

The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States

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IN SEPTEMBER 1940 POLICE arrested and charged thirty-five-year-old Bert Chapman with committing an “act of gross indecency” with John Bates, a consenting adult, at his home in Livingston County, Michigan. Before his trial, the prosecuting attorney filed a petition seeking to have Chapman certified as a criminal sexual psychopath and committed indefinitely to a psychiatric hospital. As required by the statute, the court appointed two psychiatrists, who examined Chapman and diagnosed him with “psychosexual deviation, homosexual (sexual psychopath).” The doctors warned that Chapman “must be considered a distinct sexual menace and a source of serious concern in a free community” not only because of his “homosexual practices” but also because “his psychosexual deviation is very likely to assume a much more ominous manifestation, that of pedophilia [*sic*] (the use of children as sexual objects).” Despite their acknowledgment that Chapman had never exhibited any sexual interest in children, the psychiatrists found that the “possibility [of pedophilia] must be gravely considered.” After a brief hearing, the court accepted the psychiatrists’ findings and ruled that Chapman was a “criminal sexual psychopathic person.” The court ordered him confined to a psychiatric institution until he “shall have fully and permanently recovered from [his] psychopathy.”¹

In committing a man to a psychiatric hospital, possibly for the rest of his life, for engaging in a consensual, entirely private sexual act, the *People*

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¹ *People v. Chapman*, 301 Mich. 584, 584, 589, 591–94 (1942). Unfortunately, the opinion does not reveal whether Bates was also arrested and institutionalized, and I was unable to determine whether or when Chapman was ultimately released.

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v. Chapman decision illustrates the deeply antihomosexual undercurrent of sexual psychopath laws. Sexual psychopath statutes, under which courts committed individuals charged with or convicted of certain crimes, typically sex offenses, to psychiatric institutions, proliferated in the United States between the late 1930s and early 1960s.² Twenty-nine states and the District of Columbia enacted versions of these statutes in response to a sex-crime panic that swept the nation after a wave of publicity about violent sex crimes committed against children.³ Large urban newspapers and national magazines such as *Time*, *Newsweek*, *Coronet*, and *Collier's* repeatedly covered the "sex-crime menace"; the *New York Times* published 143 articles on sex crimes just in 1937.⁴ While scholars have argued that sex crimes did not actually increase during this period, news media outlets nevertheless regularly reported on violent sex crimes, leading citizens' groups, law enforcement agencies, and the media to argue that the state had to act to prevent innocent victims from attack.⁵ At a time when both the medical profession and the public often equated homosexuality with pedophilia, it is not surprising that the sexual psychopath laws contained clear homophobic undertones.⁶ Indeed, while the statutes varied widely in terms of the crimes that triggered the laws' application and in their definitions of sexual psychopathy, they were almost always applied to men convicted of consensual sodomy and were used to commit homosexual men to institutions.⁷ These statutes, which treated offenders as patients

² For a discussion of the different ways in which sexual psychopath laws were structured, see Tamara Rice Lave, "Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws," *Louisiana Law Review* 69, no. 3 (2008): 572–73; William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, MA: Harvard University Press, 1999), 354–55.

³ Eskridge, *Gaylaw*, 354–55.

⁴ Estelle B. Freedman, "Uncontrolled Desires: The Response to the Sexual Psychopath, 1920–1960," *Journal of American History* 74, no. 1 (1987): 83, 92; Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (New Haven, CT: Yale University Press, 1998), 52.

⁵ Deborah W. Denno, "Life before the Modern Sex Offender Statutes," *Northwestern University Law Review* 92, no. 4 (1997): 1363–66; John F. Galliher and Cheryl Tyree, "Edwin Sutherland's Research on the Origins of Sexual Psychopath Laws: An Early Case Study of the Medicalization of Deviance," *Social Problems* 33, no. 2 (1985): 103; Lave, "Only Yesterday," 561–64.

⁶ John Pratt, "The Rise and Fall of Homophobia and Sexual Psychopath Legislation in Postwar Society," *Psychology, Public Policy, and Law* 4, nos. 1–2 (1998): 36; Stephen Robertson, *Crimes against Children: Sexual Violence and Legal Culture in New York City, 1880–1960* (Chapel Hill: University of North Carolina Press, 2005), 207, 213, 215, 217; Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999), 27, 322–23, 326.

