NOTES

THE FUNCTION OF LAW IN THE REGULATION OF SEXUAL CONDUCT

The opinion is often expressed by some writers that existing sex laws should be more stringently enforced and should be backed up with broader restrictive measures.[1] Other commentators, considering what they term the realities of sex conduct as uncovered through extensive research, contend that the strictures governing sex conduct are outmoded and unrealistic.[2] For them human conduct simply is not amenable to such regulation.[3] The merits of both these vocal positions deserve examination.

The purpose of this note is to make such an analysis in the area of those laws aimed at proscribing, *inter alia,* obscenities, lewdness, indecent and immoral conduct and lascivious behavior. These laws form a great part of the criminal legislation of every state and are generally catalogued as "offenses against religion, conscience, morals and decency."[4] The

---

1. For a most outspoken exposition of this belief, see Harpster, *Obscene Literature,* 34 MARQ. L. REV. 301 (1951). The writer sees this country in a "process of moral disintegration" which precedes the fall of all great nations. He deals with modern literature as one of the ". . . causes of America's moral weakness. . . ." *Ibid.*

2. See KINSEY, POMEROY AND MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948). These writers see no reason for a continued reliance upon the ". . . theologic classifications and . . . moral pronouncements of the English common law of the fifteenth century." *Id.* at 202. The laws are seen as setting an ideal standard out of context with the actual behavior of people as this behavior is borne out by statistical analysis. *Id.* at 392.

For critical reviews of the first Kinsey report see Horack, *Sex Offenses and Scientific Investigation,* 44 ILL. L. REV. 149 (1949); Burling, Book Review, 23 N.Y.U.L.Q. REV. 540 (1948); Holcomb, Book Review, 38 J. OF CRIM. L. & CRIMINOLOGY 687 (1948); Schwartz, Book Review, 96 U. OF PA. L. REV. 914 (1948).

See also KINSEY, POMEROY, MARTIN AND GEBHARD, SEXUAL BEHAVIOR OF THE HUMAN FEMALE (1953), the companion volume of the first Kinsey report. For a series of critical analyses of this work, see SEX LIFE OF THE AMERICAN WOMAN AND THE KINSEY REPORT. (Ellis ed. 1953).

3. The contention is that a great deal of our sex regulation is based on outmoded social conventions.

For a very outspoken denunciation of our sex conventions see, GUYON, THE ETHICS OF SEXUAL ACTS (J. C. & Ingeborg Flugel's Translation 1943). Guyon, who wrote in the late twenties, advocated minimal regulation of sex conduct in a manner similar to the Kinsey researchers. Both recognized the need for an intelligent attitude toward sexual matters on the part of the participants. Kinsey points out the facts of sexual behavior, but other writers indicate that there is need for more than a recognition that sexual conduct is not intrinsically bad. An emotionally mature attitude toward sex is essential. To the emotionally mature ". . . sex . . . is . . . neither noble nor shameful, but a need to be temperately fulfilled." Freeman, *Sex and Emotional Health,* in SEX LIFE OF THE AMERICAN WOMAN AND THE KINSEY REPORT 68 (Ellis ed. 1953).

4. For a comprehensive consideration of this country's statutory sex laws, see SHERWIN, SEX AND THE STATUTORY LAW (1949).

unifying thread which ties these laws together, beside the fact that all seek, more or less, to eliminate public manifestations of the sexual aspect of human life, is their vagueness and broadness of coverage which lends them a possibly wide application at the discretion of enforcement officers and gives them an illusory quality.[5] It is this type of legislation which tends to undermine one of the basic principles of criminal law in a democratic state, *i.e.*, no punishment without a law,[6] as opposed to the totalitarian concept of no offense wihout a punishment.[7]

The statutes considered here are aimed at regulating voluntary sexual and sex-related conduct as well as minor offenses as opposed to those dealing with violent sexual crimes, *e.g.*, common law rape. These laws encompass widely divergent types of human behavior which are generally considered offensive or dangerous to our society. Minors are required to deport themselves in a manner both decent and moral;[8] adults are not

---

5. "Lawyers and judges are . . . cognizant of the law's shortcomings in its confused semantics, vague standards relating to sex-law objectives, uneven results and general illogic and ineffectiveness." DRUMMOND, THE SEXUAL PARADOX 88 (1953).

SHERWIN, *op. cit. supra* note 4, at 13-22, discusses what he terms the catchall type of law directed toward a general proscription of conduct not under the condemnation of specific statutes.

A noted writer of the eighteenth century commented on the illusory quality of such laws, phrased in generalities, and aimed often at the prohibition of nonexistent harms. 2 BENTHAM, THEORY OF LEGISLATION (Translated and edited from the French of Dumont by Atkinson, 1914 ed.).

6. See HALL, PRINCIPLES OF CRIMINAL LAW c. 2 (1947). The author discusses the origin and development of this basic principle of criminal law. He notes certain areas of the criminal law which have laid little claim to specificity, *e.g.*, laws dealing with vagabonds, but he makes only a limited attempt to justify and explain this departure from the definiteness requirement. *Id.* at 47-49.

7. *Id.* at 41. The writer discusses the departure from the principle of legality in totalitarian states. He makes reference to a German law enacted under the Nazi regime in 1935 which provided: "Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law which the fundamental conception applies most nearly to the said act." *Id.* at 42 n.55. A similar Russian law of 1926 states: "A crime is any socially dangerous act or omission which threatens the foundations of the Soviet political structure. . . . In cases where the Criminal Code makes no direct reference to particular forms of crime . . . other measures of social protection are applied in accordance with those Articles of the Criminal Code which deal with crimes most approximating, in gravity, and in kind, to the crimes actually committed. . . ." *Ibid.*

See also Ludwig, *Control of the Sex Criminal*, 25 ST. JOHNS L. REV. 203 (1951). This writer points out that anything less than a clear statutory definition of sex crimes tends to the "totalitarian doctrine that there can be no wrong committed against the state which is incapable of being punished." *Id.* at 211.

Ambiguous and vague laws lend themselves to use as a repressive and dictatorial device as is pointed out by one writer commenting on the position of the negro in the Southern states. I MYRDAL, THE AMERICAN DILEMMA 537, 562 (1942).

8. Juvenile delinquency laws generally attempt to regulate the "morality" of children. Indiana's law provides that a child under eighteen is delinquent if he "uses vile, obscene, . . . indecent language," or "is guilty of indecent or immoral conduct," or if he "deports himself so as to wilfully injure or endanger the morals or health of

to cause a child to be guilty of violating these commands.[9] Behavior between adults which is "lewd and indecent" is almost universally outlawed either by statutes directed squarely at such conduct[10] or more

himself or others." IND. ANN. STAT. §10-4210 (Burns Supp. 1953).

There are similar provisions in other states. See ILL. ANN. STAT. c. 37, §.089 (1936) (indecent or lascivious conduct); IDAHO CODE ANN. §16-1701 (Supp. 1953) (deports self so as to injure or endanger morals of self or others); TEX. STAT. art. 2338-1(3) (1948) (habitual conduct tending to endanger morals of self or others); UTAH CODE ANN. §55-10-6 (1953) (deports self so as to endanger the morals or health of himself or others); ALA. CODE tit. 13, §350 (1940) (guilty of immoral conduct or leading idle, lewd, dissolute life); DEL. CODE ANN. tit. 10, §1101 (1953) (acts tending to endanger morals or health of self or others).

One basic variation is typified by the Oklahoma provision that states a child is delinquent if he is "guilty of immoral conduct in any *public* place or about any school house." (emphasis added) OKLA. STAT. tit. 10, §101 (1951). The accent here is on the public character of the immoral conduct. The Idaho provision was similar to the Oklahoma law but was recently amended to include conduct whether or not it is public.

In an Illinois case involving the crime of contributing to the delinquency of a minor, the court ruled that an indictment alleging that the defendant was guilty of sexual relations with the child sufficiently charged the crime. People v. Kohler, 413 Ill. 283, 109 N.E.2d 210 (1952). The court stated: "The term 'sexual relations' . . . imports such wrongful and improper conduct as would tend to render a child guilty of indecent and lascivious conduct and thus delinquent. . . ." *Id.* at 285, 109 N.E.2d at 211.

Any kind of sexual conduct on the part of the child tends to render him or her delinquent. For an interesting portrayal of juvenile delinquency sex provisions in action, see IMLER, A STUDY OF 35 JUVENILE SEX OFFENDERS KNOWN TO THE MARION COUNTY JUVENILE COURT (Unpublished Thesis in Indiana University Library, 1950). See also DRUMMOND, *op. cit. supra* note 5, c. 5.

