. After homosexual law reform this fear begins to ebb, although the change is slow and is likely to take at least a generation for its full impact to be felt. But there is already evidence that homosexual law reform is working in this manner.

Two cases are remembered, both involving the same person. About twenty years ago this individual picked up a hitch-hiker in his car, who suggested that they go to the latter's apartment for sexual purposes. The individual agreed. At the conclusion of the sex, the individual was assaulted and bound to the bed, while his erstwhile sexual companion made off with his car. Although he immediately reported the robbery to the police,

the victim told nothing about his having gone to the robber's apartment for sexual purposes. Only after his car had been recovered by the police and the robber had been apprehended -- which made it necessary for him to appear as the prosecution witness -- did disclosure of all the circumstances become necessary. At that time the state where he lived had not reformed its sodomy law, violation of which could lead to imprisonment of up to twenty years. The victim underwent days of agony at the prospect of having to reveal his sexual conduct to the county prosecutor who was preparing the case. Imagine, therefore, his relief when, after he finally made a full disclosure, the prosecutor informed him that he was not interested in what had occurred sexually, and that all he was concerned with was that a robbery had been committed. He intended to prosecute <u>that</u> crime and nothing else. Recently the same individual found himself once again in an almost identical situation. His car was stolen by another pick-up with whom he had spent the preceding night at a motel. Once again it was recovered by the police with the thief in it. But this time, no doubt fortified by his earlier experience, and, above all, by the fact that his state had now reformed its sodomy law, he gave full details of his sexual involvement at the time of his initial report to the police immediately upon discovering the theft. He did this, he stated, without fear or concern, since he knew that the law was now on his side.

These occurrences also demonstrate the chicken-and-egg relationship between changes in the criminal law on the one hand and changes in societal attitudes on the other. There is no doubt that legal changes are promoted by changes in public opinion, one indication of which is an unwillingness on the part of law-enforcement authorities to prosecute violations of laws which a significant body of opinion feels should have been repealed long ago. Thus the refusal of the prosecutor to prosecute the homosexual victim twenty years ago for his illegal conduct reflects the preëxisting attitude of the law-enforcement authorities in that state toward the crime of sodomy long before the law itself was reformed. As part of the political and social climate within the state, it must be considered an adumbration of the subsequent

New Jersey sodomy-law reform.

But to return to the psychological effects of sodomy-law revision on homosexuals themselves. There is little question that substantial numbers of homosexuals victimized by sexual partners under circumstances where they would never for a moment have complained to the authorities under the old unreformed sodomy statutes are willing to do so after legal reform, and are prepared to disclose their homosexual conduct in the process. This new willingness to report crimes associated with their homosexual activities must be viewed as an important aspect of the affects of sodomy-law reform on homosexuals. Indeed, questions about this might well have been included in the survey. Here again, however, we must guard against attributing this psychological change entirely to law reform. Changes in the social climate during recent years have also played their part in fortifying homosexuals with the necessary resolve to stand up for their legal rights. Nevertheless there _is_ a psychological impact due to law reform, and it is not limited to homosexuals involved in criminal proceedings. It is manifest in a host of other situations whenever homosexual life makes contact in any serious way with the legal system of a reformed state. These legal contacts may involve anything from a tort action between two homosexual lovers who have fallen out, the probate of a homosexual's will, or a child-custody case involving a lesbian mother. The entire legal spectrum is covered. The underlying fact is simply that, after sodomy-law reform, the terror customarily induced by the prospect of discovery by the authorities that one is homosexual is greatly reduced, even though there remain many homosexuals who never fully succeed in eliminating their fears because they are so deep-rooted.

In this connection one must commend the prescience of

VIII

Epilogue on Methods of Investigation

The remaining pages are devoted to a discussion of the investigatory methods employed in the survey, and to suggesting certain alternatives. But first, as to the number of respondents. We are informed that the survey's conclusions were based on 26 questionnaires received from police departments, 21 questionnaires from prosecuting attorneys, and 27 from homosexual groups, representing respectively 19%, 26%, and 12% of the total number of questionnaires distributed to each category.[92] To hazard conclusions on a sampling so thin, which did not involve any face-to-face contact between questioner and respondent strikes this writer as totally inadequate. These misgivings are not dispelled by the study's confident assertion that "the rather low percentage of returns should not be regarded as a serious shortcoming of the study."[93]

We come now to a discussion of the best way to obtain reliable information, taking into consideration the subject under investigation.[94] Here it becomes apparent that the nature of the subject virtually predetermines the type of investigative tools which need to be employed. Thus we begin with the fact that, whatever the merits of questionnaires in other connections, they are clearly not appropriate in the area of homosexuality. This conclusion is buttressed by the fact that it was not merely homosexuality itself which was here under investigation, but its relationship to the law. From much of what has preceded, it would seem that those responsible for the survey were (1) uninformed about the sexual laws themselves, (2) had little understanding of the practices of law-enforcement officers with respect to those laws, and (3) had little or no knowledge of the effects of various laws on homosexuals, either before or after their revision. This explains their failure to recognize the centrality of the solicitation and open-lewdness statutes in any discussion of sodomy-law reform. As a consequence, they looked

in the wrong places and asked the wrong questions. Their apparent ignorance of the implications of municipal ordinances caused them to omit an entire area of the criminal law affecting homosexuals in the most direct way. It is not unreasonable to suppose that, had they consulted with persons knowledgeable in the field of sexual law, they would have known what to ask and would have recognized that questionnaires could not elicit the kind of information they were seeking.

Three alternatives to the use of questionnaires come to mind, any one of which alone or in combination with the others would seem to have been far more suitable for the purposes of the survey. The first is personal interviewing, face-to-face. The second, which is less time-consuming, but also less likely to produce as much information as the first, is telephone interviewing. A third method, and certainly for the purposes of this survey the best of all, is participant observation, in which the investigator obtains his information during the course of his own participation in the activity being examined. This has the obvious advantage of dissolving any latent fear

or suspicion on the part of respondents, and creates the kind of rapport so necessary for successful interviewing. Many people who will not fill out questionnaires will respond to face-to-face information gathering. It enables the interrogator to record responses which are qualified and to probe for details which no prepared question sheet can ever elicit. Personal interviews at the spot where the activity being investigated takes place, even if it does not involve direct participant observation, usually provide certain other opportunities for information gathering, since more than one respondent is often available at such places, thus enabling an investigator to verify information received from one person by questioning another. On-the-spot questioning also provides readily-available visual confirmation of much of the information which is obtained. Conceded that this method of investigation is far more time-consuming and expensive, it is still the best, and sometimes the only, way to obtain valid and meaningful data. Information of this kind cannot be secured by sitting at a desk collating responses to questionnaires which have been sent in by respondents who have never been seen. What is required are live respondents and live investigators, the latter willing, figuratively, "to get their hands dirty" in the real world of homosexual cruising and soliciting.

