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Sexual Offenses — LEGAL AND MORAL CONSIDERATIONS

S. OLEY CUTLER, S. J.*

IN ANY DISCUSSION of sexual offenses and the law the first problem to be faced is to determine exactly what is meant by the term “sexual offense.” At the outset of his article in this symposium, Dr. Cavanagh takes notice of this difficulty.¹ No scholar has recognized and clarified this definition problem as well as Dr. Mueller in a recent book dealing with this subject.² There are, he notes, the obvious classes of prohibited acts, the definition of which all would agree upon, such as solicitation, rape, various kinds of sexual assaults, etc. In our presentation here, we shall omit a discussion of these “undisputed areas” of crime. We will also pass over cases which clearly are the product of mental disease or defect—insanity cases. A further complication arises in defining “sexual offenses” because there are criminal acts which are sexual in nature but whose motivation is sheer profit. Again, there are acts such as kleptomania, arson, etc., which fall into criminal law categories as offenses against property, although the offense itself may often have an obvious sexual motivation such as the working out of a problem through vicarious experience. More broadly, topics such as obscenity seem to fall into the basic category of sexual offenses. It will be our endeavor in this article to treat first the general problem area of sexual offenses, since this currently is the subject of most debate. Afterwards, we shall consider several specific offenses.

Recent Trends for Legal Reform

There are trends constantly observable in the field of criminal law and its enforcement both here and abroad — trends which are moving

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¹ Cavanagh, *Sexual Anomalies and the Law*, 9 CATHOLIC LAWYER 1, 4 (1963).

² MUELLER, *LEGAL REGULATION OF SEXUAL CONDUCT* 10-12 (1961).

towards basic reforms. At times a specific reform movement may seem novel and even dangerous to some, yet surely, it must be conceded that what has been most accomplished by such movements has been the stimulation of basic thinking on the purposes of our entire system of criminal law and its administration in our society. There are several noteworthy examples of such trends and movements. The now famous Royal Commission's *Report on Capital Punishment*³ in England which was followed shortly after by the *Durham* decision⁴ in this country, inflamed the still raging controversy over the validity of the M'Naghten Rule as a defense of insanity in criminal cases.

Current interest in the topic of this symposium was undoubtedly triggered by the publication of Dr. Kinsey's Reports,⁵ the Report of the English Wolfenden Commission⁶ and finally, the American Law Institute's official draft of its *Model Penal Code*.⁷ This latter publication — a work of many years' extensive research on the part of many of America's most distinguished scholars in the field of criminal law and its administration — is a document worthy of serious consideration.

The Wolfenden Report

As Mr. J. E. Hall-Williams indicated in

³ The report was presented to Parliament at the request of Her Majesty, The Queen, in September, 1953.

⁴ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁵ KINSEY, POMEROY, MARTIN & GEBHARD, *SEXUAL BEHAVIOR IN THE AMERICAN MALE* (1948); cf. KINSEY, POMEROY, MARTIN & GEBHARD, *SEXUAL BEHAVIOR IN THE AMERICAN FEMALE* (1953).

⁶ Committee on Homosexual Offenses and Prostitution, *Report*, CMD. No. 247 (1957).

⁷ MODEL PENAL CODE (Prepared Official Draft 1962).

1960,⁸ the British experience with full-scale investigations and proposed reforms in the field of sexual offenses has been a long and comprehensive one. After World War I, the increase in reported sexual offenses throughout Great Britain led to a thorough government investigation in 1924. Although this group made at least forty-three recommendations for legal reform, little reform legislation resulted.⁹ Another study was made in 1928.¹⁰

The Wolfenden Committee on Homosexual Offenses and Prostitution was created in 1954 and reported its findings to the Home Secretary three years later.¹¹ Numerous suggestions were made by this latter group for changes in existing British statutes on prostitution. Some of these ideas, although not their spirit, were incorporated in the new Street Offenses Act of 1959. The specific question of prostitution will be discussed later in this article.

Of greatest importance, perhaps, were the views which this Committee reported on the question of homosexuality. Here its principal recommendation was for the legalization of homosexual acts committed privately between consenting adults. The British reaction to this was, of course, highly controversial.