9. This is the crime of contributing to the delinquency of a minor. Indiana makes it unlawful for an adult to commit any act which would cause or tend to cause delinquency as defined elsewhere in the laws. There is also a catchall provision against adults causing "any such boy or girl to be guilty of vicious or immoral conduct." IND. ANN. STAT. §10-812 (Burns Supp. 1953). This state also provides for the felony of enticing a female under 17 into an immoral place "for vicious or immoral purposes." This is punishable by sentence of from two to fourteen years. IND. ANN. STAT. §10-4210 (Burns 1933). It is further provided that the fact that the man has entered an immoral place with a girl shall constitute prima facie evidence of criminal intent.

See the laws of other states as to the crime of contributing to the delinquency of a minor. ILL. ANN. STAT. c. 37, §.090 (1936); N.Y. PENAL LAW §483; TEX. STAT., PEN. CODE art. 534 (1948). The New York provision makes it a misdemeanor for anyone to cause or permit a child under sixteen to have its life placed in danger or its morals depraved or to cause or permit such a child to be placed in a situation where its life is likely to be endangered or its morals likely to be impaired. This law is broad enough to take in any act which might now or in the future be considered harmful to a child.

Pennsylvania makes it a misdemeanor punishable by imprisonment up to three years to commit any act which "corrupts or tends to corrupt the morals of any child under the age of eighteen years." PA. STAT. ANN. tit. 18, §4532 (Supp. 1953).

The Louisiana Code provides that it is a crime for any person to cause or entice a child under seventeen to "perform any sexually immoral act." LA. CODE CRIM. LAW & PROC. ANN., art. 92, §7 (Supp. 1952). This act had formerly read that it would be an offense to cause such a child to commit any immoral act. The Louisiana Supreme Court found this void for vagueness since the word "immoral" was too all inclusive. State v. Vallery, 212 La. 1095, 34 So.2d 329 (1948). The addition of the word "sexually" was the legislative answer to the request for specificity.

10. For a general discussion of this type of legislation, see SHERWIN, *op. cit. supra* note 4, at 21 *et seq.* Typical of this kind of statute is the New Jersey provision to the effect that "[a]ny person who shall be guilty of open lewdness, or any notorious act of public indecency, grossly scandalous and tending to debauch the morals and manners

general legislation dealing with vagrancy,[11] disorderly conduct,[12] and

of the people or who shall in private be guilty of any act of lewdness or carnal indecency with another, grossly scandalous and tending to debauch the morals and manners of the people, shall be guilty of a misdemeanor." N.J. REV. STAT. §2:140-1 (1937).

Under the common law, lewdness was no offense unless committed openly. Coleman v. Commonwealth, 247 S.W.2d 535 (Ky. 1952). In that case a negro convicted of common law lewdness was acquitted because of the state's failure to prove acts of public indecency. But see Koa Gora v. Territory of Hawaii, 152 F.2d 933 (9th Cir. 1946). In this case a territorial statute prohibiting "lascivious conduct" was ruled to apply to both public and private acts of indecency.

A New Jersey case construing the law quoted above acknowledged the legislature's endeavor to reach private acts of indecency but ruled that only those private acts which were "grossly scandalous and tending to debauch the morals and manners . . ." came within the intendment of the act. The court required the element of public nuisance. State v. Brenner, 132 N.J.L. 607, 41 A.2d 532 (1945). This case contains a discussion of the development of common law lewdness.

The laws of the various states are generally phrased in terms of "open lewdness or any notorious acts tending to debauch the morals of the people." PA. STAT. ANN. tit. 18, §4519 (1939); FLA. STAT. §798.02 (1951). They often refer to: "lewd and lascivious cohabitation" or "any open and notorious act of public indecency," MO. STAT. ANN. §563.150 (Vernon 1949); to acts constituting public indecency and tending to debauch the morals of the people, OKLA. STAT. ANN. tit. 21, §22 (1951); IDAHO CODE ANN. §18-4101 (1947); or to acts of indecent or obscene nature before women or children. IND. ANN. STAT. §10-2801 (Burns Supp. 1953).

For a discussion of these laws as affected by the first Kinsey report see, Note, *Post-Kinsey: Voluntary Sex Relations As Criminal Offenses*, 17 U. OF CHI. L. REV. 162 (1949). The author of the note lists eighteen states which have a statutory offense of lewdness. *Id.* at 166, table 1.

11. Vagrancy statutes in many states serve the purpose of, among other things, a catchall sex offender law. The vagrant is often defined as a "lewd, wanton and lascivious person." FLA. STAT. §856.02 (1951). Other enactments employ similar words: CAL. PEN. CODE §647(5) (1949) (every idle, lewd, or dissolute person); ILL. REV. STAT. c. 37, §.538 (1936) (any person lewd, wanton, and lascivious in speech or behavior); N.D. REV. CODE §12-4204(5) (1943) (any person lewd, wanton, or lascivious in speech and behavior); UTAH CODE ANN. §76-61-1(5) (1953) (every idle or lewd or dissolute person); WASH. REV. CODE §9.87.010(7) (1952) (lewd, disorderly or dissolute persons); WIS. STAT. §348.351 (1945) (all persons lewd, wanton, or lascivious in speech or behavior); D.C. CODE ANN. §22-3302(3) (1951) (immoral or profligate). This is not an exhaustive list of states with similar provisions.

These vagrancy laws are also directed toward common prostitutes, solicitors, and frequenters of houses of prostitution. For a comprehensive discussion of these laws, see Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953). The writer describes the crime as being classified as a certain type of person. It is a continuing offense subjecting the person to arrest at any time until he reforms. *Id.* at 1216.

For a discussion of the California vagrancy law, see Grossman, *Who is a Vagrant in California?*, 23 CALIF. L. REV. 506 (1935). This writer sees the law as vesting "a dangerous discretionary power in the police." *Id.* at 506. In rebuttal to this article, see Ames, *A Reply to "Who is a Vagrant in California?,"* 23 CALIF. L. REV. 616 (1935). This author sees the laws as "a positive necessity for police regulation of those who are, or might become, a menace to well-ordered society." *Id.* at 617. In California, one act of "lewdness" is sufficient to constitute a person a vagrant. People v. Scott, 113 Cal. App. Supp. 778, 296 P. 601 (1931). In this case a woman who danced in the nude was adjudged a vagrant. See also People v. Lund, 137 Cal. App. 781, 27 P.2d 958 (1933), in which a man who lived off the earnings of a prostitute was ruled a vagrant. The California law also contains a provision that any one who "loiters" near a school or "annoys and molests" a child is a vagrant. CAL. PEN. CODE §647 a (1) (1949).

12. The disorderly conduct laws serve a function similar to the vagrancy acts in some states. Like the vagrancy acts these laws vest discretion in the police and other enforcement officers. *E.g.*, N.Y. PENAL CODE §722. Broad standards such as "offensive

prostitution.[13] The most recently added stricture in many states is that forbidding indecent and lewd behavior with a minor or child.[14] Finally, there are those laws, both state and federal, directed against the production and distribution of obscene writings and other such matter.[15]

---

conduct and behavior" are employed. The Illinois law provides that persons "guilty of open lewdness, disorderly conduct or any other notorious act of public indecency, tending to debauch the public morals . . ." are guilty of a misdemeanor. ILL. ANN. STAT. c. 37, §.124 (1936).

13. So-called lewd and immoral acts may be punished under the broad provisions of prostitution laws condemning the committing of "lewdness" or "other immoral acts." Landrum v. State, 255 P.2d 525 (Okla. 1953).

The notoriously broadened provisions of the Mann Act, which prohibits the transportation of a woman in interstate commerce "for the purpose of prostitution or debauchery or for *any other immoral purpose*," 36 STAT. 825 (1910), 18 U.S.C. §2421 (1946) (emphasis added), have been used to secure convictions unrelated to commercial vice. For a general discussion of the United States' Supreme Court's handling of the Mann Act, see Levi, *An Introduction to Legal Reasoning*, 15 U. OF CHI. L. REV. 501, 523-540. In Cleveland v. United States, 329 U. S. 14 (1946), Mormons who took their wives across state lines were found to be in violation of the law. The Court found the act applicable not only to commercial vice but to any immorality. Mr. Justice McKenna in dissent in an earlier case which had extended application of the Act said: "'Immoral' is a very comprehensive word. It means direliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order." Caminetti v. United States, 242 U.S. 470, 497 (1916) (dissenting opinion). For a concise discussion of these cases, see Taylor, *Manhandling The Mann Act*, 5 NAT. B.J. 39 (1947).

14. One of the recent developments in sex legislation has been the tightened repression of sexual conduct directed toward children. Among the states which have enacted such laws in the past two decades are Florida (1943), Idaho (1949), Indiana (1951), Louisiana (1942), Missouri (1949), Ohio (1946), Oklahoma (1947), Texas (1950). In other states there has been a tendency to increase the penalty for the offense, *e.g.*, California.