⁷ William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Laws in America 1861–2003* (New York: Viking, 2008), 95; Karl M. Bowman and Bernice Engle, "A Psychiatric Evaluation of Laws of Homosexuality," *Temple Law Quarterly* 29 (1956): 279–80. It should be noted that several states did not prosecute consensual homosexual sodomy but rather regulated gay conduct through vagrancy, disorderly conduct, lewdness, and solicitation laws;

instead of criminals, were originally considered progressive developments that provided a more humane approach to treating sexual deviancy.⁸

The vast majority of states enacted their sexual psychopath statutes between 1939 and 1951.⁹ However, in 1955—only four years after the rush to enact sexual psychopath laws ended—the American Law Institute (ALI) voted to exclude consensual sodomy from its Model Penal Code (MPC), indicating that consensual sodomy was not a criminal matter. Therefore, in a very short period, a group of influential legal thinkers had moved consensual homosexual activity from a sign of possible pathology to a legally benign, albeit still immoral, practice. The MPC, a model criminal statute aimed at stimulating penal law reform throughout the United States, became highly influential in legislative efforts to revise state criminal codes, leading twenty-two states to repeal their sodomy statutes by 1978.¹⁰ Although states defined sodomy differently, the term typically referred to any sexual penetration other than penile-vaginal intercourse, which is how I will employ the word in this article.¹¹

This article explains how American law evolved from the widespread implementation of sexual psychopath statutes to the decriminalization of sodomy, arguing that this shift emerged out of debates around sexual psychopath laws and Alfred Kinsey's reports on male and female sexual behavior, which questioned many of the assumptions underlying both sexual psychopath statutes and criminal code provisions on consensual sodomy. The Kinsey reports were an integral part of a larger debate on the nature of homosexuality in the postwar period, one that would draw on psychiatric, sociological, and juridical expertise. Kinsey's work was one of the many scientific elements of a medicolegal regulatory regime that emerged around homosexuality, but it had a profound impact on American law.

many sexual psychopath laws applied to gay men convicted of these statutes. See, for example, New York City Mayor's Committee for the Study of Sex Offenses, *Report of Mayor's Committee for the Study of Sex Offenses* (1940), 66 (hereafter cited as NYC Committee Report); California Department of Mental Hygiene and Langley Porter Clinic, *Final Report on California Sexual Deviation Research* (1954), 154.

⁸ Susan R. Schmeiser, "The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-legal Reasoning," *Yale Journal of Law & the Humanities* 20, no. 2 (2008): 219, 226–27; Denno, "Life before the Modern Sex Offender Statutes," 1354.

⁹ Eskridge, *Gaylaw*, 354–55.

¹⁰ Herbert Wechsler, "Codification of Criminal Law in the United States: The Model Penal Code," *Columbia Law Review* 68, no. 8 (1968): 1427; Melinda D. Kane, "Timing Matters: Shifts in the Causal Determinants of Sodomy Law Decriminalization, 1961–1998," *Social Problems* 52, no. 2 (2007): 214; Mary Bernstein, "Nothing Ventured, Nothing Gained? Conceptualizing Social Movement 'Success' in the Lesbian and Gay Movement," *Sociological Perspectives* 46, no. 3 (2003): 364; Paul H. Robinson and Markus D. Dubber, "The American Penal Code: A Brief Overview," *New Criminal Law Review* 10, no. 3 (2007): 326.

¹¹ Eskridge, *Dishonorable Passions*, 50–53, 90–92. While some states included bestiality within their definition of sodomy, my discussion of sodomy is limited to human intercourse.

This change in legal thought occurred after nine of the states that had enacted sexual psychopath laws established commissions to either propose new legislation or review the statutes' implementation. From 1943 to 1953 these commissions examined all types of sex crimes to provide the legislature with recommendations.¹² While they were not primarily focused on homosexuality, the majority of the reports nevertheless commented on the inappropriateness of including consensual sodomy under the umbrella of psychopathy, thereby separating homosexuality not just from pedophilia but also from violence. Several commissions also questioned whether consensual sodomy should be criminalized at all. The vast majority of these commissions relied on Kinsey's data to argue that the statutory schemes were not based on scientific evidence and therefore needed to be amended or repealed.