ALI Model Penal Code

On this side of the Atlantic, the American Law Institute had been working for many

⁸ Hall-Williams, *Sex Offenses: The British Experience*, 25 LAW & CONTEMP. PROB. 334, 335 (1960).

⁹ Departmental Committee on Sexual Offenses Against Young People, *Report*, CMD. No. 1561 (1925).

¹⁰ Street Offenses Committee, *Report*, CMD. No. 3231 (1928).

¹¹ Committee on Homosexual Offenses and Prostitution, *Report*, CMD. No. 247 (1957).

years towards a final form of its *Model Penal Code*. Such a final revision was submitted to and approved by its membership at the Institute's annual meeting in Washington, D. C., in May of 1962. The Institute in its Code did not espouse the "mutual consent" approach with respect to homosexual acts, as did the Wolfenden Report. In its original form, as proposed by its Reporters and unanimously approved by the Advisory Committee, the Wolfenden "consensual approach" was followed.¹² This move was not approved by the Council of the Institute.¹³ As the ALI's then tentative Draft No. 4 declared:

Some members believe that the Reporters' position is the rational one but that it would be totally unacceptable to American legislatures and would prejudice acceptance of the Code generally. Other members of the Council oppose the position of the Reporters and the Advisory Committee on the ground that sodomy is a cause or symptom of moral decay in a society and should be repressed by law. . . .¹⁴

With respect to the corruption of the morals of minors, treated in a subsequent section of the Code, persons who engage in deviate sexual acts are guilty of an offense only if the other participant is under the age of sixteen and the actor is at least four years older.¹⁵ These ages of consent, the Institute concedes, are arbitrary ones, and it leaves to individual lawmaking bodies the final determination.¹⁶

Although such leeway is evident here for legislative choice, the permissive approach

of the Institute is quite apparent throughout its entire treatment of this and related sexual offenses. Authorities admit this to be the ALI intent.¹⁷ This basic Institute approach raises doubts as to the willingness on the part of the American community to accept some of the basic moral assumptions of the Institute. It would seem that its present recommendations face as hard a fight for general acceptance as its proposed revision of the M'Naghten Rule as a defense in criminal cases.

General Moral Norms

Returning now to the Wolfenden proposals, we observe a most interesting and controversial moral reaction. At this point, as we discuss general moral norms, we restrict our attention to the single issue of homosexual offenses.

Among the principal observations at the end of its own report, the Wolfenden Committee made it quite clear that, as a group, it was fully aware of the agonizingly difficult decisions it had been called on to make. This is an area, it declared, where "there is no frontier more controversial."¹⁸

British religious reaction to the Committee's proposals was easily predictable from the nature of the testimony given the Committee by the Church of England Moral and Welfare Committee which had declared:

It is not the function of the State and law to constitute themselves guardians of *private morality* and thus to deal with *sin as such* belongs to the province of the church. On the other hand, it is the duty of the State to punish crimes and it may take cognizance of and define as criminal those sins which also

¹² Cf. MODEL PENAL CODE § 207.5, comment (Tent. Draft No. 4, 1955).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See MODEL PENAL CODE (Tent. Draft No. 4, 1955).

¹⁶ *Ibid.*

¹⁷ Cf. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 22 (1961).

¹⁸ Street Offenses Committee, *Report*, CMD. NO. 3231, at 38-49 (1928).

constitute offenses against public morality.¹⁹

The Anglican Council's attitude towards existing legal restrictions on consensual, adult homosexual activities has aptly been described as one of "laissez-faire."²⁰

Official Catholic reaction was expressed by His Grace The Archbishop of Westminster through a statement of his printed in the Westminster Cathedral Chronicle:

The civil law takes cognizance primarily of public acts. Private acts *as such* are outside its scope.

However there are certain private acts which have public consequence in so far as they affect the common good. These acts may rightly be subject to civil law.

It may be, however, that the civil law cannot effectively control such acts without doing more harm to the common good than the acts themselves would do. In that case it may be necessary in the interests of the common good to tolerate without approving such acts.²¹

Specifically, as to legislation of homosexual offenses, His Grace continued:

1. As regards the moral *law*, Catholic moral teaching is:

- (i) Homosexual acts are grievously sinful.
- (ii) That in view of the public consequences of these acts, e.g., the harm which would result to the common good if homosexual conduct became widespread or an accepted mode of conduct in the public mind, the civil law does not exceed its legitimate scope if it attempts to control them by making them crimes.