These laws are generally of two types. There are those that are directed strictly at assaultive conduct and those that broadly prohibit any type of lewd, indecent behavior with or in the presence of a child. The Indiana Act is illustrative of the first type. It is in the form of a proviso to the statute dealing with assault and battery and states that when "in the commission of the offense [assault and battery] any person removes . . . or attempts to remove any clothing of any child . . . or fondles or caresses the body . . . of such child who is of the age of 16 years or under . . ." in a manner which frightens the child and indicates an intent to satisfy the sexual desires of the assaulter then the penalty shall be one to five years rather than the six month maximum usually provided for common assault and battery. IND. ANN. STAT. §10-403 (Burns Supp. 1953).

The second type of law is exemplified by the Idaho provision which states: "Any person who shall wilfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor or child under the age of sixteen years with the intent of arousing . . . or gratifying the lust or passions or sexual desires of such person or of such minor shall be guilty of a felony. . . ." *Idaho* CODE ANN. §18-6607 (Supp. 1952). Similar are the provisions of California, CAL. PEN. CODE §288 (1949); and Missouri, MO. ANN. STAT. §563.160 (Vernon 1949).

Adult sexual relations with very young children is truly a problem, but there is a question whether the laws enacted to cope with it should also deal with the problem of normal but possibly undesirable sexual relations between young persons of approximately the same age. For a discussion of adult sexual relations with children, see GUTTMACHER, SEX OFFENSES, 43-44 (1951).

15. State obscenity laws cover a wide range of activities from publishing, printing, and producing to distributing, or the possession for the purpose of distributing, any printed matter or other articles of an obscene or immoral nature. The Pennsylvania

Vagueness in criminal legislation is objectionable for many reasons which are related to two standard contentions: First, such laws pose difficulties for enforcement agencies—the police, prosecution, and judiciary—by failing to establish an adequate standard of guidance for application of the laws, and, second, such statutes fail to inform persons that their prospective conduct may be illegal.[16]

The lack of administrative standard in vague laws is demonstrated clearly by the modern sexual psychopath acts now existent in some twenty-three states and the District of Columbia.[17] These special statutes which are directed at the detection and detention of the dangerous sexual deviate generally fail to specify a definite criteria for the identification of such a person.[18] The sexual psychopath is identified either in terms of an habitual course of sexual misconduct or a lack of power on his part

law in typical fashion condemns any "obscene, lewd, lascivious, filthy, disgusting, indecent" book or other printed matter and provides for punishment of those who sell, design, write, or advertise them. PA. STAT. ANN. tit. 18, §4524 (1939). The repression of the obscene is thus attended by vague and indefinite standards similar to those prevailing in morals legislation; the purpose is the same: to enhance the moral standard by prohibition of that which is sex connected.

Federal legislation in this area parallels that of the states and precludes the use of the mails for the pernicious matter. 36 STAT. 1339 (1911), as amended, 62 STAT. 768 (1948), 18 U.S.C. §1461 (1946).

For a complete and comprehensive treatment of the development of obscenity laws, see Alpert, *Judicial Censorship of Obscene Literature,* 52 HARV. L. REV. 40 (1938). See also Note, *Obscenity—Construction and Constitutionality of Statutes Regulating Obscene Literature,* 28 N.Y.U.L.Q. REV. 877 (1953); DRUMMOND, *op. cit. supra* note 5, c. 8.

16. Both elements were lacking in State v. Vallery, 212 La. 1095, 34 So.2d 329 (1948), where a law prohibited any person to cause a child to perform an immoral act. See Lanzetta v. New Jersey, 306 U.S. 451 (1939). The Supreme Court struck down a New Jersey law providing for a $10,000 fine and a maximum sentence of twenty years for all those proved to be "gangsters."

For a discussion of vagueness in the law and of the doctrine of "void for vagueness," see Aigler, *Legislation in Vague Or General Terms,* 21 MICH. L. REV. 831 (1923). See also Harriman, *Void for Vagueness Rule In California,* 41 CALIF. L. REV. 523 (1953).

17. For a detailed analysis of the sexual psychopath laws of the various states, see 20 CALIF. DEPT. OF MENTAL HYGIENE, FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH No. 1, 41-58 (1954).

18. The difficulty involved in arriving at an adequate definition of a sexual pyschopath arises from the fact that the term "psychopath" has no precise meaning. In May of 1949, the Committee on Forensic Psychiatry of the Group For the Advancement of Psychiatry warned against the use of the term. The Committee said: "There is still little agreement on the part of psychiatrists as to the precise meaning of the term. Furthermore, the term has no dynamic significance. The Committee believes that in statutes the use of technical terms should be avoided whenever possible. Psychiatric knowledge and terminology are in a state of flux. Once having become a part of public law such a term attains a fixity unresponsive to newer scientific knowledge. . . ."

Behind these sexual psychopath laws is the definite assumption that a sex offender is distinguishable from other types of criminals. But many writers feel that there is no basis for this. GUTTMACHER, *op. cit. supra* note 14, at 131-133; Sunderland, *The Sexual Psychopath Laws,* 40 J. OF CRIM. L. & CRIMINOLOGY 543 (1950); Ludwig, *supra* note 7, at 218.

to control sexual impulses.[19] These definitions imbue the laws with the quality of habitual offender acts.[20]

Because of this vagueness, the enactments are generally limited to use against minor offenders and not employed to isolate dangerous sex criminals.[21] The laws further become a dangerous and powerful weapon in the hands of a prosecutor since most persons could be classified as "sexual psychopaths" depending on who does the diagnosing.[22] An unfortunate use of the Minnesota law occurred in 1943 when a 42-year-old father of six children, described as a bright and capable farmer, was found to be a sexual psychopath on the basis of complaints by his wife that he demanded excessive sexual relations with her and that upon her refusal he would masturbate to orgasm.[23] There was no evidence that he was violent or guilty of anything but desire for normal relations with his wife. In Michigan, a man described as being of superior intellect was given an

19. The Minnesota law, one of the earliest, provided that "the term 'psychopathic personality' . . . means the existence in any person of such conditions of emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or combination of such conditions, as to render such person irresponsible for his conduct with respect to sexual matter and thereby dangerous to other persons." MINN. STAT. ANN. §526.09 (West 1945).

This act was challenged as being void for indefiniteness but was upheld by the United States Supreme Court on the basis of a construction by the Minnesota Supreme Court that the act was meant to apply to "those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or evil on the objects of their uncontrolled and uncontrollable desire." Minnesota *ex. rel.* Pearson v. Probate Court, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939). The United States Supreme Court held that this adequately defined the applicability of the act. 309 U.S. 270 (1940). Other states later included the element of habitual misconduct in their acts. Guttmacher and Weihofen, *Sex Offenses,* 43 J. OF CRIM. L. & CRIMINOLOGY. 153, 165 (1952). These two writers doubt whether the construction by the Minnesota court lent definiteness to an inherently indefinite concept. *Id.* at 165.

20. One writer indicates that the vagueness of the criteria as to what constitutes a psychopathic person and the inability of the psychiatrists themselves to arrive at an adequate classification causes the statutes to become habitual sex offender laws. This is inadequate he points out since "[i]t rests on the assumption that the mere fact that a man commits sex crimes makes him abnormal mentally and a dangerous sexual psychopath." PLOSCOWE, SEX AND THE LAW 228 (1951).

See also Sunderland, *supra* note 18, at 550. The writer states: "This identification of an habitual sex offender as a sexual psychopath has no more justification than the identification of any habitual offender as a psychopath. . . . The psychiatrists would almost unanimously object to this definition." *Id.* at 549.

21. PLOSCOWE, *op. cit. supra* note 20, at 229.

22. Sunderland, *supra* note 18, at 550. Sunderland states that "[t]he vagueness of the term is indicated by the fact that under the administration of one psychiatrist 98 per cent of the inmates admitted to the state prison of Illinois were diagnosed as psychopathic personalities, while in similar institutions with other psychiatrists not more than five per cent were so diagnosed. Of the sex offenders diagnosed by the Psychiatric Clinic of the Court of General Sessions in New York City, 15.8 per cent were reported to be psychopathic, while of sex offenders diagnosed by psychiatrists in Bellevue in New York City 52.9 per cent were diagnosed as psychopathic." *Ibid.*

23. Dittrich v. Brown County, 215 Minn. 234, 9 N.W.2d 510 (1943).

indeterminate sentence under that state's psychopath act after his sixth conviction for indecent exposure. Three years later his petition for release was denied,[24] notwithstanding that he had received very little treatment during detention.[25] Minor offenses are thus brought quite readily within the scope of the laws. Playing a part in these applications of the acts are the long held beliefs that such offenders are all highly recidivistic and tend to graduate into the ranks of the more serious offenders.[26] Recent research has cast doubt on this theory.[27]

On the other hand, the sexual psychopath laws may not be applied in the case of an obviously dangerous offender who has committed a violent crime. In California, a man who was guilty of having kidnapped five boys, undressing them and torturing them through abuse of their sexual parts, was held not to come within the purview of the state's psychopath law.[28] His crime was said to be unrelated to the commission of sexual offenses against children.[29] The defendant in that case was effectively segregated by life imprisonment without possibility of parole, but the act's purpose to provide for treatment and study of such persons was frustrated.