The commissions' efforts to remove consensual sodomy from the list of crimes that would trigger a sexual psychopath statute and to decriminalize

¹² Assembly Interim Committee on Judicial System and Judicial Process, *Preliminary Report of the Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process* (1950) (hereafter cited as California Preliminary Report); Assembly Interim Committee on Judicial System and Judicial Process, *Progress Report to the Legislature 1951 Regular Session: Final Report of the Subcommittee on Sex Crimes* (1951) (hereafter cited as California Final Report); Assembly Interim Committee on Judicial System and Judicial Process, *Report of the Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process* (1952) (hereafter cited as California Follow-up Report); Illinois Commission on Sex Offenders, *Report of the Illinois Commission on Sex Offenders to the 68th General Assembly of the State of Illinois* (1953) (hereafter cited as Illinois Report); Massachusetts Special Commission Investigating the Prevalence of Sex Crimes, House Doc. 2, 169, *Final Report of the Special Commission Investigating the Prevalence of Sex Crimes* (Boston: Wright & Porter Printing Co., 1948) (hereafter cited as Massachusetts Report); Michigan Governor's Study Commission on the Deviated Criminal Sex Offender, *Report of the Governor's Study Commission on the Deviated Criminal Sex Offender* (1951) (hereafter cited as Michigan Report); Minnesota Legislative Interim Commission on Public Welfare Laws, *Report of the Minnesota Legislative Interim Commission on Public Welfare Laws: Sex Psychopath Laws: Submitted to the Legislature of the State of Minnesota* (1959) (hereafter cited as Minnesota Report); Interim Commission of the State of New Hampshire to Study the Cause and Prevention of Serious Sex Crimes, *Report of the Interim Commission of the State of New Hampshire to Study the Cause and Prevention of Serious Sex Crimes* (Concord, NH: Concord Press, 1949) (hereafter cited as New Hampshire Report); New Jersey Commission on the Habitual Sex Offender, *The Habitual Sex Offender: Report and Recommendations of the Commission on the Habitual Sex Offender as formulated by Paul W. Tappan, Technical Consultant* (1950) (hereafter cited as New Jersey Report); NYC Committee Report; David Abrahamsen, "Study of 102 Sex Offenders at Sing Sing," *Federal Probation* 14, no. 3 (1950): 26–32 (hereafter cited as 1950 New York Report); Oregon Legislative Interim Committee to Study Sex Crime Prevention, *Report of the Legislative Interim Committee to Study Sex Crime Prevention Submitted to the Forty-Ninth Legislative Assembly* (1956) (hereafter cited as Oregon Report); Pennsylvania Joint State Government Commission, *Sex Offenders: A Report of the Joint State Government Commission to the General Assembly of the Commonwealth of Pennsylvania* (1951) (hereafter cited as Pennsylvania Report); Virginia Commission to Study Sex Offenses, *The Sex Offender and the Criminal Law: Report of the Commission to Study Sex Offenses to the Governor and the General Assembly of Virginia*, S. Doc. no. 18 (1951) (hereafter cited as Virginia Report).

consensual sodomy were often unsuccessful, but the commission reports portended a significant longer-term change. I will demonstrate that the members of the MPC committee drew upon these debates in their arguments for the decriminalization of consensual sodomy. Several members of the MPC committee served on state commissions or testified as experts before the commissions, and a number of committee members corresponded with Kinsey about the legal implications of his work. Kinsey effectively acted as the hub in a wheel of reform-minded jurists. However, beyond simply anticipating legal change, it is likely that the state commission reports, by providing a forum for politicians and lawyers to develop and express a reformist viewpoint, created a discourse in favor of changing criminal laws on consensual sodomy.

Scholars have analyzed the homophobic animus of the psychopath statutes but have not explored how the debates surrounding these laws also began a process of reforming American criminal codes. In her groundbreaking work on sexual psychopath laws, Estelle Freedman argued that “the frequent overlap in use of the terms *sex criminal*, *pervert*, *psychopath*, and *homosexual*, raises the question of whether *psychopath* served in part as a code for *homosexual* at a time of heightened public consciousness of homosexuality.”¹³ George Chauncey, Stephen Robertson, John Pratt, and Susan Schmeiser have echoed and expanded upon Freedman’s conclusions, each noting the definite connections between homophobia and sexual psychopath legislation.¹⁴ William Eskridge has also examined the criticisms of sexual psychopath laws within the New York and Illinois commission reports and has documented the ALI’s decision to exclude consensual sodomy from the MPC, but he has not analyzed how these were connected.¹⁵ Building upon this work, I will argue that the sexual psychopath commission reports influenced the ALI’s decision to decriminalize sodomy, presaging and contributing to a significant change in American criminal law. This article analyzes the missing link between a legal regime that characterized homosexuality as psychopathy and one that adjudicated consensual homosexual sodomy as noncriminal conduct.