This means visiting locales at the cutting edge of confrontation between homosexuals and the law. In terms of respondents it means interviewing police officers who patrol, and homosexuals who frequent, the many different kinds of homosexual meeting-places -- bars and beaches, highway truck stops and rest areas, movie theatres and adult book stores, bus stations and parks, gymnasia and baths. It means interviewing hitch-hikers and those who pick up hitch-hikers, speaking with "C.B." operators who cruise by short wave, "rapping" with "cons" and "ex-cons", talking with the "fuz" in the tenderloin districts of our large cities. It was this kind of investigation _in situ_ that won Laud Humphreys the high accolades of his fellow sociologists for his _Tea-room Trade_.[95] Very few of the homosexuals or bisexuals encountered at such places belong to any gay groups, most of whose membership tends to live in small, ghetto worlds of their own in the larger cities, thus insultating the

greater part of them from real confrontation with the law. Interviewing the variety of types found in these different locales would have produced a far more informed group of respondent police officers and homosexuals.

As it was, a questionnaire was sent to each of the chiefs of police in the cities surveyed with a second questionnaire going to "the officer in the [police] department responsible for offences such as homosexual activity." To obtain homosexual respondents, "five questionnaires each" were sent "to 47 homosexual groups listed in a national directory, asking that they be distributed to members."[96] Thus many questionnaires went to persons who may have had little or no knowledge of the subject under examination, yet who may nevertheless have taken it upon themselves to answer the questions. Personal, on-the-spot questioning allows interviewers to make some selection as to whom they interrogate, and without doubt would have contributed to the making of a more knowledgeable group of police and homosexual respondents.

Finally, there is the question of the kind of homosexuals used in the survey. We are informed that answers were received from only six of the 47 homosexual groups which were sent questionnaires, representing a response level of less than 13%. This probably reflected the transitory character of so many homosexual groups, which are here today and gone tomorrow. By comparison, 24% of the police departments and 33% of the prosecuting attorney offices responded.[97] Since only six homosexual groups were heard from, the total number of responses they returned amounted to a mere 27, which was less than 12% of the 235 questionnaires distributed to gay organizations. Even those responsible for the survey conceded that this was a "particularly low" rate of return.[98] This also speaks volumes as to the suitability of the general membership of gay groups as respondents. If they had had more knowledge of the subject, their response rate would have been substantially higher, for it is axiomatic that persons who know something about a subject are far more likely to answer questions about it than those who are ignorant.

We know little about how the questionnaires were distributed within the homosexual groups except that there seems to have been no

supervision, and that it was seemingly left to each individual who was offered a questionnaire to decide whether or not to answer it. Some people have deep-seated urges, possibly psychological, to participate in surveys or to be interrogated by interviewers, and it is debatable just how representative of any given group are those persons who act as question-answering volunteers, to say nothing of the reliability of the information they give.

These shortcomings would not be of great moment if the only purpose for using the membership of gay organizations had been to insure a wide distribution of the questionnaires amongst persons of homosexual orientation. But this was not the case, because the study utilized the membership of gay groups as its basic homosexual sample. This is disturbing, because the homosexuals who comprise the membership of gay organizations constitute a small, out-of-the closet fringe whose outlook -- social, political, and cultural -- is not representative of the great body of people who engage in same-sex behavior. The vast majority of homosexuals and bisexuals are unrecognizable and unidentified; they remain "in the closet" and belong to no gay organization. Yet they do reflect the religious, racial, ethnic, political, age, and social configuration of the population as a whole. This is not true of the membership of gay groups, which is overwhelmingly "lily white" in racial composition, below 35 in age, single in marital status, urban in its residential patterns, liberal Democratic in its political views, and middle class in its social origins. From this membership the gay leadership emerges, which explains why most of these leaders have no genuine mandate from the constituency they profess to represent. While no blame attaches for the unrepresentative character of the membership of gay organizations -- it is a consequence of the historical matrix out of which the homosexual minority sprang -- it is nevertheless an ever-present sociological fact which is ignored at one's peril.

This explains why, with a few salient exceptions, the membership of gay groups does not include the athletes, policemen, truck drivers, active-duty servicemen, John Birch Society members, farmers, politicians, ranch hands, construction workers, mechanics -- the list could go on -- who,

whether or not they consider themselves homosexual, engage in homosexual behavior. It is not that homosexuals are not represented in these callings in as high a proportion as they are in the general population; on the contrary, they are. It is simply that most homosexuals do not "come out", and that, even when they do, they are not likely to join a gay group. This is not surprising. In many of the occupations just named the risks attending "coming out" are substantially higher in terms of possible problems with government authorities or with peers than in trades or professions where a recognized homosexual presence is generally accepted.[99]

There is, however, another sense in which the homosexual respondents in the survey were not representative of homosexuals as a whole. This stems from its failure to differentiate between persons who merely engage in homosexual activity and those who are gay. Being homosexual is not synonymous with being gay even though the terms have, until this point, been used virtually interchangeably. The distinction is of great importance, and requires a brief excursus at this juncture. Those familiar with the Kinsey study of the sexual behavior of white males will remember that, for the purpose of that study, the so-called Kinsey heterosexual-homosexual rating scale was posited, ranging from zero to six.[100] It is from this study that the widely-repeated figure of 37% originated, referring as it does to the "37 per cent of the total [white] male population [which] has at least some overt homosexual experience to the point of orgasm between adolescence and old age."[101] The same Kinsey volume also stated that "10 per cent of [white] males are more or less exclusively homosexual (i.e., rate 5 or 6 [on the scale]) for at least three years between the ages of 16 and 55" and that "4 per cent of . . . white males are exclusively homosexual throughout their lives, after the onset of adolescence."[102] It is from these statistics that the widely-accepted figure of 10% for the gay population of the country is derived, representing as it does simply the sum of the 5's and 6's on the Kinsey scale.

This 10% figure must be distinguished from the "30 per cent of all males" who the Kinsey study tells us have had "at least incidental

homosexual experience or reactions (i.e., rate 1 to 6 [on the scale]) over at least a three-year period between the ages of 16 and 55."[103] This distinction stems from the recognition that not all persons are necessarily gay who comprise the 30% of the population that engage in homosexual conduct. Something more than homosexual behavior is necessary for one to be considered gay. Most persons would agree that a gay person is one who has, by and large, accepted his own homosexuality, and who does not delude himself into thinking that he is heterosexual and that his homosexual experiences are not part of his real self. Consequently, such a person will acknowledge his gayness at least to his gay friends as well as to himself. Similarly, he is generally recognized by his close friends as being gay, and his areas of socialization -- at least when not at work -- are likely to consist of other gay people almost entirely. Naturally, there are great variations in this picture, but the purpose here is only to limn a general outline. Thus a gay person may still be "in the closet", but, at least to the extent of self-recognition of his own homosexuality, he has left it, and this alone is a huge psychological step setting him off from other homosexuals. As persons whose sexual behavior is almost exclusively with the same sex, the 10% of white men who are gay make up the 5's and 6's within the 30% of white males who compose the 1's through the 6's inclusive. Hence, unless they be celibate, it is true to say that all gay people engage in homosexual relations, but that all those who engage in homosexual relations are not necessarily gay.