Use of vague and almost meaningless technical terms such as "psychopath" in this type of law is matched in the other areas of sex regulation by the utilization of equally indefinite descriptive terms such as

---

24. *In re* Kemmerer, 309 Mich. 313, 15 N.W.2d 652 (1944).

25. The court indicated that the petitioner should remain a prisoner until cured, possibly for life. *Id.* at 317, 15 N.W.2d at 653. This case is discussed in PLOSCOWE, *op. cit. supra* note 20, at 230. See also People v. Ross, 344 Ill. App. 407, 101 N.E.2d 112 (1951), where a negro was found to be a sexual psychopathic person on the basis of evidence that he had committed acts of sexual "perversion" since the age of seven. The defendant's witnesses did not deny the perversion but merely testified that he was an ordinary, normal, and sane individual. The court ruled that no appeal would lie from a determination by the lower court that the accused was a sexual psychopath.

26. Quite often the statement is made that the sex offender is always highly recidivistic. Karpman, *Considerations Bearing On The Problems of Sexual Offenders,* 43 J. CRIM. L. & CRIMINOLOGY 13 (1952); Schlesinger and Scanlon, *Sex Offenders and the Law,* 11 U. OF PITT. L. REV. 636, 640-642 (1950). "The rate of recidivism," state these writers, "among these persons is not coincidence, but a necessary outgrowth of a psychopathic personality." *Id.* at 642.

27. See GUTTMACHER, *op. cit. supra* note 14, at 113. "Most people have a mistaken concept of rescidivism in sex offenses. Certain individual offenders among the exhibitionists, homosexuals and pedophiles have a long series of arrests; but one also finds certain individual burglars, writers of forged checks and larcenists, who have numerous convictions for the same offense."

As indicated by the table on recidivism in the *Uniform Crime Reports,* rape was twenty-fourth and "other sex offenses" was twenty-fifth in order of recidivism. *Id.* at 113. ". . . [T]here is no basis for the common belief that sex criminals engage in sexual crimes of progressive malignancy. When there is recidivism among sex offenders, it is not ordinarily found in crimes of sexual violence, but rather in the more purely neurotic type of behavior. . . ." *Id.* at 114.

28. People v. Haley, 46 Cal. App. 2d 618, 116 P.2d 448 (1941).

29. *Id.* at ——, 116 P.2d at 501.

"immoral," "lewd," "indecent," and "obscene."[30] Besides the acts directed at more or less specific offenses using this type of language are various catchall laws prohibiting vagrancy and disorderly conduct which serve to fill in the statuteless gaps with their nearly unrestricted scope.[31] Under many of them vagrants are defined as lewd, dissolute persons, and disorderly conduct is described as behavior that tends to debauch the public morals.[32] This type of legislation is objectionable because, being phrased so broadly, it affords an easy basis for arrest and detention[33] and also makes for indifferent enforcement of the more specific felony statutes.[34] The vagrancy charge in California is added to the specific charge of sex offense with monotonous regularity,[35] and in Florida the courts allow a conviction for certain offensive sex behavior, such as indecent exposure, under the broad provisions of that state's vagrancy law.[36]

---

30. See notes 10 and 15 *supra.*

31. See notes 11 and 12 *supra.*

32. *Ibid.*

33. See Lacey, *supra* note 11, at 1217. The writer points out that courts and legislatures frankly recognize that vagrancy and other similar laws are directed toward potential criminals. "An individual suspected of another crime may be arrested on a charge of vagrancy so that police will have an opportunity of investigating further or of securing a voluntary or coerced confession. . . ." *Id.* at 1218.

This may be desirable, but such laws lend themselves easily to abuse as, for example, where they are used against minority groups such as negroes or generally to disrupt political discussions, labor activities, or other activities which may be unpopular with controlling officials.

Vagrancy and disorderly conduct laws may be a needed police device, see Hall, *Police and Law In A Democratic Society*, 28 IND. L.J. 133, 156 (1953), but their coverage should be limited to prevent excessive abuses.

34. "Because of the many variations from usual criminal procedure peculiar to crimes of personal condition, it is frequently much easier to obtain convictions of those offenses. In some jurisdictions vagrancy prosecutions almost wholly supplant prosecutions for certain types of crimes, usually prostitution and related sex offenses." Lacey, *supra* note 11, at 1218-19.

35. *Ex parte* Keddy, 105 Cal. App.2d 215, 233 P.2d 159 (1951). Defendant here was convicted of both indecent exposure and vagrancy. The act of indecently exposing himself rendered him a "lewd and dissolute person." People v. Babb, 103 Cal. App.2d 326, 229 P.2d 843 (1951) (conviction of the infamous crime against nature and also vagrancy). The court there stated: "One cannot commit the infamous crime against nature without being lewd and dissolute. Lewdness and dissoluteness are necessary elements of that offense." *Id.* at 330, 229 P.2d at 846.

36. Faulkner v. State, 146 Fla. 769, 1 So.2d 857 (1941). Conviction of being a vagrant, *i.e.*, a "lewd, wanton and lascivious person," was upheld on appeal where the evidence of the prosecution indicated that the defendant had exposed a part of his person in the presence of a female. The conviction could have been for indecent exposure. The court indicated that there was no possibility of double jeopardy since conviction for vagrancy obviated possible conviction for indecent exposure. *Id.* at 770, 1 So.2d at 857. But the court failed to mention that the crime of which the defendant was convicted carried a penalty of $250 or six months in jail, FLA. STAT. §856.02 (1951), as compared to $100 or 60 days for indecent exposure. FLA. STAT. §800.03 (1951). The defendant did not raise the question of possible denial of equal protection under the law.

General confusion can result when ill defined or undefined crimes overlap in their proscriptions.[37] Consider those laws forbidding conduct amounting to indecent behavior with, or annoyance and molesting of, a child.[38] A number of them fail to distinguish voluntary relations between the "victim" and the "offender" from those situations involving forcible and assaultive conduct.[39] Because the age of the child is often set quite high, the statutes amount to a proscription of any conduct approaching the offense of statutory rape, that is, sexual intercourse with a girl under the age of consent.[40] At the same time, these laws also provide for punishment of those adults who molest young children.[41] Other crimes, which are relatively clearly defined, such as assault with intent to commit rape or sodomy upon a child and the crime of sodomy with a minor, become entangled in the vague provisions of the acts directed at the prohibition of lewd and indecent behavior with children.[42] Finally, misdemeanor offenses such as contributing to the delinquency of a minor are involved in this assortment of laws directed generally at the proscription of related harms.[43]

---

37. There are, of course, those crimes which include elements of other offenses, *e.g.*, robbery and larceny.

38. See note 14 *supra.*

39. As indicated in note 14 *supra,* there are certain of these laws which combine restriction of voluntary relations between persons of approximately the same age with prohibitions of molesting of young children by adults.

40. The Louisiana Code, for example, defines indecent behavior with juveniles as "the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen with the intention of arousing or gratifying the sexual desires of either person." LA. CODE OF CRIM. LAW & PROC. ANN. art. 81 (1950).

In describing this section's history, there is a comment that "the section is intended to apply to behavior which falls short of sexual intercourse carried on with young children." *Id.* at 493.

41. State v. Saibold, 213 La. 415, 34 So.2d 909 (1948) (adult molesting an eleven year old child); State v. Prejean, 216 La. 1072 So. 2d 627 (1950). Molesting of children by adults is a crime unrelated to attempts at voluntary intercourse with a girl nearing the age of seventeen. The latter may be quite natural but socially undesirable conduct; the former probably indicates perversion.

42. California's law dealing with indecent behavior with children specifically provides for the inclusion of other crimes of a sexual nature, such as rape and sodomy. CAL. PEN. CODE §288 (1949). But see the Illinois law which provides that the crime of indecent behavior with children shall not apply to conduct constituting the crime of sodomy, rape, and seduction. ILL. ANN. STAT. c. 37, §.083 (1936). This exclusionary proviso limits and clarifies the application of the law.

43. In New York, for example, the crime of carnal abuse of a child often carries with it the added charge of "impairing the morals of a minor" which is a misdemeanor in that state. People v. Salacuse, 297 App. Div. 842, 109 N.Y.S.2d 771 (1952); People v. Amerise, 274 App. Div. 987, 82 N.Y.S.2d 635 (1948); People v. O'Nody, 296 N.Y. 305, 73 N.E.2d 35 (1947).

In Illinois, the act of having sexual relations with a young girl (seventeen or under) amounts to contributing to the delinquency of a minor. People v. Kohler, 413 Ill. 283, 109 N.E.2d 210 (1952).