COLD WAR FEARS OF SEXUAL DEVIANCY

The period in which sexual psychopath laws proliferated was a time of rising concern about the preservation of traditional masculine roles. As veterans

¹³ Freedman, “Uncontrolled Desires,” 103.

¹⁴ George Chauncey, Jr., “The Postwar Sex Crime Panic,” in *True Stories from the American Past*, ed. William Graebner (New York: McGraw-Hill, 1993), 170–71; Robertson, *Crimes against Children*, 218–23; Pratt, “The Rise and Fall of Homophobia,” 38; John Pratt, “Governing the Dangerous: An Historical Overview of Dangerous Offender Legislation,” *Social and Legal Studies* 5, no. 1 (1996): 24; Schmeiser, “The Ungovernable Citizen,” 166–67.

¹⁵ Eskridge, *Dishonorable Passions*, 77, 118–20.

returned home from World War II, Americans' desire to return to pre-Depression normalcy competed with fears that veterans would not be able to adjust to postwar life. "Many individuals feared that veterans would fail to resume their responsibilities as citizens and family men—that a crisis in masculinity could lead to crime, "perversion" and homosexuality."¹⁶ This anxiety grew as homosexual subcultures expanded in the late 1940s and the homophile movement emerged in the early 1950s.¹⁷ In the 1940s homosexual men and women patronized gay and lesbian bars in increasing numbers; these bars in turn proliferated, opening in medium-sized cities such as Richmond, Denver, San Jose, and Kansas City.¹⁸ The Mattachine Society, founded in Los Angeles in 1951, marked the beginning of the homophile movement, which would press for a positive image of homosexual men and women.¹⁹ The increasing presence of homosexual men and women in American cities, together with Kinsey's 1948 report documenting that a significant percentage of American men had had some form of same-sex experience, contributed to the perception that homosexual activity was pervasive.²⁰

The Cold War further fueled concerns about sexual perversity, as non-conformity of any type came to be seen as a potential threat to national security and stability.²¹ Federal government investigations into security risks and disloyalty targeted homosexuals in particular, based on the belief that homosexuals lacked emotional stability and were susceptible to blackmail.²² The idea that "one homosexual can pollute a Government office" led the federal government to purge massive numbers of homosexual employees from its ranks.²³ The language of pollution conveyed a deliberate message; writers in the 1950s routinely used the metaphor of disease to describe homosexuality, language that resonated for Americans who feared that sexual and political threats to the nation were contagious and spreading.²⁴ News coverage on sexual perversity increased tremendously in the spring of 1950 after a State Department official revealed that ninety-one homosexuals had been forced out of the State Department as security risks, making homo-

¹⁶ Denno, "Life before the Modern Sex Offender Statutes," 1371.

¹⁷ Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2008), 86.

¹⁸ Alan Bérubé, *Coming Out under Fire: The History of Gay Men and Women in World War II*, 20th anniversary ed. (Chapel Hill: University of North Carolina Press, 2010), 271; John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970*, 2nd ed. (Chicago: University of Chicago Press, 1998), 32.

¹⁹ D'Emilio, *Sexual Politics*, 58.

²⁰ Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, *Sexual Behavior in the Human Male* (Philadelphia: W. B. Saunders Co., 1949), 623; Kunzel, *Criminal Intimacy*, 86.

²¹ Denno, "Life before the Modern Sex Offender Statutes," 1370–71.

²² D'Emilio, *Sexual Politics*, 42.