With this as background, we approach once again the unrepresentative character of the homosexual respondents in the survey. By selecting only homosexuals who were members of gay organizations, it excluded virtually all homosexual respondents ranging from 1 through 4 on the Kinsey scale, that is, the 20% who are left from the 30% comprising the 1's through the 6's after the 10% of 5's and 6's have been deducted. The result was that the homosexual respondents in the survey were almost all gay, 5's and 6's on the Kinsey scale, instead of comprising a broad sample of people who engage in homosexual behavior, ranging from 1 through 6 on the scale. This defect is

compounded by another. Limiting the homosexual respondents to members of gay groups also had the effect of limiting them to those gay persons who seek other gay persons as sexual partners, to the exclusion of gays whose sexual outlet is with those who are primarily homosexual. This is because the membership of gay groups is composed almost entirely of gay people who are sexually attracted to other gay persons, that is, to 5's and 6's on the Kinsey scale.

This is readily understood when it is recognized that, for whatever purposes they exist, gay organizations consist of people who, for the most part, are sexually attracted to other gay people. Thus their memberships consist primarily of 5's and 6's whose sexual contacts are with other 5's and 6's plus 5's and 6's who have sexual relations with anyone ranging from 1 through 6 on the scale. But what of the 1's, 2's, 3's, and 4's, who are attracted to anyone from 1 through 6? These are not likely to be found as members of any gay group. The simple reason is that, in terms of their sociality, gay groups are no different than those whose membership is heterosexually oriented. This means they provide their members with formal or informal opportunities for intra-mural socialization over and above the other purposes for which they may exist. As is true with organizations composed of heterosexuals, these social diversions not infrequently lead to eventual sexual relations between some members and to expectations of sexual relations by many more. Consequently, gays belonging to gay groups whose sexual relations are with those who are or with those they consider predominantly heterosexual -- meaning 1's through 4's or at least 1's through 3's -- will generally limit their membership roles to some of the other purposes for which the organization exists. And, if the organization is entirely social in character, gay persons thus oriented are not likely to join in large numbers. There are many exceptions, of course, but this is the general rule. For sexual purposes, gay men (5's and 6's) who seek out apparent "straights" (1's through 3's or 4's) are likely to frequent some of the locales already mentioned, such as gymnasia or highway truck stops and rest areas, or they will go to places not generally recognized as gay cruising spots, such as locations near military bases and maritime

wharves, to districts where motor cyclists congregate, or to black bars.[104] And they will take advantage of opportunities to have sexual relations with police officers, firemen, and prison guards.

There are no statistics as to the number of gay persons whose sexual contacts are with apparent heterosexuals. Many such persons also have relations with other gay persons, in which case they can be looked upon as 5's and 6's who have sexual relations with persons within the entire range of homosexuality, from 1 to 6 on the Kinsey scale. At this point, however, we are only concerned with those 5's and 6's who confine their sexual relations to the 1's through the 4's. These gays represent that portion of the gay 10% segment who limit their sexual contacts to the 20% segment that is best described as bisexual in at least some degree. Whatever its actual size, reason suggests that its numbers must be substantial. Large or small, it is a measure of the extent to which portions of the gay group were omitted from the homosexual respondents in the survey.

Restricting the survey to gay respondents who seek only other gays as sexual partners suggests that those reponsible for the investigation may have been victims of the stereotype fostered by the gay movement, which sedulously seems to cultivate the image of gay boy meeting gay boy and lesbian meeting lesbian, after which they are supposed to live happily in eternal bliss. Why the movement pays so little attention to gay men who desire to have sexual relations with predominantly heterosexual men is difficult to explain, unless it be the fear that, to do so, would project an image which it does not wish to see circulated, if only because it might appear to give credence to the baseless charge that homosexuals are out to proselytize "straights".

In fine, any survey which uses as its homosexual component membership in homosexual/gay organizations is likely to end up with few representative homosexuals. Nevertheless, one must not be overly critical of those who conducted the survey. They were only following a well-travelled path when they selected members of homosexual/gay groups for their homosexual

sample. A far more authoritative study than theirs, involving homosexuals in the military, and published under the aegis of none other than the Institute for Sex Research, was based on just such a sample, which is the key to that study's inadequacy.[105] The implicit assumption in all such studies is that the membership of homosexual groups is representative of homosexuals in the general population. This is not so.

In sum, no sample of homosexual attitudes and opinions can be meaningful unless it taps part of the huge terra incognita that comprises the majority of homosexuals, who are silent and in the closet. Admittedly, this is not easily done, and those who conducted the survey are hardly to be faulted for not having done so. It requires the kind of staff and financial resources which they did not have, and it points to the fact that no definitive study in this area can expect to get under way without some kind of government or private funding. But the dividends to be obtained from this kind of in-depth survey at the scene of action are too great to be ignored.

Examples confirming this are many. One of the most valuable insights into the effects of sodomy-law reform in Illinois was brought home to the writer several years ago by a convict in Chicago, who was out of prison at the time, on vacation between crimes. He had never been convicted of any sexual offence and he was clearly heterosexual. He gave an excellent account of how the Illinois sexual-law reforms had eliminated his ability to "shake down the queers" -- that is, to blackmail homosexuals whom he had induced to proposition him -- and how, as a result, "cons" such as he had to look elsewhere for their criminal pickings.

The writer remembers another case in Chicago involving a traveller about thirty years ago, long before Illinois had reformed its sodomy law. He was apprehended by a policeman in mufti as he emerged from behind a building one evening with a male companion with whom he had just had sexual relations. The officer had actually seen nothing, but he correctly suspected what had occurred, and, after producing his credentials, he arrested the one, but not his companion. Instead of taking him to the police station, the

officer took him to the lobby of a third-rate hotel nearby, where the discussion turned on what it would take to drop the charges. The victim, a young professional man who was returning East from Minnesota, was completely distraight, and permitted his guilty conscience to be its own confessor. Not realizing what was taking place, he not only admitted his conduct, but, in answer to a question, he stupidly disclosed the amount of his personal savings in his bank at home. The police officer then made what was ostensibly a phone call to the "judge", after which the victim was informed that the "judge" was willing to drop the case upon payment of "bail", the amount of which just happened to coincide with the amount of the victim's savings. The officer then accompanied the victim to a telegraph office, and stood by while a telegram was sent to the bank for the funds. Finally, the policeman accompanied the victim to the latter's hotel, and arranged to return there the following morning when the money was expected to arrive.

Fortunately, the individual had regained his composure early the following morning. He immediately telephoned his bank and countermanded his request for the money, which had not yet been sent. He then left his hotel and went to a legal defence attorney for advice. The attorney informed him that blackmail of this kind was rampant in Chicago, and that the worst part of it was that some judges were involved in it, and would protect the blackmailing police if anything ever came out in court. The lawyer took the position that one must assume the arresting officer was a real one and that the judge, too, was genuine. He indicated it was necessary to make such assumptions in Chicago because the entire municipal system was permeated with corruption. Since the traveller had no ties to Chicago, and was merely passing through, he was advised to leave and to return to his hotel immediately, making sure he was not followed. Then he was to pack his bag and prepare to check out but he was not actually to leave his hotel until shortly before his train's departure, so that there would be no waiting at the station. He was instructed to leave his hotel by a rear door and again to make sure he was not being followed, and he was warned that, if he arrived at the station much before depar-

ture time, there might be an opportunity for his hotel check-out to be discovered before he boarded his train, which might result in his being apprehended at the station. The blackmailing policeman, he was told, would surely arrest him if he were discovered. This advice appears to have been followed, for the victim succeeded in making his way back home safely.