Many more sex laws are objectionable because they are so broadly worded as to bring within their purview activity that could be of an innocent nature. This type of enactment may use undefined, nonlegal terminology which does not sufficiently delimit the activity that is to be

---

The situation which arose in Idaho is strikingly illustrative of this particular problem. There a recently enacted statute, IDAHO CODE ANN. §18-6607 (Supp. 1953), making it unlawful for anyone to commit any lewd or lascivious acts upon the body of a minor with the intent of arousing or gratifying the sexual desires of himself or the minor became the center of a heated judicial debate. In the case of State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952), an indictment charging a violation of the law was demurred to on the ground that the statute unconstitutionally denied equal protection and due process and inflicted cruel and unusual punishment. Reversing the trial court, the Supreme Court of Idaho upheld the constitutionality of the act.

The defendant's equal protection argument was that, under the facts presented by the prosecution, he could have been charged with the crime of assault with the intent to commit rape, a crime carrying a penalty of from one to fourteen years as compared to the mandatory life sentence under the act he was charged with violating. The statute itself provides ". . . for a term of not more than life. . . ." IDAHO CODE ANN. §18-6607 (Supp. 1953); under Idaho law the minimum sentence is abolished and the maximum must be imposed by the courts subject to parole. This is the so-called indeterminate sentence. IDAHO CODE ANN. §19-2513 (1947). Counsel for the defendant pointed out that for a crime of the same nature another person might receive a much lighter sentence at the discretion of the enforcement officials. State v. Evans, 73 Idaho 50, 55, 245 P.2d 788, 790 (1952). The Idaho Supreme Court rejected the argument by indicating that the intent necessary in the proof of a commission of the two crimes was different, one requiring the proof of intent to rape. *Id.* at 55, 245 P.2d at 791. The court did not elaborate as to how acts manifesting an intent to rape could be distinguished from those indicating an intent to engage in lewd and lascivious behavior.

The court also refused to give weight to the due process contention that the words "lewd" and "lascivious" were so broad in their application as to render the law void for vagueness. It was admitted that under the phrasing of the statute some enforcement officers might consider "necking" and "petting" where a child under sixteen was involved to be a violation of the act. *Id.* at 59, 245 P. 2d at 793. This did not make the law too indefinite in the eyes of the majority of the court. They did feel it necessary, however, to read into the law a legislative intention to allow the trial judge to set the sentence at a period less than life contrary to the provisions of the law. Life imprisonment for "necking" was considered cruel and unusual punishment. *Id.* at 59, 245 P.2d at 793.

Mr. Justice Keeton, in dissent, condemned the court's decision as an improper extension of the presumption in favor of the validity of a law. *Id.* at 61, 245 P.2d 795. He considered it impossible to determine what conduct the particular law was intended to prohibit since the statute failed to define its terms or fix any standard. He saw only confusion as the result of attempts to reconcile the act with the main body of sex legislation. *Id.* a 63, 245 P.2d 796.

A month later three cases arose under the section. In two of them the Supreme Court of Idaho upheld the constitutionality of the provision, overruling adverse holdings by the trial courts. State v. Petty, State v. Deane, 73 Idaho 136, 248 P.2d 218 (1952). It ruled that lewd and lascivious behavior was a necessarily included offense in the crime of assault with intent to commit rape and that, therefore, the defendants were properly charged with both crimes. In the *Evans* case the same tribunal had found this section to define a distinguishable offense on the basis of the different specific intents needed in proof of the violations. It is also interesting to note that the "necessarily included offense" carries a much more severe maximum punishment than the major crime of assault.

In the third case the defendant was ruled to have been properly charged with sodomy in one count and lewd and lascivious behavior on the body of a child under sixteen in another. State v. Wall, 73 Idaho 142, 248 P.2d 222 (1952). Again, the court was required to reverse a trial court ruling that the law was unconstitutional. Mr. Justice Keeton,

prohibited. Thus, laws forbidding loitering[44] around schools or peeping[45] into windows can be objected to as overly broad. In each the element of *mens rea,* the specific intent usually essential to criminality, is lacking since not all loitering nor all peeping can be considered criminal.

The way in which a poorly worded law can be twisted in its application is indicated by a recent Florida case in which a forty-seven year old father of seven children and owner of a neighborhood shoe store frequented by many children was convicted of making an indecent assault upon a child and sentenced to two and a half years at hard labor.[46] The strongest case for the prosecution was that the convicted man had put his arm around the girl and had called her a "little sweetie." He testified that he was merely attempting to keep the child away from the machines located in the shop. On appeal this conviction was reversed. The court stated that "the evidence of the prosecutrix shows that his [defendant's] approach to her was fatherly" rather than assaultive.[47] But the entire affair probably left doubts lurking in the minds of many mothers in this particular neighborhood. Moreover, the embarrassment, expense, and loss of business resulting from the necessity of defending against such charges must be considered.[48]

A sizeable objection to the vagueness of these laws is that their semantic gaps leave room for infringement of constitutional rights. The rights to free speech, due process, and equal protection may be denied; a group of recent decisions illustrate this. In a California case, a man who

---

who dissented from all the court's holdings, said in conclusion to his final dissent: "I referred to the confusion that would arise in attempting to uphold this statute . . . in the case of State v. Evans. . . .I now think the confusion is with us." *Id.* at 142, 248 P.2d at 229. The same confused application can result in other jurisdictions depending on how vaguely the laws proscribing indecent assaults on children are phrased.

44. CAL. PEN. CODE §647 a(2) (1949). (Every person who loiters around a school is a vagrant.)

45. ALA. CODE tit. 14, §436(1) (Supp. 1951). This section provided that: "Any male person who goes near and stares, gazes or peeps into any room, apartment, chamber or other place of abode, not his own or under his control, which is occupied by a female person . . . shall be guilty of a misdemeanor. . . ."

In Kahalley v. State, 254 Ala. 482, 48 So.2d 794 (1950), the Alabama Supreme Court invalidated the above statute because of vagueness. The court said: "A state must so write its penal statutes as to be not so vague and indefinite as to permit the punishment of innocent acts and conduct which are a part of the right of every citizen to pursue as well as acts evil in nature and affected with public interest." *Id.* at 484, 48 So.2d at 796.

This court also invalidated a city ordinance of Birmingham which made it unlawful for any two persons of the opposite sex, except husband and wife or parent and minor child to jointly and privately occupy any room in a hotel. Connor v. City of Birmingham, 257 Ala. 588, 60 So.2d 479 (1952).

46. Boles v. State, 158 Fla. 220, 27 So.2d 293 (1946).

47. *Id.* at 222, 27 So.2d at 294.

48. For a discussion of other cases involving this situation of an innocent man injured through the broadness of the scope of these laws, see CALIF. DEPT. OF MENTAL HYGIENE, *op. cit. supra* note 17, at 34 *et seq.*

was politically unpopular with Los Angeles city officials was convicted of vagrancy as a "dissolute" person.[49] Conviction was affirmed because of the defendant's default on appeal.[50]

Those state and federal acts and city ordinances dealing with the prohibition of various obscene and offensive matters work similar harms in regard to the freedom of expression via the written word.[51] One zealous police chief used the particular ordinance of his city to coerce bookdealers to remove from their stock certain named volumes which his vice squad decided were obscene or immoral within the meaning of

49. The defendant in this case was a communist. In his petition to the Supreme Court of the United States for a writ of certiorari he was described as a common figure at Pershing Square where he spoke often on political and economic matters. He had been arrested sixty-three times within the space of a few years. Thirteen times formal bookings were made on various charges. Once he was charged with the offense of defacing public property in connection with his standing on a thick cement bench. Brief for Petitioner, p. 4, Edelman v. California, 344 U.S. 357 (1953).

Edelman was here convicted under CAL. PEN. CODE §347 (5) (1949). (Every idle, or dissolute, or lewd person is a vagrant.)

50. Default was due to the fact that Edelman's substitute attorney was notified too late to take an appeal. The Supreme Court of the United States denied certiorari on the ground that there was no decision by the highest court of the state construing the statute which the petitioner contended to be violative of his right to free speech because of its vagueness which allowed a discriminatory enforcement against him. The convicted had recourse, it was held, to habeas corpus to test the constitutionality of the restraint imposed upon him. Edelman v. California, 344 U.S. 357 (1953).

Mr. Justice Black, who was joined by Mr. Justice Douglas, dissented on the ground that the law was excessively vague. The Justice thought it necessary for the Court to consider possibilities of discrimination against the petitioner and of infringement of his right to free speech. He cautioned against allowing this type of dragnet legislation used to abridge public discussion to go unexamined. *Id.* at 365.

From an inspection of the record, it would seem that the trial court had noted the failure of the state to establish sexual immorality on the part of Edelman and had instructed in vague generalizations that Edelman was guilty as charged if found to be "lawless" or "loosed from restraint." Transcript of Record, pp. 46-47, Edelman v. California, 344 U.S. 357 (1953).