The teaching authority of the Bishops is primarily concerned with laying down these two principles of *law* which cannot be denied by any Catholic.

2. However, two questions of *fact* arise:

- (i) If the law takes cognizance of private acts of homosexuality and makes them crimes, do worse evils follow for the common good?
- (ii) Since homosexual acts between consenting males are now crimes in law, would a change in the law harm the common good by seeming to condone homosexual conduct?²²

To some extent, at least, British Catholic thinking leaves the door open on the two so-called "questions of fact." Nevertheless, in a volume published by an English priest shortly after the appearance of the Wolfenden Report, we discover a clear "no" to the above two questions of fact.²³ The Catholic Archbishop of Liverpool seems to hold a similar view.²⁴

On the subject of homosexual offenses, the American Law Institute's *Model Penal Code*, as we have already seen, eschews the all-or-nothing Wolfenden approach. As a consequence, in this country there has been no such sharp definition of the issue as we observe in Great Britain. Because of the state of the question here, it seems best to bring this entire issue down to its most basic elements.

Law and Morals

As in Great Britain, so here, most scholars of the problem of sexual offenses (or even the specific one of homosexuality) and the law are keenly aware that the real question here — the relationship of law to morality — must first be met and answered. That our criminal law both in origin, development and spirit is permeated with moral concepts

¹⁹ *Id.* at 38.

²⁰ Fletcher, *Sex Offenses: An Ethical View*, 25 LAW & CONTEMP. PROB. 240, 250 (1960).

²¹ Quoted in BUCKLEY, MORALITY AND THE HOMOSEXUAL 197 (1959).

²² *Id.* at 198.

²³ *Ibid.*

²⁴ *Id.*, Foreword at xix-xxiii.

is a fact beyond all dispute.²⁵ Nowhere is this fact more evident than in the area of criminal responsibility, traditionally represented by the *mens rea* concept. It is no accident we find this in society as it matures towards more civilized levels, because many of these moral aspects of our criminal law represent the dread decision of adjudging guilt and affixing punishments, sometimes even death, to our fellow human beings. It is not enough, as in discussions on the abolition of sanctions against consensual homosexual acts between adults, to draw again to our common attention the liaison between public morality and private morality. To state this obvious truth and then to conclude that problems can be easily solved by one group of society, with no relevancy to the rest of society, is surely a great oversimplification.

To oppose the increasing tendency to permissiveness in criminal law towards sexual offenses, especially as to homosexual offenses, should not be considered as an attempt by one segment of society to impose its ethics or beliefs upon others. The so-called "modern school" which favors abolition of certain criminal sanctions agrees.²⁶ In admitting the necessity of retaining or even stiffening²⁷ sanctions against violent assaults, etc., the modern school itself concedes that there are common goals towards which society aspires to move. This also should imply, I think, that "private acts"

may possibly have an effect upon the community and upon the common good if legalization of homosexual practices in private would lead to the breakdown of a nation's strength and integrity. Consent has never made a right out of a wrong. What is involved here is aptly reflected in the distinction of Catholic moral teaching between objective and subjective moral guilt. Great as may be our collective sympathy for the unfortunates afflicted with homosexual problems, we cannot take individual hardships as the basis for general legal norms.

Some Catholic opponents of any legal reform in this area, such as Father Buckley, mentioned above,²⁸ tend to oversimplify this problem by demanding almost absolute responsibility in every case. Advocates of sweeping reforms, on the other hand, seem to find little, if any, responsibility in these cases. One group diminishes freedom to the vanishing point, while the other demands too much. Both positions, I believe, are equally untenable. Father Burlchaell, a severe critic of Father Buckley's opinion,²⁹ insists that this view fails to take into consideration the etiology of what is truly a mental condition. If medical science has given us new insights into this problem, can we still treat the occasional "harmless" type of offender in the same fashion as we would a hardened criminal? Obviously we cannot, for the collective conscience of the community refuses to inflict punishment where it cannot discover responsible human behavior. Catholic moralists have long since given this subjective aspect of the offender

²⁵ Cf. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 158-59 (1947).

²⁶ Cf. MUELLER, *op. cit. supra* note 17.