²³ *Ibid.*

²⁴ Kunzel, *Criminal Intimacy*, 87.

sexuality a national political issue.²⁵ Officials emphasized the similarities between homosexuals and Communists, arguing that individuals in both groups could pass undetected and tended to participate in underground subcultures; both thus represented a destabilizing force.²⁶ The widespread depiction of homosexuals as national security risks and moral perverts gave police forces around the country a license to harass homosexual men and women, leading to brutal crackdowns throughout the 1950s.²⁷ This further increased the visibility of homosexuality, rendering the issue of sexual deviance increasingly salient for an anxious public. Concerns over male sexual deviance converged with the rising prominence of psychiatry, leading to the development of a new sexual theory of crime: sexual psychopathy.²⁸

PSYCHIATRY'S ANSWER

The diagnosis of sexual psychopathy emerged as psychiatry was gaining influence in American society and developing theories about how sexual desires, instincts, perversions, and complexes were essential factors in virtually all crimes. Who qualified as a sexual psychopath varied in different jurisdictions but typically included "sex murderers," rapists, pedophiles, sadomasochists, exhibitionists, voyeurs, and homosexuals.²⁹ Some psychiatrists extended the list further, including "anyone who was too 'immature' to 'adjust' to the 'norms' of society" by engaging in extramarital or premarital sex.³⁰ The sexual psychopath did not necessarily commit sexually based offenses, but his crimes were sexually motivated. Given that the sexual psychopath was not defined by his crime but by his inner desires, the sexual psychopath required specialized knowledge to identify and treat. Psychiatrists, who could diagnose the criminals as psychopaths, consequently became central to an entire field of legal regulation.³¹

The concept of the sexual psychopath existed before the sex-crime panic, but until the 1920s psychiatrists typically applied the diagnosis to "hypersexual" women. It was only in the 1930s, when the Depression raised questions about masculinity and male sex-role identity, that psychiatrists reframed sexual psychopathy as a diagnostic category for aggressive male "sexual deviants." The economic threats to men's social status, combined with the emergence and popularity of Freudian psychoanalytic thought, which

²⁵ David K. Johnson, *Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004), 5.

²⁶ Kunzel, *Criminal Intimacy*, 87.

²⁷ D'Emilio, *Sexual Politics*, 49.

²⁸ Freedman, "Uncontrolled Desires," 88; Denno, "Life before the Modern Sex Offender Statutes," 1333.

²⁹ Chauncey, "The Postwar Sex Crime Panic," 167.

³⁰ Irma Hewlett, "What Shall We Do about Sex Offenders?," *Parents' Magazine*, August 1950, 38.

³¹ Schmeiser, "The Ungovernable Citizen," 185, 187.

provided an intellectual framework for understanding the causes of sexual crime, led psychiatrists to focus on masculinity and male sexual deviance. These efforts emphasized the extremes of deviancy: men who were insufficiently masculine, namely, “the effeminate homosexual,” and those who were overly masculine, the violent sexual predator. These two poles came to be considered characteristics of the sexual psychopath, who not coincidentally resembled the unemployed, antisocial, Depression-era male drifter.³²

Since psychiatric and psychoanalytic theories of the period equated homosexuality and pedophilia, both aggressive men and homosexuals were thought to attack children.³³ The convergence of homosexuality and pedophilia emerged in the 1920s, when American psychiatrists and criminologists began to incorporate Freudian ideas about psychosexual development into their work, and had crystallized by the 1930s, when psychiatric interest in homosexuality flourished.³⁴ While psychiatrists had previously argued that homosexuality was congenital, psychoanalysts now saw homosexuality as acquired.³⁵ According to this view, homosexuality was a condition that some individuals developed as the result of a disruption or flaw in psychosexual development.³⁶ For psychoanalysts, homosexuality was a stage of psychosexual development that preceded adolescence, and homosexuals were individuals who were frozen at that stage. As a result of their emotional and sexual immaturity, homosexuals could relate to children and therefore sought children as sexual objects.³⁷ While American psychoanalysts, who identified homosexuality as a dangerous deviation, claimed their theories were rooted in Freud’s principles, Freud actually understood homosexuality as a natural and benign variation in human sexuality.³⁸

Psychiatrists further equated homosexuals with violent sex offenders in arguing that homosexuals lacked self-control. Indeed, the two traits that psychiatrists associated with sexual psychopathy were uncontrollable sexual impulses and immaturity. The interconnected nature of the two characteristics in psychiatric literature became reflected in popular books, magazines, and newspapers, which also linked uncontrolled sexuality and

³² Freedman, “Uncontrolled Desires,” 88–89; Denno, “Life before the Modern Sex Offender Statutes,” 1339, 1341–42.