The moral once again is that only face-to-face interviewing can elicit information of this kind. And this information lies everywhere for the asking. Hitch-hikers, for example, are a mine of information. Many young men, who are not primarily homosexual in orientation -- probably 1's, 2's or 3's on the Kinsey scale -- and who would ordinarily never dream of hustling, will become <u>de facto</u> hustlers when hitch-hiking, taking their payment in kind. They know that allowing sexual favors to the men who give them rides will mean that all their food and lodging as well as their transportation will be provided them for the duration of their trip. These young men, who include a substantial number of college students during the Summer, sometimes plan vacations on this basis, and will tour the entire country in this manner. Their paripetetic life takes them frequently across state lines, and they are not infrequently in jail for short periods of time, either for some form of illegal hitch-hiking or for minor drug-law violations, with the result that they can often provide valuable insights into law-enforcement practices as well as an understanding of homosexual cruising in a variety of settings.

Regular, full-time hustlers are a further store of information. Some of them can be described as sexual data banks. A significant number of cross-country hitch-hikers are full-time hustlers in the process of changing their business locations from one coast to the other. This accounts for a surprising amount of the hitch-hiking between New York in the East and Los Angeles and San Francisco in the West during the Winter. Sometimes these trips are broken by stops in New Orleans during the Winter or in Chicago during the Summer. Hustlers can be very voluble, and will provide much valuable information once the necessary rapport has been established. That rapport is best developed by persons who are recognized by the hustler

as not being a potential "score", that is, a customer. Many other fertile sources of information could be mentioned, such as the patrons, employees, and proprietors of gay steam baths, a homosexual institution in many larger cities, but the list need not be expanded here. As already indicated, the information which such persons can provide is usually best obtained by questioning them at the places they frequent or where they work.

So much for the respondent sample used in the survey. In concluding, the writer only wishes to state that the consequences of homosexual law reform are so numerous and wide-spread that no single study can hope to do the subject justice. In this case no attempt at comprehensiveness has been made, and no doubt the reader can think of many consequences not mentioned here. The primary purpose of these pages will have been satisfied if they help to chart a course for future investigators who may wish to plumb the depths to which any genuine study of sexual law refrom inevitably leads. Here it should be noted that it is always easier to criticize the work of others than to offer something better of one's own. With this in mind, we should recognize that the survey of Geis, Wright, Garrett, and Wilson was the first scholarly effort in the field. To the extent that it succeeded in authoritatively burying those who predicted that sodomy-law reform would produce a new Sodom on earth, they deserve the plaudits of us all. But for their pioneering work, these pages would not have been written.

IX -- APPENDIX

Note on the Membership of Gay Organizations

The gap between homosexuals who belong to gay organizations and those who do not is particuarly unfortunate in the face of the overwhelming evidence that, except for their sexual orientation, the great majority of homosexuals do not differ in any recognizable way from their heterosexual counterparts and that they are to be found in all walks of life and in all segments of society. This is clearly not the case with respect to the membership of gay organizations. It explains why investigators should avoid using that membership as respondents in surveys claiming to reflect homosexual opinion, difficult though it is to obtain alternatives. This study, it is hoped, will suggest some ways in which more representative homosexuals can be reached for investigatory purposes.

Here it can be noted that the gap between those who comprise the membership of gay groups and the great body of practicing homosexuals is the root cause of much of the factionalism, the instability, and the irresponsibility which has not infrequently been such a notorious characteristic of many homosexual organizations. These groups lack the stabilizing inluence which a strong membership base representative of rank-and-file homosexuals would provide. No doubt some of this is due to the rapid expansion of the gay movement from a position of virtual non-existence to a recognized element on the national scene in the course of a decade. And there are signs that conditions are improving. But even with due allowance for the fact that the active members of any minority group are bound to differ from the rank-and-file in terms of education, talent, social origins, and degree of involvement in minority affairs -- the difference, for example, between blacks who belong to the N.A.A.C.P. and working-class blacks in the ghetto -- the chasm between the anonymous, unidentified homosexual and most of his self-appointed

spokesmen tempts one to think that few minorities have been so ill served by those who claim to speak for them.

Clearly there are many exceptions to the above, exceptions composed of highly talented and responsible people who would be a credit to any movement for reform. Some of the homosexual religious bodies, such as the various Metropolitan Community Churches and the several chapters of Dignity and Integrity have done outstanding work in countering the negative public image of homosexuals, and in presenting a positive picture of stability and responsibility. They have done this even though it is not their raison d'etre. Unfortunately, many homosexuals have an understandable antipathy toward religion in any form, with the result that gay church groups have often been met with less than a friendly reception from other sectors of the gay community.

NOTES

1 Journal of Homosexuality, Volume I, No. 4, p. 419. Hereafter cited as Survey Report.

2 Ibid.

3 Ibid., p. 421.

4 Ibid., p. 419.

5 The solicitation laws referred to here are quite different and distinct from general criminal solicitation statutes, which punish solicitations to commit crimes generally. These punish only solicitations to commit sexual acts. They also must be distinguished from solicitations for purposes of prostitution. Not infrequently they appear under different heads, such as "importuning", "accosting", "making an indecent proposal" or "loitering for the purpose of soliciting". (For further discussion, see infra, p. 14.) The open or public lewdness statutes also appear under a variety of names, such as "public indecency" or "indecent exposure" Some states have both open-lewdness and indecent-exposure statutes, the second differing only slightly from the first and being quite unnecessary. Perhaps the existence of two such statutes promotes the feeling that the public morality is doubly secure.

6 Sexual Offences Act, 15 & 16 Eliz. II, cap. 60.

7 The following are illustrative of the situation in England prior to the Wolfenden reform. They constitute cases VIII and VII respectively in the Report of the Committee on Homosexual Offences and Prostitution, Command Paper 247 (Her Majesty's Stationery Office, London, 1957), p. 49. Commonly known as the Wolfenden Report, after the Committee's chairman, Sir John Wolfenden, it is so cited hereinafter. The cases follow:

> "C, aged 45, was observed by the police to be associating with men younger than himself and his movements were watched. As a result of this observation, it came to the notice of the police that he had, on a particular night, shared a single room at the hotel where he was employed, with D, aged 21 years. D was accordingly questioned by the police and admitted offences with C on the night in question and other similar offences which had occurred a few nights previously.
>
> "C was then questioned by the police, and admitted not only the offences with D, but also a number of other offences going back for some 20 years. Among the offences so admitted were acts of gross indecency committed some 12 or 13 years earlier with E, then a youth of 17. There was no suggestion that any offences had been committed with or by E during a period of at least 10 years prior to the date at which C was being questioned.
>
> "The police nevertheless questioned E, by now a man of 30, occupying a responsible position and happily married with two children. E admitted that acts of mutual masturbation had taken place with C over a period of seven months some 13 years earlier. On the advice of the Director of Public Prosecutions, no proceedings were taken in respect of the offences between C and E owing to the lapse of time."