²⁷ Ploscowe, *Sex Offenses, The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 224 (1960).

²⁸ See note 21 *supra*.

²⁹ Guild of Catholic Psychiatrists Bull., July 1960, p. 193.

the profound restudy it deserved.³⁰

If the homosexual offender does represent a mental problem, the ordinary laws, it seems to me, should be called upon to handle such situations. In many states of the United States, such laws are called sexual psychopath statutes. These laws, of course, cry out for modernization, as most authorities have demanded. One such voice declared recently:

Unfortunately the vagueness of definition of sexual psychopath contained in these statutes has obscured their basic underlying purpose. . . .

The result, is that many nuisance type, nondangerous sex offenders have been imprisoned for long periods of time, without treatment, in those jurisdictions where such laws have been enforced.³¹

Long imprisonment, characteristic of such statutes, is no solution without adequate prison medical therapy. The above authority is aware of this and suggests rather:

This is not to say that the compulsive, nondangerous types of sex offenders should be immune from prosecution and punishment; but short sentences or probation are more than adequate to deal with these delinquents, unless better facilities are provided.³²

As for the dangerous, repetitive sex offender who oftentimes resorts to violence in their molestation of youth, this same authority calls for stronger penalties — up to life imprisonment when necessary. Parole should be based on proven rehabilitation and demonstrated improvement.³³ The American Law Institute proposals reflect a

similar view.³⁴

Some of the other more common arguments in favor of abolition of sanctions upon homosexual acts committed privately between consenting adults are: the unenforceability of present laws, difficulties in securing evidence, and the absence of violence which outrages public decency.

All of these arguments could be true and not necessarily represent reasonable justification for abolition of sanctions; reform by way of law revision might be more appropriate.

Natural and Normal

The designation of certain sexual offenses of a perverse type has traditionally been in terms such as “unnatural.”³⁵ Unfortunately, such terminology suffers an easy onslaught from those who rightfully attempt to define the “natural” or “normal” man. Hence follows the accusation that many of our sex offenders statutes are anachronistic because they reflect the spirit of “unnatural” terminology, which in turn reflect the values of another era and of an outworn philosophy.

Of course, no serious writer who is at all acquainted with the scholastic natural law tradition would be so naive as to confound it with the desiccated concepts of “natural law” and “nature” as find expression in the moralistic *Commentaries* of Blackstone.

This attempt at defining the “natural” and hence the “normal,” presents a real difficulty, it seems, to some modern commen-

³⁰ Cf. FORD & KELLY, *CONTEMPORARY MORAL THEOLOGY* (1958); HAGMAIER & GLEASON, *COUNSELLING THE CATHOLIC* 231 (1959).

³¹ Ploscowe, *supra* note 27, at 223.

³² *Ibid.*

³³ Ploscowe, *supra* note 27, at 224.

³⁴ MODEL PENAL CODE, Appendix D at 288 (Tent. Draft No. 4, 1955).

³⁵ Cf. BISHOP, *CRIMINAL LAW* 503 (1882); BLACKSTONE, *COMMENTARIES* 214. For an interesting discussion of such statutes, see also *State v. Williams*, 34 La. Ann. 87 (Sup. Ct. 1882).

tators.³⁶ The following is a characteristic statement of this problem:

It is true that current law and morals regard every other sexual activity [*i.e.*, other than ordinary marital intercourse] as unnatural. But surely this is unreal, for natural can be only that which is conditioned and determined by nature. Thus, if upon examining a man charged with sodomy . . . we find that the hormone structure of his body is predominantly female, although his physical appearance is predominantly male, it seems that his behaviour was rather natural, namely in accordance with his natural endowment. It is seriously questioned, therefore, whether current definitions of "the natural" are in accordance with reality, and whether the law should continue to regard what it thinks to be abnormal as also implicitly unnatural.³⁷

The question of the advisability of retaining such terminology as "natural," etc., has already been discussed. Yet, surely, this cannot mean we must therefore dispose of the term "normal" also, or even to identify the two. Although every law student admits to initial problems in defining the "reasonable, prudent man" and even "normal," it is well known that this is a practical and working norm, necessary for most of the law of torts as well as of crimes. A distinguished American psychiatrist some years ago attempted his definition of the "normal man" for just such needs as we have here. He declared:

The normal person may be defined as one who conforms to the average human being in his methods of thinking, feeling, willing and acting, is reasonably happy, emotionally balanced and adjusted and ori-

ented towards future goals.³⁸

Undoubtedly, the term normal is an equivocal one. Its many meanings are well described by Father John Ford:

Some psychiatrists seem to object to using it at all — as if it had no meaning, as if there were no such thing as a normal person.³⁹

Father Ford also suggests that normal can mean "conformed to some ideal standard." Abnormal, therefore, will be identified with anyone who falls short of such a standard. Again, it can mean "average," as where measurable qualities are involved. Finally, it can mean conformity to conduct which is usual in a given group. Of course, if such conduct were wrong, as lying, it would be considered abnormal not to conform to such evil.

So many meanings might suggest that there is no such being as a normal person.

It would seem that those who object to the word normal, as having little or no meaning, fasten their attention too exclusively on one or another of these meanings. They are impressed also by the fact that so-called "normality" shades off into so-called "abnormality" by imperceptible degrees. . . . It is natural enough, but fallacious nevertheless, to conclude that because one cannot draw a definite line separating normal from abnormal, therefore there is no real distinction between them. . . .⁴⁰

In conclusion to this present discussion, then, we state again that the law is inexorably joined to the entire gamut of moral issues — from determining criminal responsibility to assigning criminal sanctions

³⁶ Cf. MUELLER, *LEGAL REGULATION OF SEXUAL CONDUCT* 20-21 (1961).

³⁷ *Id.* at 21.

³⁸ Cavanagh, *Criminal Responsibility and Free Will*, *Guild of Catholic Psychiatrists Bull.*, Dec. 1955, pp. 24-25.

³⁹ FORD & KELLY, *op. cit. supra* note 30, at 347.

⁴⁰ FORD & KELLY, *CONTEMPORARY MORAL THEOLOGY* 348 (1958).

against prohibited behaviour. Law surely cannot legislate morality in the sense that it cannot automatically create the perfect man, operating freely within an ideal human society.

To be perfectly practical, we must finally ask ourselves: Can we safely remove restrictions on aberrant sexual conduct? Perhaps we could, on the basis of the principle earlier stated by the Archbishop of Westminster,⁴¹ that the toleration of evil is often necessary for the promotion of the common good. On the other hand, abolition might well lead to greater dangers than already exist in this perplexing area. This is what I particularly fear, because any proposed legal reform here involves necessarily the definition of "adult," that is to say, involves the setting of age limits. At best this is a very difficult task. State statutes establishing a lower age limit for drinking are ample evidence of this. With the possibility of the moral corruption of our younger citizens involved, I believe that the abolition of existing sanctions on sexual conduct (even if consensual) is too risky an experiment to hazard. This simply is not a case of private, individual morality.

Specific Problems

Although it is obviously impossible within the confines of this article to discuss every aspect of sexual offenses from a viewpoint of law and morality, still several specific problem areas call for some brief comment.

Prostitution

From the vast number of statutes in the United States covering all features of the contemporary prostitution problem, and

from the notable absence of any strong reform movements among various groups in our society, one is forced to agree with a recent conclusion:

Within the sphere of sexual offenses, no problem is harder to tackle, legally, sociologically or psychologically, than that of prostitution. . . . Suffice it to say that the law has no intention to give up trying to repress prostitution by the methods at its command. Evidence gathered by the United Nations on a world-wide basis makes this course appear preferable to a permissive attitude of legalized and state-regulated prostitution.⁴²

The American Law Institute in its study of the question, notes that although prostitution is prohibited in all American jurisdictions, the number of prostitutes may be upwards of 200,000 here.⁴³ Admittedly, a problem does exist here. In Great Britain, for example, the Wolfenden Committee reported a marked increase in the number of arrests, prosecutions and convictions, especially for solicitations for prostitution during the past twenty years.⁴⁴ The Committee observed two main defects in then existing British law which could account for some of this increase. Both were concerned with the definition of the elements of the offense and the difficulty in substantiating these elements in a court of law. The Committee's proposals for reform were directed in the main to driving off the streets sources of annoyance to the public and occasions for affronts to public decency. Shortly after the publication of the Wolfenden Report, the new Street Offenses Act was passed.⁴⁵ Only

⁴¹ *Cf.* text accompanying notes 21-22.