51. No one can with assurance say what will or will not be considered "obscene." The approach used in a recent Kentucky proceeding shows none of the specificity generally present in a criminal case. The court quoted with approval from an earlier case the following: "A publication, writing, or picture might be so lascivious or obscene as to shock every sense of common decency, and leave no doubt in the mind of any person of ordinary morality that it would have a tendency to debase and corrupt the thoughts of those into whose hands it might fall. On the other hand, a writing, picture, or paper might be of such a character as to make it a matter of doubt whether it was indecent or obscene, depending upon the mental and moral training and characteristics of the person who came to pass judgment upon it. So that, when there is doubt in the mind of any ordinarily upright, well-balanced person as to whether or not a publication comes within the meaning of the statute, it is proper to submit the question to the jury. But if, as in the case before us, the matter at first impression, confirmed by more careful consideration, appears to be entirely free from the vice the statute was designed to suppress, the court should either sustain a demurrer to the indictment or direct a verdict of acquittal." King v. Commonwealth, 313 Ky. 741, 745, 233 S.W.2d 522, 524 (1950).

the ordinance.[52] Those dealers who refused to comply faced the possibility of one hundred dollar fines or thirty days imprisonment or both.[53] Compliance was axiomatic since they were not eager to invite public censure. This was especially so because no one could foretell what would or would not be found obscene under such laws. On suit by a publisher, who was injured by this type of enforcement, a federal district court enjoined the activities of the police but refused to declare the ordinance itself invalid.[54]

Vague sex statutes also open up possibilities for denial of equal protection under the laws when a member of a minority group is implicated. In a recent Oklahoma case indicating such discrimination, the conviction of a negro for an act of lewdness was upheld on appeal to the Criminal Court of Appeals of that state.[55] The defendant was found in a *private* office caressing a white woman and kissing her on the neck. Prejudice against the negro was obvious from the very wording of the indictment which needlessly charged that "defendant, *being a negro,* was holding the right breast of a *white* woman. "[56] The judge of the appellate court stated that this could be treated as mere surplusage to be cured by a motion to strike the words "being a negro" and "white."[57]

52. New American Library of World Literature v. Allen, 114 F Supp. 823 (N.D., Ohio 1953). The Youngstown, Ohio, Chief of Police seems to have initiated the procedure and was later assisted by the Federated Woman's Clubs of Youngstown.

53. *Id.* at 828.

54. The district court rejected the petitioner's argument that the Supreme Court of the United States, in Burstyn v. Wilson, 343 U.S. 495 (1952), had repudiated "its previous hasty dictum" in Winters v. New York, 333 U.S. 507 (1948), upholding the word "obscene" as sufficiently definite for use in this type of criminal statute. The *Burstyn* holding was that the interest in allowing the people to see certain kinds of motion pictures outweighed that of protecting religions from "sacrilegious" attacks. The word "sacrilegious" was also held too vague to constitute an adequate administrative standard for censorship of movies. This limited holding did not invalidate use of the words "immoral" and "obscene" in criminal legislation which has the purpose of protecting public morals.

The district court cited a 1914 Supreme Court holding that the word "immoral" was a sufficiently clear standard in movie censorship. Mutual Film Corp. v. Ohio Industrial Comm'n, 236 U.S. 230 (1914). However, in January of 1954, the Court in a per curiam decision declared a similar Ohio law unconstitutional along with a New York act which enabled a certain board of regents to ban "immoral" films. Superior Films Inc. v. Dep't of Education of Ohio, Commercial Pictures Corp. v. Regents of the University of the State of New York, 346 U.S. 587 (1954). The Court's holdings in these cases are all phrased in narrow terms, and it would be unwise to generalize on the basis of them as to the validity of use of such terms as "obscene, immoral, and indecent" in this type of legislation. For a discussion of the latest cases, see Note, 102 U. OF PA. L. REV. 671 (1954).

55. Landrum v. State, 255 P.2d 525 (Okla. 1953).

56. *Id.* at 528.

57 *Ibid.* The court said. "The color or race of the participants is not involved in a consideration of the charge. It would not make any difference under the statute whether the participants were all white, all black or white and black as in this case." This language covered an untenable extension of the law involved. It is obvious that the statute in question would not be enforced against a white couple or a negro couple who were as careful in their behavior as the one involved here. See note 61 *infra.*

The prosecution was brought under the vague provisions of the state's prostitution law[58] rather than under the act forbidding all conduct "which openly outrages public decency and is injurious to public morals."[59] The reason for this was that the latter crime, which is itself very loosely drawn, requires the element of public display The prosecution was able to fall back on the prostitution law because of its general prohibition of "lewdness." For all practical purposes "lewdness" remains undefined by the act. It is simply indicated that lewdness is "to include the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement."[60] It seems highly incongruous that an act directed at the punishment of commercial prostitution or the indiscriminate giving of the body for free should be used to fit the particular facts of this case.[61]

The trial of the sex offense and the sex related violation is emotion packed for the most impartial of judges and juries. Excessive vagueness fails to provide a restraint on emotion. Prejudice against the defendant can enter at any step of the proceedings, and little can be done to preserve this in the record for appeal to a higher court. The danger in these laws is basically that the morality they try to express in a legal form is a shifting concept that changes from time to time and from place to place.[62]

---

58. OKLA. STAT. tit. 21, §1029 (1951). This Act provides in part that it shall be unlawful "to solicit, induce, entice or procure another to commit an act of lewdness, assignation, or prostitution with himself or herself."

59. OKLA. STAT. tit. 21, §22 (1951).

60. OKLA. STAT. tit. 21, §1030 (1951).

61. Prostitution is defined by this Act " to include the giving or receiving of the body for sexual intercourse for hire, and shall also be construed to include the giving or receiving of the body for indiscriminate sexual intercourse without hire." OKLA. STAT. tit. 21, §1030 (1951).

Neither of these elements was present in this case. The vague word "lewdness," undefined except for the even more indefinite phrase indicated in the text, was construed completely out of context to cover conduct unrelated to acts of prostitution and assignation.

See Coleman v. Commonwealth, 247 S.W.2d 535 (Ky. 1952). In this case it was proved that a negro and white girl had often been seen with each other. The appellate court reversed a conviction for common law lewdness stating that. "The gravamen of the charge against Coleman is the performance of an act in public which, in itself, was lewd. The fact that he was a negro and Miss Nance a white woman does not alter this requirement." *Id.* at 536. The Landrum case would have been similarly disposed of had it not been for judicial extension of the vague law dealing with prostitution.

62. The changes which occur in moral standards can best be indicated by reference to a 1913 Oklahoma decision in which the act of publicly wagering on the outcome of a baseball game was held to have "grossly disturbed the public peace, openly outraged public decency and injured public morals." State v. Lawrence, 9 Okla. Crim. Rep. 16, 130 Pac. 508 (1913). The judge in affirming the conviction said "A wager laid upon the result of a contest of chance constitutes gaming. Mr. Blackstone says it is an offense of the most alarming nature, tending by necessary consequence to promote idleness, theft, debauchery among those of the lower class, and that among persons of superior rank it has frequently been attended with sudden ruin. " *Id.* at —, 130 Pac. at 509.

Each judge, indeed each juror, is left to determine the applicable standard of morality and decency, which will thus vary with the different arbitrators of fact and law. This is truly government by men rather than by laws.

The sex laws are vague for various reasons. One fairly obvious factor which is involved throughout the criminal law is that, with the great increase in the complexity of life and relationships with others in large urban areas, there has been a demand for greater regulation of every aspect of human behavior and repression of more and more conduct as patently antisocial.[63] This is illustrated in the sex law area by the increase in the number of statutes prohibiting so-called indecencies with minors.[64] For several years there has been a growing tendency on the part of legislatures to employ broad standards—a big net which scoops in possible violators and leaves to the judiciary the task of screening out the guilty. Coincident with this development is an increasingly hardened attitude toward the criminally involved person. The fear that the innocent might be wrongfully punished has become overshadowed by the fear that

---

Divergence in attitudes as to what constitutes obscenity is illustrated by two cases recently decided in Ohio and Georgia. In the Ohio proceeding, certain magazines which the prosecution considered "so indecent that it would be improper to place them in the records of this court" were found not to be obscene. State v. Lerner, 81 N.E.2d 282 (Ohio 1948). The judge of the court of common pleas found nothing *per se* obscene about the nude human body. *Id.* at 292. "Pure normal sex ideas are all right, all of mankind have sex ideas. Nature is aflame with sex ideas." *Id.* at 286.

The other case involved prosecution for the display of a motion picture of an obscene nature. The judge affirming the trial court's ruling that the picture was obscene, stated: " 'The Valley of the Nude' pictured a place where men and women and children were playing and living in the nude, exposing their persons to one another, eating, playing, sleeping together—naked. In our opinion it was in violation of the statute." State v. Gore, 79 Ga. App. 696, 707, 54 S.E.2d 669, 676 (1949). This same picture was shown without objection in three or four other states. Clearly, the "obscene" exists in the mind.