In the following case, the outcome of which was more typical, the rigors of the law were not suspended.

> "X, a nineteen-year-old serviceman, who was . . . being questioned by the service police in connection with homosexual offences . . ., made a statement which included references to an offence which had occurred five years earlier between Y, a man of 47, and himself, in a cinema in his home town. Y was in due course questioned by the police . . ., to whom X's statement had evidently been passed by the service police, and made a statement admitting this offence and a number of other offences over a period of years, including some with Z, a man of his own age, which had taken place some six or seven years previously. There had . . . been no offences between Y and Z for over six years, but Z was charged with and convicted of an offence which had taken place six years previously."

[8] A survey conducted in Connecticut under the auspices of the National Committee for Sexual Civil Liberties about a year after the enactment of sodomy-law reform in that state, but before the law had taken effect, seemed to indicate that there were then only two persons in penal institutions in the entire state who could be said to have been convicted of sodomy under circumstances which unequivocally involved nothing more than private consensual conduct between adults. However, a significant number of persons appeared to have been incarcerated for sodomy which had taken place in public, conduct which, after sodomy-law revision, as we shall see, constitutes nothing more than the offence of open lewdness. (See _infra_, pp. 7-8.) Regrettably, the Connecticut survey was not complete.

[9] The fundamental shift in social climate during recent years has been noted and discussed in a plethora of studies and critiques, both scholarly and popular, too numerous to consider here. Suffice it to mention the names of Wardell B. Pomeroy (_Dr. Kinsey and the Institute for Sex Research_, New York, 1972) and Paul Robinson (_The Modernization of Sex: Havelock Ellis, Alfred Kinsey, William Masters and Virginia Johnson_, New York, 1976), for the landmark significance of Kinsey's work; Felice Flanner Lewis (_Literature, Obscenity and the Law_, Carbondale, Illinois, 1976) and Charles Rembar (_The End of Obscenity_, New York, 1968), on the enormous increase in access to sexually-explicit materials; Richard Hettlinger (_Sex Isn't That Simple: The New Sexuality on Campus_, New York, 1974) and Robert C. Sorenson (_Adolescent Sexuality in Contemporary America: Personal Values and Sexual Behavior Age Thirteen to Nineteen_, New York, 1973) for changes in the sexual behavior of young people; George F. Gilder (_Sexual Suicide_, New York, 1973) and Herbert Hendin (_The Age of Sensation_, New York, 1975), who view the changes with alarm, while acknowledging their deep significance; Hugh M. Hefner (_The Playboy Philosophy_, Chicago, 1962-65) and Gay Talese (_Thy Neighbor's Wife_, New York, 1980), who are candidly exultent; and Nancy Friday (_My Secret Garden_, New York, 1973 and later works) and Shere Hite (_The Hite Report_, New York, 1976 and _The Hite Report on Male Sexuality_, New York, 1981), who have produced popular assemblages of individual testimonies as to the scope of the changes.

[10] For further discussion along these lines, see _infra_, p. 29 _et seq_.

[11] See _infra_, p. 16 and note 34; also p. 28 and note 64.

[12] The sexual ages of consent resulting from sodomy-law reform in the seven surveyed states are Colorado, 16; Connecticut, 16; Delaware, 16; Hawaii, 16; Illinois, 18; Ohio, 15; Oregon, 18.

[13] 15 & 16 Eliz. II, cap. 60.

[14] _Wolfenden Report_, _op. cit._, p. 27.

[15] This argument appears somewhat strained in the light of the substantial homosexual behavior in the English public schools.

[16] _Wolfenden Report_, p. 27.

[17] Home Office, Criminal Law Revision Committee, _Working Paper on Sexual Offences_ (London, Her Majesty's Stationery Office, 1980), p. 1. Hereinafter referred to as Working Paper.

[18] _Ibid._, "The Age of Consent", p. 5.

[19] Perhaps the most celebrated of these studies was one by Kinsey, Pomeroy, and Martin, the three men responsible for _Sexual Behavior in the Human Male_ (Philadelphia and London, 1948) the so-called "Kinsey Report". A year after their _magnum opus_ appeared, they summarized a few of their findings in an article they wrote in collaboration with Paul H. Gebhard. In this connection they stated:

> "The data which we have already published on social levels show that by fourteen years of age perhaps as many as eighty-five per cent of all boys have acquired the patterns of sexual behavior which will characterize them as

19 (continued)

> adults, and something like nine out of ten of them do not materially modify their basic patterns after sixteen years of age." (Alfred C. Kinsey, Wardell B. Pomeroy, Clyde E. Martin, and Paul H. Gebhard, "Concepts of Normality and Abnormality in Sexual Behavior", in Paul H. Hoch & Joseph Zubin, eds., Psychosexual Development in Health and Disease [New York, 1949], p. 21.)

This appeared five years before the Wolfenden Committee was appointed and eight years before is Report was issued. In discussing these finding with Dr. C. A. Tripp, eminent psychologist, who was an associate of Dr. Kinsey at the Institute for Sex Research in Bloomington, Indiana for almost a decade, this writer was informed, not only that these data have never been controverted since they were published, but that, because they are based on factors which have not been affected by the sexual revolution of more recent years, they are unlikely ever to be controverted.

20 Working Paper, "Consensual Homosexual Acts between Women", p. 53.

21 Sexual Offences Act, op. cit., section 1(1).

22 Working Paper, "Consensual Buggery", p. 28.

23 Ibid. If 18 rather than 16 is to the the age of consent for heterosexual sodomy as well as for homosexual, what becomes of the Criminal Law Revision Commission's argument that "the considerations which led them to recommend a minimum age of 18 for male homosexual conduct do not have the same force in the case of females"?

24 Ibid., p. 29 citing Regina v. Tyrrell, 1 Q.B. 710 (1894).

25 Sexual Offences Act, section 1(2)(a).

26 This appears to have been an unreported decision, because it is not to be found amongst the regularly reported English cases.

27 Working Paper, "Sexual Acts in Public", p. 47 et seq.

28 Ibid., "Non-Consensual Buggery", p. 20.

29 In only two states, Massachusetts and California, were suggestions ever made that the homosexual age of consent should be higher than the heterosexual, and in neither state was the proposal ever seriously pursued.

30 As already indicated (note 5), the specific term "soliciting" need not be employed for a statute to be a solicitation law. Other language is often used.

31 Oscar Wilde was sent to prison, not under the English sodomy law, but under section 11 of the Criminal Law Amendment Act of 1885, which, for the first time, punished "any male person who . . . commits . . . any act of gross indecency with another male person." This provision, which came to be known as "The Blackmailer's Charter", introduced a new concept -- private lewdness -- into the then-existing English criminal law by punishing the proscribed behavior wherever it occurred, whether in public or private. (See 48 & 49 Vict., cap. 69, sec. 11.) A few American states also punish lewdness in private as well as in public.