⁴² MUELLER, *op. cit. supra* note 36, at 49.

⁴³ MODEL PENAL CODE § 207.12 (Tent. Draft No. 9, 1959).

⁴⁴ *Cf.* Committee on Homosexual Offenses and Prostitution, *Report*, CMD. No. 247 at 143 (1957).

⁴⁵ Street Offenses Act of 1959, 7 & 8 Eliz. 2, c. 57.

some of the Committee's proposals were incorporated in the new legislation. From what has been reported so far, the new law seems to be operating satisfactorily.

The British spirit of nonintervention into what has been called "the private life of consenting men and women,"⁴⁶ is reflected in most of the modern thinking on the prostitution problem.⁴⁷ Rather than trends towards abolition of present-day criminal sanctions, however, we in the United States observe instead, insistence on stricter penalties and law enforcement in order to rid society of an "annoyance." The other reason alleged for stronger controls on the problem is the frequent tie up between the vice and commercialized crime, police and other governmental corruption. Stricter suppression, therefore, is advocated on a frankly utilitarian basis. What is disturbing in this spirit, of course, is its pallid unconcern for the rehabilitation of offenders and prevention of the extension of the vice among greater numbers of lower income victims.⁴⁸

Also neglected in many discussions of the problem is reference to the reasonable demands of public morality even in our contemporary society, with its pluralistic moral concepts and beliefs. As long as public morality continues to be, as so often it appears to be, merely a question of good taste and manners, this individualistic spirit of hedonism will probably continue to guide and inspire the legal reforms in this special area

of sexual offenses.

Obscenity

Our survey of the contemporary legal landscape with respect to sexual offenses would not be complete without some consideration of the problem of obscenity. Obscenity, as a sex-related offense, has long since been under the surveillance of law.⁴⁹ Both the meaning of the term obscene, and the intention of legislation directed against it, never seemed unclear to earlier ages. Thus in 1857 Parliament passed the Lord Campbell Act against obscene written works. This Act was interpreted by Sir Alexander Cockburn in 1868 in the famous case of *Queen v. Hicklin*.⁵⁰ It was Judge Cockburn who decided that the test of obscenity should now be "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."⁵¹

Obscenity cases have traveled an uneven course in the United States. Currently, in American law, both the definition of "obscenity" and the legislative intent of statutes passed against it lie in mystery. In the case of *Roth v. United States*, the United States Supreme Court chose to define "obscene" as "material which deals with sex in a manner appealing to the prurient interest."⁵²

The language of this new test was borrowed from the American Law Institute's *Model Penal Code*.⁵³ The ALI test was de-

⁴⁶ Anglican Council Report to the Wolfenden Committee, in Committee on Homosexual Offenses and Prostitution, *Report*, CMD. No. 247 (1957).

⁴⁷ Cf. MODEL PENAL CODE 235 (Prepared Official Draft 1962).

⁴⁸ Cf. Ball & Logan, *Early Sexual Behaviour of Lower-Class Delinquent Girls*, 51 J. CRIM. L., C. & P.S. 209 (1960).

⁴⁹ McDonald, *Youth, Obscenity and the Law*, 1961 WASHBURN L.J. 220.

⁵⁰ L.R., 3 Q.B. 360 (1868).

⁵¹ *Id.* at 371.

⁵² *Roth v. United States*, 354 U.S. 476, 487 (1957).

⁵³ MODEL PENAL CODE § 207.10 (Tent. Draft No. 6, 1957).

liberately formulated to avoid the ambiguities of the older "tendency" tests. Nevertheless, the United States Supreme Court majority in *Roth*, reviewing various older state tests, declared: "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. . . ." ⁵⁴

Since then, in the eyes of this Court, there is no "significant difference" between the *Roth* (i.e., the ALI) text and those used by the courts in the various states, we are left, for all purposes, with no constitutional test for obscenity. This no man's land situation has led some to observe:

Any one of these verbal formulas (referring to various state tests) may be constitutionally acceptable as a *definition* of obscenity, provided it meets the requirements that the material be judged as a whole instead of by its parts, and by its appeal to or effect upon the normal person, instead of the weak and susceptible and provided the definition is *only applied* to material that the Court considers obscene. For what really counts is not definitions or verbal formulas, but the kind of material the Court views as obscene. ⁵⁵

In one sense, the vagueness as to what is legally considered as obscene leaves the question of the definition an open one. This demands that commentators and all serious students of this problem reconsider several basic issues:

- 1) the competency of state and local governments to legislate in this area, and
- 2) the validity of the legislative intent, namely, to protect morality and/or to prevent the corruption of the morals of our youth by the imposition of criminal sanctions against obscene materials.