³³ Elise Chenier, *Strangers in Our Midst: Sexual Deviancy in Post-War Ontario* (Toronto: University of Toronto Press, 2008), 123–24.

³⁴ Freedman, “Uncontrolled Desires,” 90; Schmeiser, “The Ungovernable Citizen,” 220–21.

³⁵ Stephen Robertson, “Separating the Men from the Boys: Masculinity, Psychosexual Development, and Sex Crime in the United States, 1930s–1960s,” *Journal of the History of Medicine* 56, no. 1 (2001): 22.

³⁶ Schmeiser, “The Ungovernable Citizen,” 220–21.

³⁷ Robertson, *Crimes against Children*, 207, 210–11, 213.

³⁸ Paul Robinson, “Freud and Homosexuality,” in *Homosexuality & Psychoanalysis*, ed. Tim Dean and Christopher Lane (Chicago: University of Chicago Press, 2001), 92–93, 96; Henry Abelove, “Freud, Male Homosexuality, and the Americans,” in *The Lesbian and Gay Studies Reader*, ed. Henry Abelove et al. (New York: Routledge, 1993), 382.

childishness.³⁹ For example, Irma Hewlett explained sex offenders to the readers of *Parents' Magazine* by stating that such criminals "are immature, frequently with no more control over their impulses than the child who wants what he wants when he wants it."⁴⁰

While sexual psychopathy was a psychiatric concept, not all psychiatrists agreed that sexual psychopathy was a viable diagnostic category or that homosexuals were necessarily sexual psychopaths. A number of prominent psychiatrists, including Manfred Guttmacher, Karl Bowman, and Edwin Sutherland, criticized the term "sexual psychopath" in the postwar era and became vocal opponents of sexual psychopath legislation.⁴¹ Thus, while psychiatric theory formed the basis of sexual psychopath laws, psychiatrists did not uniformly support sexual psychopathy as a medical or legal category.

STATE COMMISSION REPORTS

In an effort to subdue the sex-crime panic, many states hastily enacted sexual psychopath statutes. Several states established commissions to study sex offenses and sexual psychopath legislation to better understand the issue prior to crafting a law, but public pressure to address the problem led several of the legislatures to pass sexual psychopath statutes before they received the commissions' reports. These legislatures' hurry often resulted in laws that their commissions later opposed. For example, Massachusetts established a commission in April 1947 and enacted a sexual psychopath law three months later.⁴² The report that the commission issued in April 1948 recommended amending the law, which committed "aggressive sexual deviates" to the Department of Correction, on the basis that sexual psychopaths required a therapeutic institution that is "neither a prison nor a hospital, but somewhere between these two types."⁴³ Similarly, New Jersey created a commission on 10 March 1949, enacted a sexual psychopath law on 11 April 1949, and received the commission report denouncing the statute on 1 February 1950.⁴⁴ Only two states, Pennsylvania and New Hampshire, waited until they had received their commissions' reports before enacting sexual psychopath statutes. Five states, California, Illinois, Michigan,

³⁹ Robertson, *Crimes against Children*, 209–10; Schmeiser, "The Ungovernable Citizen," 223–24.

⁴⁰ Hewlett, "What Shall We Do," 38, quoted in Robertson, *Crimes against Children*, 210.

⁴¹ Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry, *Psychiatrically Deviated Sex Offenders* (Topeka, KS: Group for the Advancement of Psychiatry, 1949), 2; Edwin H. Sutherland, "The Sexual Psychopath Laws," *Journal of Criminal Law and Criminology* 40, no. 5 (1950): 550–51; Karl M. Bowman and Milton Rose, "A Criticism of Current Usage of the Term 'Sexual Psychopath,'" *American Journal of Psychiatry* 109, no. 3 (1952): 178–79.

⁴² Massachusetts Report, 3; Act of 1 July 1947, chap. 123A, 1947 MA Laws 745.

⁴³ Massachusetts Report, 12–16; Edwin H. Sutherland, "The Diffusion of Sexual Psychopath Laws," *American Journal of Sociology* 56, no. 2 (1950): 145.

⁴⁴ New Jersey Report, 4–5; Act of 11 April 1949, chap. 20, 1949 NJ Laws 65.

Minnesota, and Oregon, established commissions several years after passing sexual psychopath legislation to evaluate their statute's implementation and suggest changes.