32 Conceded that solicitation statutes of the second type, which punish solicitations for the purpose of prostitution, do, in fact, punish requests to commit a relatively minor crime (prostitution), the fact remains that prostitution is a more serious offence than open lewdness, which is the only possible illegal conduct that a simple sexual solicitation of the third type can involve. Furthermore, simple sexual solicitations are, most of the time, for conduct which is perfectly legal. By contrast, prostitution in this country is frequently connected with other more serious crimes, such as illegal drug trafficking and,

32 (continued)

especially, robbery, so there is substantial warrant for punishing solicitations to engage in it as long as prostitution itself remains a crime.

33 Strictly speaking, Illinois, the first state to reform its sodomy law, retained a fornication statute, but it is applicable only when "the behavior is open and notorious". Smith-Hurd Illinois Annotated Statutes, chap. 38, sec. 11-8(a) (fornication).

34 People v. Gibson, 521 P. 2d 774; 184 Colo. 44 (1974) and State v. Tusek, Cr. App. 630 P. 2d 892 (1981).

35 See State v. Phipps, 389 N.E. 2d 1128; 58 Ohio St. 2d 271 (1979), reversing State v. Phipps (unreported slip opinion), Hamilton County Court of Appeals, no. C-76886, 29 March 1978. However, in 1975 a Columbus municipal ordinance, the language of which was identical to the state statute sustained in Phipps except that the state law proscribed only "same sex" solicitations while the ordinance was pan-sexual, was struck down as unconstitutional by the Franklin County Court of Appeals, and review of the decision was denied by the Ohio Supreme Court. See City of Columbus v. Scott, 353 N.E. 2d 858; 47 Ohio App. 2d 287.

36 See Delaware Code Annotated, title 11, sec. 768 (indecent exposure) & sec. 1341 (open lewdness); Hawaii Revised Statutes, title 37, sec. 707-738 (indecent exposure); Ohio Revised Code Annotated, title 29, sec. 2907.09 (public indecency); Pennsylvania Consolidated Statutes Annotated, title 18, sec. 3127 (indecent exposure). New Jersey also has a statute which follows along these lines to the extent that it requires the commission of a "flagrantly lewd and offensive act which" the defendant "knows or reasonably expects is likely to be observed by other nonconsenting persons who would be affronted or alarmed." Regrettably the provision was amended shortly before its final enactment so as to criminalize this conduct wherever it takes place, whether in public or in private. Hence, in New Jersey, all conduct is punished under the circumstances just defined, and the offence itself is denominated "lewdness" not "open" or "public lewdness". See New Jersey Statutes Annotated, title 2C, sec. 14-4 (lewdness).

37 American Law Institute, Model Penal Code (Philadelphia, 1962), sec. 251.1 (open lewdness). The foregoing should help to explain why it is customary to speak of reforming or revising the sodomy and open-lewdness laws, but of repealing the sexual solicitation statutes entirely. Even after decriminalization of all private consensual conduct between persons above the sexual age of consent, sodomitical behavior involving force or with persons under age still remains criminal. Thus there continues to be a crime of sodomy after sodomy-law reform in the same way there remains a crime of rape after repeal of the fornication law. Similarly, after reform of the open-lewdness laws, there remain some forms of public sexual behavior so outrageous and offensive to nonconsenting viewers that they continue to be proscribed. For this reason we speak of reform of sodomy and open-lewdness laws. On the other hand, it is difficult to discover any genuine state purpose behind simple sexual solicitation laws. This is confirmed by the fact that some states have never had such laws, and that, during the past few years, other states have repealed those they once had -- all without any perceivable untoward consequences. Thus we speak of repeal of simple sexual solicitation laws, not of their reform or revision.

38 California Statutes, 1975, chap. 71, sec. 10 and chap. 877, sec. 2. It should be noted that reforming the sodomy law by special legislative bill, as was done in California, is an exception to the general rule. In every other reformed jurisdiction except New Mexico -- where reform was accomplished in somewhat the same manner as in California -- revision of the sodomy law came about as a result of the enactment of an entire new criminal code for the state. This meant that the issue of reform was never met head on in the legislatures of these states, since legislators voted on an entire criminal-code package, embracing several hundred provisions, only one of which involved the change in the sodomy law. Unless some alert legislator or outsider called public attention to the proposed revision, the change in the sodomy law remained buried within the mass of other provisions and was rarely noticed.

39 California Penal Code, section 647 (a) (disorderly conduct).

40 Pryor v. Municipal Court, 25 Cal. 3d 238 at 257 (1979); 158 Cal. Rptr. 330 at 341; 599 P. 2d 636 at 647.

41 See Massachusetts General Laws Annotated, chap. 272, sec. 34 (crime against nature) and sec. 35 (unnatural and lascivious acts).

42 Commonwealth v. Balthazar, 366 Mass. 298; 318 N.E. 2d 478 (1974).

43 Commonwealth v. Sefranka, 414 N.E. 2d 602 (1980) at p. 608. Defendant was specifically charged with being a "lewd, wanton and lascivious person in speech or behavior" in violation of Massachusetts General Laws Annotated, chap. 272, sec. 53. This language, which goes back to 1699, demonstrates how far removed from the term "solicit" the wording of a statute can be, yet still constitute a solicitation law.

44 Commonwealth v. Balthazar, op. cit., at p. 481. Italics this writer's.

45 Commonwealth v. Ferguson, 422 N.E. 2d 1365 (1981) at p. 1367.

46 It should be noted, however, that a 1971 Florida Supreme Court decision invalidating that state's "abominable and detestable crime against nature" statute as unconstitutional for vagueness has had absolutely no effect on arrest or conviction patterns for homosexual conduct, which continue as before under a second statute, like the Massachusetts law, punishing any "unnatural and lascivious act". See Franklin v. State, 257 So. 2d 21 (1971).

47 Much of this information came from attorneys on the staff of the Sexual Law Reporter in Los Angeles.

48 It is not unusual for policemen to be unaware of recent legal changes where, as here, the change involves a minor offence, such as open lewdness, and where it constitutes part of an entirely new criminal code containing -- as did the new Ohio penal code -- more than one hundred different offences. By contrast, sodomy-law reform constitutes such a fundamental about-face in the criminal law's approach to conduct which, before reform, had almost always been a serious felony, that all police officers are aware of it almost as soon as it is on the statute book.

49 In the absence of any fornication law, changes of the kind just instanced in sexual-solicitation and open-lewdness statutes should, at least in theory, have an effect on arrests and prosecutions for heterosexual conduct. But since it is doubtful whether there are any but isolated arrests or prosecutions for heterosexual violations of these laws before they are changed -- and those few probably involve only the grossest violations -- heterosexual arrest and prosecution patterns are not likely to have changed afterwards.