63. This increased generality in laws was noted as much as three decades ago. See Aigler, *supra* note 16, at 831.

See also People v. Commonwealth Sanitation Co., 107 N.Y.S.2d 982 (1951), where a city magistrate's court of the City of New York said: "As a general proposition, it is true that the criminal law should be definite and certain and that it should be possible for any one to know what is and what is not criminal before he acts. *Nullum crimen sine lege* is a basic principle of the criminal law of the Western World. Unfortunately the myriad forms of socially dangerous or socially objectionable behavior do not lend themselves to meticulous definitions. The criminal law must operate in large areas of objectionable behavior with general standards and through general criteria." *Id.* at 985.

It should be noted, however, that the court there dealt with a law which made it an offense either knowingly or negligently to do any act which would be dangerous to life and detrimental to the health of any human being. This measure can be considered a criminal law only in the loosest sense of the word. It is a regulatory provision requiring maintenance of sanitary conditions and prescribing an exactment of a fine in case of violation. The law amounts to what some writers term a "civil offense." Perkins, *The Civil Offense,* 100 U. OF PA. L. REV., 832 (1952).

64. See note 14 *supra.*

one guilty person might elude the law's strictures.[65] Wide discretion is given the courts under acts aimed at generally unacceptable conduct.

Proponents of this type of criminal law argue persuasively that in the light of varied forms which offensive conduct can take, the legislature should not be required to define and denounce specifically that behavior considered to be a crime.[66] This contention in the last analysis is that the legislature should continue to remake the criminal law to fit the need for general denunciation of antisocial conduct. But this argument is basically unsound. Under this approach, the legislature abandons its task of definitively proscribing conduct which intentionally results in harm. This matter is left to the court; the consequence is a general condemnation of all that offends the state.[67]

In reality there is no need for the provisions to be so general. When the legislature considers itself inadequate to define effectively the behavior it wishes to proscribe, the question that it should pose is whether there is an actual harm involved and what conduct and intent cause the harm. After considering these factors, it may realize that to a great extent there is no substantial harm involved which could not be handled with specificity and that by enacting a general law it condemns a great deal which causes no such harm. Thus those laws aimed generally at openly lewd and lascivious behavior now bring within their scope acts that offend public decency by shocking observers. Tort law as a general rule does not allow recompense for mental anguish resulting from either a negligent or intentional act unless there is some physical injury or great mental disturbance.[68] It does not seem that the criminal law should be ready to secure the mental well being of all individuals.

---

65. See CALIF. DEPT. OF MENTAL HYGIENE, *op. cit. supra.* note 17, at 34.

66. One writer puts forth the argument for a general code of laws in the following manner: "Offenses of this kind [sexual misconduct] may be committed through a wide variety of conduct, and it is not to be expected that the legislature will undertake the cumbersome and probably impossible task of providing for all detailed violations in advance." Note, *Constitutional Law-Criminal Law—Statutory Construction and Interpretation,* 8 LA. L. REV. 129, 132 (1947). He continues in defense of a certain section of the Louisiana Code struck down by the courts as being too vague: "The avowed intention of the reporters and of the legislature in enacting Article 104 of the Criminal Code was to draft a general definition which would include all types of disorderly houses and places known as such, or which might become known as such in the future." *Ibid.*

A draftsman of the Louisiana Code stated that: "The choice of general phrasing is largely responsible for the success of civilian legislation; the lack of it is the greatest single defect in Anglo-American legislation. . . ." Morrow, *Civilian Codification Under Judicial Review: The Generality of "Immorality" in Louisiana,* 21 TUL. L. REV. 545, 550 (1947).

67. Legislation would become a matter of vesting complete discretion in certain men to punish all offenders of a general code. This is a typically totalitarian disregard for the democratic safeguard of specificity in criminal law. See note 7 *supra.*

68. PROSSER, TORTS 51, 210 (1941).

A second cause of the vagueness in sex legislation is the tendency of the laws to confound sin with crime. Present day legal restrictions are based on a Judeo-Christian conception of morality—a legalistic code setting the bounds of decent human behavior.[69] Both the moral and the penal codes have suffered in the exchange.[70]

The question is raised as to whether or not the legislature should continue to recognize a substantial community interest in maintaining a sex-moral standard through criminal law. Some authorities, while fully recognizing the shortcomings of this legislation, still maintain that the criminal law should educate morally.[71] This argument is based on the assumed immorality of deviant sexual behavior and indicates a great faith that the penal sanction can influence for the better "the general moral climate of the community."[72]

While basically the criminal law may have a foundation of absolute moral standards, the social customs which pass under the guise of morals and are imposed on the general public replete with penal sanctions should be recognized as nothing more than conventions. They should be preserved, perhaps, but not by a criminal statute unless its provisions are specifically directed at a serious legal harm. An improvement of the moral tone of the community can be approached apart from criminal jurisprudence.[73]

Another cause of vagueness in sex legislation is that the laws represent, to a large extent, hastily enacted sops to the public demands for protection from the real or imagined thousands of sex fiends which are

69. For a discussion of the development of our sex laws, see MAY, SOCIAL CONTROL OF SEX EXPRESSION (1931), especially at 256. See also DRUMMOND, *op. cit. supra* note 5.

70. Morals have achieved a connotation of sexual purity to be enforced with penal sanction. A minister commenting on the effect of the Kinsey report sees a possible regeneration of the concept of morality as some thing other than a legalistic code. See Gill, *Sin and Sex,* in SEX LIFE OF THE AMERICAN WOMAN AND THE KINSEY REPORT 79 (Ellis ed. 1953). "The moral life," he commented, "is not the life that is made to fit the legalistic box, forced to lie along the pattern of convention and custom. The moral life is . . . a life lived in a loving, creative, productive, harmonizing . . . direction." *Id.* at 90-91.

71. See Ludwig, *supra* note 7, at 209.

72. Schwartz, *supra* note 2, at 916. This position is that the criminal law should pose an ideal standard of conduct to set the pattern for human conduct. It should be noted that this ideal standard opens the door to blackmail; see Note, *Post-Kinsey: Voluntary Sex Relations as Criminal Offenses,* 17 U. OF CHI. L. REV. 162, 178 n.78 (1949).

73. Schwartz in his book review of the Kinsey report argues that because human conduct does not align itself with our criminal law standards is no reason for discarding the laws. Many persons lie, but we still retain our perjury laws. Schwartz, *supra* note 2, at 916. But Schwartz does not carry his analogy far enough. The perjury laws are aimed at a specific harm caused by certain defined conduct. The same cannot be said of sex statutes which attempt to maintain a moral standard.

pictured by some writers as loose in this country today.[74] One sadistic murder of a child or woman is all that is needed to make every stranger in a given neighborhood suspect as a degenerate, sex killer. One effect of these scares is an increase in the body of statutes which represent endeavors by the legislature to isolate and treat the dangerous sex deviate but which in the end serve only to clutter up the collection of minor sex regulations. Laws serve the purpose of satisfying the people's demands for the "something which has to be done about it."

In considering what can be done about excessive vagueness in these laws, the possibility which immediately occurs is judicial condemnation of legislation for indefiniteness. The void for vagueness doctrine has become thoroughly entrenched both as a constitutional and criminal law principle.[75] The suggestion is often voiced that the courts should refrain from striking down legislation on the sole basis of vagueness,[76] and, as a general rule, they are reluctant to do so.[77] The Supreme Court of the United States will not void state legislation without allowing an opportunity for the highest court of the state to place a saving construction upon

74. Writers have pointed out that the danger to our citizens from the sex criminal has been greatly exaggerated. See Sunderland, *supra* note 18, at 543; Symposium, *The Challenge of the Sex Offender,* 22 MENTAL HYGIENE 1 (1938).

75. See Aigler, *supra* note 16, for a discussion of the development of the constitutional principle of "void for vagueness." For a discussion of the doctrine as inherent in the criminal law principle of legality, see HALL, *op. cit. supra* note 6, c. 2.

76. See Note, *Void For Vagueness: An Escape from Statutory Interpretation,* 23 IND. L.J. 272 (1948). See also Mr. Justice Frankfurter's dissent in Winters v. New York, 333 U.S. 507 (1948).

77. Ordinarily, when a law is invalidated more than a lack of due process because of vagueness is offered as justification. Winters v. New York, 333 U.S. 507 (1948), involved an invasion of the right to free speech as did Burstyn v. Wilson, 343 U.S. 495 (1948), and Superior Films Inc. v. Dep't of Education of Ohio, Commercial Pictures Inc. v. Regents of the University of the State of New York, 346 U.S. 587 (1954). The free speech argument was also the basis of the decision in Herndon v. Lowery, 301 U.S. 242 (1937), where the Court invalidated a law making it criminal to advocate certain political ideals.