⁵⁴ *Roth v. United States*, *supra* note 52, at 487 n.20.

⁵⁵ Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?* 7 UTAH L. REV. 289, 292 (1961).

On the question of a state's competency to legislate in this area of public morals, the United States Supreme Court has left no doubt:

It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid. [T]he protection even as to previous restraint is not absolutely unlimited. [Citing Hughes, C. J., in *Near v. Minnesota*, 283 U. S. 697, 715-16 (1931)]. . . . In addition, the Court said that "the primary requirements of decency may be enforced against obscene publications." ⁵⁶

If a state seriously attempts to regulate materials which it considers to be obscene and injurious to youth, a further, more practical question arises: Does a certain class of printed or pictorial materials have the effect of corrupting morals? There seems no doubt that courts presently will uphold legislation to prevent outrages of public decency. The question then, comes down to a consideration of the cause and effect ratio, if any, of obscene materials upon youth. While addressing ourselves to this core aspect of the topic, we do not wish at all to imply that we here propose or advocate a "decency" standard for films and books, predicated upon the norm of youthful ignorance, immaturity and curious sense of good taste.

The critical issue cannot but be to decide whether obscene materials do actually lead to a breakdown of public morality, and especially, the corruption of our youth — substantive evils against which states certainly can exercise their police power prerogative. The causal relationship, here referred to, evokes quite contrary responses. Prompted

⁵⁶ *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47 (1961); *cf.* *Kingsley Int'l Pictures Corp. v. Board of Regents*, 360 U.S. 684 (1959) (the famous *Lady Chatterly's Lover* case).

by Dr. Fredric Wertham's famous book, *The Seduction of The Innocent*,⁵⁷ it had been assumed that certain comic books do influence young minds to criminal conduct. Drs. Eberhard and Phyllis Kronhausen, established authorities in the field of the psychology of pornography, declare quite the opposite.⁵⁸ These two scholars insist on an important distinction between "obscenity" and what is erotic realism in literature. As for "obscene books," they declare: "It seems to us undeniable that the vast majority of 'obscene books' fulfill their first and primary function of stimulating most readers erotically,"⁵⁹ or are books which "are designed to be psychologically aphrodisiacs."⁶⁰

Books containing passages of erotic realism are accounted as just one of numerous psychological stimuli of an erotic nature in our culture. The erotic book, in its very nature, tends to sustain the erotic stimulation over a longer period of time and with greater intensity. With these points kept in mind, one must also consider the subjective factors of the reader of obscene materials. So it is that they conclude:

[W]hile it is perfectly true that the aim and, the effect of an "obscene" book is to act as an erotic stimulus, the ultimate test of whether something is "obscene" cannot be conclusively deduced from its effects; it can only be determined on the basis of the content analysis of the book itself.⁶¹

These two authors see no ready answer at the moment to the question of the measurable effects of reading obscene literature, especially the causal ratio between such reading and juvenile delinquency. They

count on their side in this latter conclusion the late Dr. Kinsey, Drs. Sheldon and Eleanor Glueck, the Brown University psychology team report of Drs. Levy, Lipsitt, and Rosenblith, as well as many other contemporary scholars.⁶²

Many present-day authorities tend to agree with the medical viewpoint stated above. The conclusion of some of these is that, in keeping with the lines set down by the United States Supreme Court in *Roth*⁶³ and with common sense itself, obscene materials should be judged by the audience for which they were primarily intended. As some have put it:

This variable obscenity approach requires that in each instance the finding of obscenity be based upon the nature of the primary audience to which the sales appeal is made and the nature of the material's appeal to that audience. In each instance the question should be: With respect to the *primary audience* is the material treated as hard-core pornography — to satisfy or nourish erotic fantasies of the sexually immature? This requires that any *peripheral audience* be disregarded.⁶⁴

The advantages claimed for this approach to the *Roth* definition problem are:

[I]t permits control over hard-core pornography, or anything treated as such, without the fiction of pretending that such stuff appeals to the prurient interest of the normal adult in order to make it fit the verbal formula announced in *Roth*.⁶⁵

Not all authorities so minimize the effect of obscene materials upon the minds of the young. One such voice is that of FBI Director, Mr. J. Edgar Hoover.⁶⁶

⁵⁷ WERTHAM, *SEDUCTION OF THE INNOCENT* (1959).