50 Pennsylvania Consolidated Statutes, title 18, sec. 3127 (indecent exposure).

51 Ibid., section 3124 (voluntary deviate sexual intercourse), struck down as unconstitutional by Commonwealth v. Bonadio, 490 Pa. 91; 415 A. 2d 47 (1980).

52 Ibid., section 902 (criminal solicitation). As indicated supra (p. 14), general solicitation laws punish requests to commit any crime of a serious character. They are found in every jurisdiction, and are quite distinct from sexual solicitation laws and those which punish soliciting for purposes of prostitution. As long as voluntary deviate sexual intercourse remained a crime in Pennsylvania, a solicitation to engage in it came within the scope of the state's general solicitation statute. However, a problem arises from the fact that not every solicitation for homosexual relations is for conduct which legally constitutes sodomy (or voluntary deviate sexual intercourse). A substantial amount of homosexual behavior occurring in private amounts neither to sodomy (nor to voluntary deviate sexual intercourse), and, because it occurs in private, it does not violate any open-lewdness law.

52 (continued)

These non-sodomitical forms of homosexual conduct in private are clearly legal, and hence a solicitation to engage in these forms of same-sex behavior is nothing but a request to engage in lawful conduct. The judicial decisions are fairly clear that, for a state to prohibit requests to engage in legal conduct is unconstitutional, since this would violate the First Amendment. (See People v. Gibson and State v. Tusek, supra, p. 16 & note 34 and Pryor v. Municipal Court, supra, pp. 17-18 & note 40.) Yet, such is the force of the sodomy laws that, when they have not been reformed, there appears to be no case where a defendant in a criminal prosecution arising under some type of sexual solicitation statute ever made the argument that he must be acquitted because he solicited someone for conduct which legally fell short of sodomy or of any other crime, and was therefore legal. The truth is that, even in the absence of sodomy-law revision, many solicitation prosecutions and convictions have no legal basis, since the solicitation amounted only to a request to engage in some legal form of same-sex behavior. To this writer's knowledge, the only challenges to sexual solicitation prosecutions on the ground that the solicitation was for legal conduct have been made in states which have reformed their sodomy laws, examples of which have been cited.

53 Interview with Richard D. Atkins, Esq. of Philadelphia, 28 July 1981. Mr. Atkins has had broad experience as a defence attorney in cases of this kind.

54 See Delaware Code Annotated, title 11, sec. 1321(5) (loitering for purpose of soliciting) and sec. 1341 (open lewdness). The Delaware solicitation provision is the only such law in the country which carries only a fine as a penalty. It does not have the usual provision authorizing either a fine, imprisonment, or both.

55 "Hustling" is the common colloquialism for prostitution.

56 Rumor has it that off-duty police officers sometimes participate in these activities.

57 Supra, p. 16.

58 Supra, p. 17.

59 However, subsequent to the survey, in 1981, the Oregon Court of Appeals, a court of statewide jurisdiction, held that state's homosexual solicitation law unconstitutional. See supra, State v. Tusek, p. 16 & note 34.

60 Survey Report, op. cit., p. 420, quoting from Foster Gunnison, Jr., "The Homphile Movement in America" in R. W. Weltge, ed., The Same Sex: An Appraisal of Homosexuality (Philadelphia, 1969), p. 119. This was an article without legal research, intended for the general reader, the author of which made no pretensions to legal knowledge. His reference to sodomy-law revision in Illinois was merely a repetition of then-current "curbstone" law.

61 Smith-Hurd Illinois Annotated Statutes, chapter 38 (Criminal Code of 1961), sec. 11-14 (prostitution).

62 These data were provided by staff attorneys of the Sexual Law Reporter, Los Angeles. See also supra, pp. 17-18 & note 40.

63 Homosexual activity of this kind in cars is no different than the corresponding heterosexual activity which takes place in cars parked in so-called "lovers' lanes".

64 State v. J.C. and F.C., 69 N.J. 574 (1976) at 577; 355 A. 2d 195 at 197, quoting from New Jersey Criminal Law Revision Commission, The New Jersey Penal Code (Newark, 1971), section 2C:34-1 (open lewdness).

65 State v. Saunders, 75 N.J. 200 (1977); 381 A. 2d 333.

65a But see supra, note 36.

[66] Unrecorded case of Alan Gick, Deptford (New Jersey) Municipal Court, November, 1976.

[67] Unrecorded case of Dennis Schwartz, Deptford (New Jersey) Municipal Court, March 1977.

[68] Meeting with Colonel Clinton Pagano, Chief, New Jersey State Police et alii, Trenton, N. J., 5 August 1976.

[69] Although a defendant's conduct may simultaneously violate both a municipal ordinance and a state statute, he may only be prosecuted under one or the other, not both. To do otherwise would subject him to double jeopardy, thus violating the Fifth Amendment, which has been made applicable to the states by the Fourteenth. (See Waller v. Florida, 397 U. S. 387 [1969].) This must be understood, because many people erroneously think that the relationship between a state and its municipalities is the same as that between the Federal Government and the states. By a single act a defendant may violate both a state law and a Federal statute, and he may be prosecuted, convicted, and punished by both the state and the Federal Government without any violation of the double jeopardy provision. This is because we are citizens of two sovereigns: (1) the United States and (2) the state wherein we reside. (U. S. Constitution, amendment XIV, sec. 1.) Each sovereign may try a defendant once for any violation of its laws. Unlike the states, however, municipalities are not separate sovereign entities, and though we may reside in them, we are not citizens of them. Municipalities are entirely creatures of the states which created them. They are totally subordinate to the state, exist only at the sufferance of the state, and their acts are legally acts of the state. Thus a municipal ordinance is, from a legal viewpoint, part of the state's body of statutory law, and a municipal court is part of the state's judicial system, just as a Federal district court is part of the Federal judicial system.

[70] Even when an ordinance defines an offence in language identical to that of a state statute, it may still conflict with the state enactment if it provides for a penalty which is different or higher than that in the state law. Some states go further and hold that a conflict exists if the penalty provided for by the ordinance differs in any way from the one set by the state, even if it be lower. Finally, there are those states which hold an ordinance voidable even in the absence of a conflict between it and any state statute. The mere fact that the state has legislated on the subject at all is held to signify that the state has "preëmpted the field", with the result that any ordinance touching on that subject, even in the slightest, is voidable, no matter how compatible it may be with the state enactment.

[71] Legal challenges for the purpose of having a preëmpted ordinance declared null and void are unnecessary when its enforcement is voluntarily abandoned. City and town attorneys will sometimes notify their police departments that a certain ordinance has, in their view, been preëmpted by state legislation, and should therefore be considered void. Ordinarily, the police will then cease to enforce it.

[72] Illinois Constitution of 1970, article 7, sec. 6(a).

[73] Municipal Code of Chicago, chap. 192, sections 1,2,3, & 7 (public morals).