The court did strike down a New Jersey statute which made it a crime to be a "gangster" because it failed to define that term. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

Courts generally will look to the common law background of words to give them meaning and uphold acts wherever possible. In State v. Magaha, 182 Md. 122, 32 A.2d 477 (1943), the court found nothing vague about the requirement of "reasonable care" in driving. The court said: "The term 'reasonable care' is a familiar expression in common speech and in the terminology of the law. Its accepted meaning is that degree of care which a person of ordinary prudence would exercise under similar circumstances." *Id.* at 130, 32 A.2d at 481. On the same basis, the United States Supreme Court found nothing vague in the term "moral turpitude." Jordan v. De George, 341 U.S. 223 (1951). Similarly, laws employing words such as "lewd, obscene, immoral" may be validated because of common law backgrounds which the laws acquired in their development in conjunction with Christian concepts of morality. *Supra* note 69, and text. Cf. Winters v. New York 333 U.S. 507, 517-518 (1948).

For a discussion of the approach by courts to legislation under the doctrine, see Harriman, *supra* note 16.

the act.[78] In a rare case in which the Court did strike down a state law which was directed toward repressing sex and criminal literature, Mr. Justice Frankfurter, in dissent, expressed fear for a multitude of local laws endangered by such an approach.[79] The enactments he cited were not only numerous but cover areas long considered proper for state legislation under the police power. There is little likelihood that the Court will ever begin a wholesale attack on such statutes. Neither do developments on the state level indicate that the courts are eager to force a revamping of these laws or that legislatures would welcome such an endeavor.[80]

The shortcomings of sex legislation are so basic that they cannot be cured by the judiciary in constitutional attacks for indefiniteness. Each separately considered law can generally be upheld against the charges of vagueness because usually each judge can fairly well categorize that which he considers to be obscene, lewd or indecent and fails to see the

78. Musser v. Utah, 333 U.S. 95 (1948). This case involved a Utah statute making it a crime to conspire to "commit any act injurious to the public health, to public morals, or to trade or commerce. . . ." UTAH CODE ANN. §103-11-1 (1943). A group of Mormons were convicted under the law for conspiring to advocate polygamy. State v. Musser, 110 Utah 534, 175 P.2d 724 (1946). The United States Supreme Court remanded the case stating that "[w]hat the statutes of a State mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe." Musser v. Utah, 333 U.S. 95, 98 (1948).

79. Winters v. New York, 333 U.S. 507, 522 (1948).

80. Only in a few states has there been any notable activity. In Louisiana, three articles of a recently enacted criminal code were invalidated by the supreme court of that state. In State v. Truby, 211 La. 178, 29 So.2d 758 (1947), a law defining a disorderly house as any place used for "any . . . immoral purpose" was found too indefinite because the morality of the people did not serve as a sufficient guide to administration of the law nor did it provide adequate warning of illegality to persons subject to its provisions. A provision forbidding any person to cause a child to perform an "immoral" act was found similarly invalid in State v. Vallery, 212 La. 1095, 34 So.2d 329 (1948). In State v. Kraft, 214 La. 351, 37 So.2d 815 (1948), a law forbidding the possession of an indecent print or film was voided. But the court stopped short of invalidating an act forbidding the commission of "indecent" behavior with a juvenile. State v. Saibold, 213 La. 415, 34 So.2d 909 (1948).

In Alabama, the supreme court recently invalidated a statute and a city ordinance involving the regulation of sexual conduct. See note 45 *supra*. California has had several recent cases in which legislation has been struck down by the courts, but this is generally in the area of business regulation. See Harriman, *supra* note 16. Recently, however, the court of that state found adequate a statute which defined as a vagrant all persons who should "annoy or molest" children. People v. Pallares, 112 Cal. App.2d 895, 246 P.2d 173 (1952).

The hesitancy with which courts strike down vague laws is illustrated in Musser v. State, 223 P.2d 193 (Utah 1950) (on remand from the United States Supreme Court, see note 78 *supra*), where the high court of Utah finally invalidated the statute involved there after finding that "[n]o language in this or any other statute of the state or law thereof or any historical fact or surrounding circumstance connected with the enactment of this statute has been pointed to as indicating that the legislature intended any limitation thereon other than that expressed on the face . . ." of the law. *Id.* at 194.

possibility of any wide departure from his conception of the content of these legally descriptive terms. When courts do strike down vague statutes, the laws that are enacted to replace them are seldom an improvement.[81] As long as this attitude of working at cross purposes prevails, "void for vagueness" will serve only as a limited remedy for the ills created by inadequate sex-morals legislation.

The sex laws' basic fault lies in their failure to state adequately an over-all purpose apart from the preservation of an ideal level of conduct through the repression of all that deviates from the ideal. The statutes in tending to ignore facts of actual human sexual behavior represent an unrealistic approach to sex-created problems. The assumption inherent in them that the sexual needs of individuals are basically the same and that each will find it a relatively simple matter to conform to a single pattern imposed by convention has been cast out by research.[82] Many factors—psychological, physiological, economic, and cultural—are recognized as playing a part in the differentiation of sexual behavior.[83]

Failing to acknowledge this, the laws continue to treat as nearly synonymous sex, immorality, and illegality. Because of this the acts become vulnerable to the criticism that they represent little more than a codification of the prejudices of predominant social and economic groups.

To meet these criticisms they should be basically altered to assume a role in a program desigued to accomplish positive fitting and subordinating of the sexual pattern of the individual's life to the social and economic pattern of society. What is needed is a new approach to the problems created by offensive sexual conduct: one of education rather than repression and condemnation. The readjustment of individual attitudes to sexual matters is, of course, more than a legislative problem. Perhaps it will be impossible to accomplish in light of the many psychological complications of the human mind.[84] But the more immediate objective of the

81. In Louisiana, the statutes invalidated (see note 80 *supra*) were promptly replaced with meaningless amendments. The two sections containing the invalidly broad "immoral" were amended to read "sexually immoral." LA. CODE CRIM. LAW & PROC. art. 92, §7, 104. (Supp. 1953). The indecent print or film became any print or film portraying "any act of lewdness or indecency, grossly scandalous and tending to debauch the morals and manners of the people." LA. CODE CRIM. LAW & PROC. art. 106 (Supp. 1953). This latter phrase is more colorful if not more helpful. None of these provisions have been tested before the supreme court of the state.

82. KINSEY, POMEROY AND MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 196-197 (1948).

83. See note 2 *supra*.

84. It is doubtful whether human sexual conduct can ever be relegated to the position of any other physiological function of the human body in the mauner described by Aldous Huxley in his novel, *Brave New World* (1932). This was a world in which frustrations, neuroses and all human ills were conquered by scientific advance, but yet a frightening world devoid of thought and emotion.

legislature should be a reconstruction of existing laws. Those that prohibit offensive conduct should not make behavior illegal merely because it tends to affront certain people. Legislators should discontinue the picturesque but not too helpful characterization of offensive conduct as "immoral," "lewd," "lascivious," and "indecent." These words readily call forth subjective standards of application. The laws protecting minors from harmful behavior on the part of adults should be confined to the prohibition of adult sexual violation of very young children. Legislation restricting obscenity should be clarified to prevent the possibility of infringement of the right to free speech. The notion that criminals are created from the readers of such matter should not be so readily accepted. These laws should have a definite standard directed toward the prohibition of that material which has only one object and that being the portrayal of the pornographic. The legislature should state precisely what types of matter are considered objectionable and should know, in terms of substantial harm, why this is so.

There is much that needs to be done in the area of criminal sex regulation. The stopgap efforts to repress the immorality of man should be discontinued in favor of a realistic consideration of the over-all sex question. Legislation will not solve all the multitudinous problems, but one step in the direction of a mature policy toward what is considered offensive behavior is a recodification of the laws to accomplish intelligent regulation of voluntary sex behavior and minor sex offenses.

PUBLIC OR PRIVATE POWER—RESPONSIBILITES OF THE FPC

Current development of the nation's water power is set in a maze of overlapping and sometimes conflicting jurisdictions.[1] Congress has delegated much of its authority over waters to various administrative agencies. The Federal Power Commission exercises dominion over power rights.[2]

1. For a survey of the development of governmental supervision and the present jurisdiction of certain governmental agencies over various aspects of water control, see 3 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 5-348 (1950).

2. "For the first time, the Act of 1920 [41 STAT. 1063 (1920), 16 U.S.C. §791 *et seq.* (1946)] established a national policy in the use and development of water power on public lands and navigable streams." Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9, 19 (1945). Prior to 1920, private parties interested in developing sites under federal jurisdiction introduced bills into Congress; Congressional approval was almost an automatic matter. *Id.* at 11. President Theodore Roosevelt played an important part in putting a stop to this type of enactment. He felt that the then current Congressional practice amounted to giving away the property of the people. Gatchell, *The Role of the FPC in Regional Development*, 32 IOWA L. REV. 283,