⁵⁸ KRONHAUSEN & KRONHAUSEN, *PORNOGRAPHY AND THE LAW* (1959).

⁵⁹ *Id.* at 263.

⁶⁰ *Ibid.*

⁶¹ *Id.* at 265.

⁶² *Id.* at 279.

⁶³ *Roth v. United States*, 354 U.S. 476, 490 (1957).

⁶⁴ Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?* 7 UTAH L. REV. 289, 299 (1961).

⁶⁵ *Id.* at 301.

⁶⁶ Letter From J. Edgar Hoover to All Law En-

Apparently, definite conclusion of the causal ratio of obscene materials and their effect on impressionable young minds cannot be established. I do not think it is enough in our society, conscious as it is of its responsibilities to our future citizens to eradicate juvenile delinquency, etc., merely to consider this problem as "peripheral" and "to be disregarded." I would rather subscribe to the view of L. D. McDonald,⁶⁷ that until we know more about the causal ratio, we do our utmost to safeguard our greatest natural resource—our youth. He also has a practical suggestion for a current solution or *modus vivendi* with the problem:

[E]ach state should be allowed to establish its own policy concerning obscene publications and their distribution. A statute so worded as to punish those who sell or make available obscene literature to youth is within powers of the state, and is directly comparable with the selling of alcoholic liquors to minors. In one case the body is injured; in the other the mind; but in both, the community ultimately suffers the loss. Sex intrigues all, especially the young, who find it difficult to cope with the coming of maturity. The natural problems are enough, without subjecting them to unrealistic and unnatural situations in obscene publications that clothe these situations in normalcy.⁶⁸

General Conclusion

One great impression that must come to any student of the general problem of sexual offenses vis-à-vis their legal and moral relationships is one of uncertainty and also of uneasiness. One senses uncertainty because there is an admitted shortage of factual data to support many of the proposed reforms of the so-called "modern school" in this area. One senses uneasiness because

forcement Officials, Jan. 1, 1960, in FBI Law Enforcement Bull. (Jan. 1960).

⁶⁷ McDonald, *Youth, Obscenity and the Law*, 1961 WASHBURN L.J. 220.

⁶⁸ *Id.* at 231.

the proposed reforms of the various contemporary movements for drastic changes in our laws indicate a marked lack of practicality and the absence of hard thinking on the foundations of the public philosophy of law that must underpin any great changes.

In our own appraisal of the current legal situation with regard to sexual offenses, we have frequently had recourse to the phrase "corruption of youth." This factor was so stressed because, it seems to me, it must be the overriding consideration which must be kept in mind when we are speaking of laws that could possibly affect the moral fitness of our nation's greatest resource—its youth. This motivation is only scantily obvious in current thinking on the topic here in question.

Finally, the state has its moral responsibilities too, and social experimentation through law is one of its most cunning temptations. Such experimentation is dangerous if predicated on a "bad man" theory of law that harks back to Holmesian positivism.

Much is made today in discussions on the topic of our symposium of the supposed inhibitive influence of morality upon law. It is instructive, I think, to recall on this point, the insights of Professor Lon Fuller. Speaking of the inverse ratio of the effect of law upon morality, he said:

It should be noted that the view I am expounding here does not assert that men are, in the ordinary affairs of life, consciously deterred by legal penalties. It concedes that the effective deterrents which shape the average man's conduct derive from morality, from a sense of right and wrong. What it asserts is that these conceptions of right and wrong are significantly shaped by the daily functionings of the legal order, and that they would be profoundly altered if this legal order were to disappear.⁶⁹

⁶⁹ FULLER, *THE LAW IN QUEST OF ITSELF* 137 (1940).