[74] Revised Ordinances of the City of Newark, New Jersey, 1966, Vol. II, title 17, sec. 2-1 (accosting persons). This ordinance clearly appears to have been preëmpted even though it comprised a solicitation law and the New Jersey Supreme Court decision dealt with open lewdness. (Supra, p. 28 & note 64.) The municipal enactment punished anyone who shall "accost or approach any person and by word, sign or gesture, suggest or invite the doing of any indecent or unnatural act". This clearly proscribed solicitations for conduct which did not amount to open lewdness as defined by the state supreme court, and hence it punished requests to engage in legal behavior. Thus it was totally incompatible with the state statute as defined by the court.

[75] 1 William & Mary, session 2, chap. 2, sections 1 & 2. The royal power to suspend a statute permitted the King to suspend the operation of a law in whole or in part. The dispensing power enabled him to grant dispensations to individuals exempting them from the operation of a particular statute.

[76] Connecticut General Statutes (repealed 1969, repeal effective 1971), title 53, chap. 944, sec. 53-216.

[77] Ibid., section 53-217.

[78] Ibid., section 53-219.

[79] Ibid., section 53-226. Italics this writer's.

[80] This is not a usual arrangement. Although a number of states have created pardon boards, they are in most cases merely advisory to the governor, who retains the ultimate pardoning authority.

[81] See supra, pp. 7-8. This is not true where reform comes about as a result of judicial reinterpretation of a sodomy law so that it no longer applies to private conduct between consenting adults. Since the court's limiting construction leaves consensual sodomy between adults in public untouched, that conduct will continue to constitute the crime of sodomy and not open lewdness.

[82] This is another example of the diminished diligence on the part of law-enforcement officers to prosecute for voluntary sodomy, so long as the conduct does not involve anyone below the sexual age of consent -- also a sign of the change in public opinion.

[83] Pryor v. Municipal Court, op. cit., at p. 648.

[84] Supra, p. 17 & note 38.

[85] Chaffin v. Frye, 119 Cal. Rptr. 22 (1975) at 26; 45 Cal. App. 3d 39 at 46.

[86] Gay Lib. v. University of Missouri, 416 Fed. Supp. 1350 (1976). However, this was later reversed by the U.S. Circuit Court of Appeals (558 Fed. 2d 848 [1977]), and certiorari was denied by the U.S. Supreme Court (434 U.S. 1080 [1978]). But see the vigorous dissent from the Supreme Court's denial of the writ by Mr. Justice Rehnquist.

[87] In the Matter of Adoption of Adult Anonymous, Fam. Ct., 435 N.Y.S. 2d 527 (1981) at 530-531, citing People v. Onofre, 51 N.Y. 2d 476; 415 N.E. 2d 936; 434 N.Y.S. 2d 947 (1980).

[88] This is not quite accurate, since the State of Michigan did enact a provision in 1978 having to do with the licensing of nursing homes which requires every nursing home to "certify annually . . . that all phases of its operation . . . are without discrimination against persons or groups of persons on the basis of race, religion, color, national origin, sex, age, handicap, marital status, sexual preference, or the exercise of rights guaranteed by law, including freedom of speech and association." (Michigan Statutes Annotated, section 333.21761 [discrimination; exceptions], Italics this writer's.)

[89] Survey Report, p. 423.

[90] As one Englishman is reported to have said after the enactment in 1967 of the Wolfenden recommendations for sodomy-law revision: "Sodomy is wrong, but I suppose, if Parliament says so, it is all right."

[91] Interview in Denver bar, July, 1974.

[92] Survey Report, p. 421.

[93] Ibid.

[94] Here it should be noted that "reliable" and its substantive "reliability" have a special meaning for sociologists which differs from their meaning in general use. The Modern Dictionary of Sociology has this to say:

94 (continued)

> "Reliability may be measured by giving a test (or questionnaire) to the same subjects more than once to see if the same results are obtained or by comparing different sections of a test that are supposed to measure the same thing. Reliability deals with the problem of whether a measuring instrument is accurately measuring whatever it is measuring. It is not concerned with the problem of *validity*, that is, with whether it is measuring what it purports to measure. A test may be reliable, but not valid." (George A. & Achilles G. Theodorson, eds., *Modern Dictionary of Sociology* [New York, 1969], pp. 343-344.) Italics in original.

This is *not* the sense in which "reliable" and "reliability" are used in this article. Here we *are* considering whether the questionnaires used in the survey were measuring what they purported to measure. In this context "reliable" is intended to be synonymous with such terms as "credible" and "trustworthy". When it is stated here that information is "reliable", it is intended to mean that it is consonant with verifiable data or common knowledge. As used in this more customary sense, "reliable" is the equivalent of "valid".

95 *Tearoom Trade: Impersonal Sex in Public Places* (Chicago, 1970). This book won the C. Wright Mills award of the Society for the Study of Social Problems.

96 *Survey Report*, p. 421.

97 *Ibid*.

98 *Ibid*.

99 See Appendix, pp. 60-60A *infra*, for "Note on the Membership of Gay Organizations".

100 According to the Kinsey heterosexual-homosexual rating scale, which was "based on both psychologic reactions and overt experience, individuals rate as follows:

> 0. Exclusively heterosexual with no homosexual
> 1. Predominantly heterosexual, only incidentally homosexual
> 2. Predominantly heterosexual, but more than incidentally homosexual
> 3. Equally heterosexual and homosexual
> 4. Predominantly homosexual, but more than incidentally heterosexual
> 5. Predominantly homosexual, but incidentally homosexual
> 6. Exclusively homosexual" (Alfred C. Kinsey, Wardell B. Pomeroy & Clyde E. Martin, *Sexual Behavior in the Human Male* [Philadelphia & London, 1949], p. 638.)

It should be noted that this study, hereafter cited as the *Kinsey Report*, involved only white males, no blacks.

101 *Ibid*., p. 650. Italics in original.

102 *Ibid*., p. 651. Italics in original.

103 *Ibid*., p. 650. Italics in original.

104 As already noted (*supra*, note 100), the *Kinsey Report* on male sexuality was based entirely on data from white male respondents. This does not mean, however, that the Institute for Sex Research, the so-called "Kinsey Institute", which sponsored the research that lead to the *Kinsey Report*, does not have data from large numbers of black males. Dr. Martin S. Weinberg, then senior sociologist at the Institute, informed this writer several years ago that the Institute had amassed a large number of sexual histories of black males, and was considering publishing this material in a companion volume to the one already published on white males, a project apparently abandoned. Dr. Weinberg corroborated the writer's opinion, based on long study, that there are significantly fewer gay persons proportionately among black males than among white males, but that there is proportionately more

104 (continued)

same-sex behavior. That is, a smaller proportion of black males than white males are 5's or 6's, but a substantially higher proportion of them than whites range from 1 through 4 on the scale. This means that the proportion of exclusive homosexuals (0's on the scale) is significantly less among black males than among white males. It is one reason why gay males (5's or 6's) who wish to have sexual relations with men that are apparently heterosexual (1's through 4's) have greater success in "making out" with blacks than with whites.

105 Colin J. Williams & Martin S. Weinberg, Homosexuals and the Military: A Study of Less than Honorable Discharge (New York, 1971).

ADDENDA

91a 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 (pamphlet, privately printed), pp. 3 & 7.

91b Ibid., p. 7.