The legislatures charged their commissions with analyzing the problem of sex offenses and evaluating legislative possibilities to prevent violent sexual crimes against women and young children. All but two of the commissions were led by members of the state senate or house of representatives; the New York and Michigan commissions were comprised of citizens appointed by the governor. With the exception of Pennsylvania, which limited its research to a review of other commission reports, all of the commissions included or consulted a wide range of experts, including psychiatrists, criminologists, social workers, lawyers, and judges, who had carefully studied the question of homosexuality, pathology, and sodomy.⁴⁵ Four of the state commissions held public hearings to solicit input from constituents and civic organizations.⁴⁶ Although the legislatures typically appropriated funds to cover expenses, commission members were not remunerated for their work.⁴⁷ Many commission members nevertheless devoted a significant amount of time to their projects, and none more so than in Michigan, where the twenty-three commission members came together more than eighteen times for meetings that averaged six hours each. They also participated in subcommittee meetings, assembled statistics, interviewed experts, helped read and abstract over six hundred books and articles, accepted speaking engagements, and participated in community discussions.⁴⁸

In analyzing the problem of forcible sexual assaults, seven of the nine commissions ended up questioning the reasonableness of including consensual homosexual sodomy within the purview of sexual psychopathy.⁴⁹ This development challenged both the criminal laws and social norms that characterized homosexuality as a Cold War threat. In almost all states, consensual sodomy was a felony subject to the same penalties as forcible sodomy, and those sentences could be extreme.⁵⁰ In Georgia and Nevada a conviction for sodomy could result in life imprisonment; in Connecticut

⁴⁵ Pennsylvania Report, iii; New Hampshire Report, 16; New Jersey Report, 4, 11–12; California Preliminary Report, 2; Illinois Report, 51; Michigan Report, iii–v; Minnesota Report, 1; Oregon Report, 1–2.

⁴⁶ California Preliminary Report, 9; Illinois Report, iv; Michigan Report, 44; New Jersey Report, 11–12.

⁴⁷ The New York City Mayor's Committee for the Study of Sex Offenses did not have funds appropriated for its work. NYC Committee Report, 6.

⁴⁸ Michigan Report, v.

⁴⁹ One notable exception was the New Hampshire commission, which recommended a broad law that not only required individuals charged with (not convicted of) certain crimes to be evaluated for sexual psychopathy but also permitted the county solicitor to file a petition against anyone suspected of being a sexual psychopath, even if that person had never had any contact with the criminal justice system. New Hampshire Report, 14.

⁵⁰ Patricia A. Cain, *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement* (Boulder, CO: Westview Press, 2000), 137.

and North Carolina the maximum sentences were thirty and sixty years, respectively. Other states, such as Arkansas, Montana, Nevada, and Tennessee, had five-year minimum sentences.⁵¹ The severe sentences for consensual sodomy convictions indicated the extent to which American society opposed any sexual acts that deviated from the norm.

The commissions' recommendations did not lead states to immediately and completely revise their criminal laws or sexual psychopath statutes. While some legislatures implemented all of their commissions' recommendations, most enacted limited changes or rejected the suggestions in their entirety. Seven of the nine commissions recommended removing consensual sodomy from the purview of sexual psychopath laws, but only three states did so (see table 1). Four commissions recommended reducing the penalties for consensual sodomy or decriminalizing it altogether, but only New York amended its criminal code (see table 2). Some legislators disagreed with the commissions' views, while other officials concurred with the commissions yet viewed the recommendations as politically unpalatable, believing they were not necessarily representative of the wider discussions in American society.

TABLE 1. SUMMARY OF COMMISSION REPORTS

State	Year of report(s)	Year of original legislation	Remove consensual sodomy from sexual psychopath law	Legislative adoption of recommendation
NY	1943 1950	1950	Yes	Yes (1950)
MA	1948	1947	Yes	No
NH	1949	1949	No	Yes (1949)
NJ	1950	1949	Yes	Yes (1950)
CA	1950 1951 1952	1939	Yes	No
MI	1951	1935	No	Yes (1952)
PA	1951	1952	Yes	No
VA	1951	1950	Yes	No
IL	1953	1938	Yes	Yes (1955)
OR	1956	1953	No	No
MN	1959	1939	Yes	No

⁵¹ Morris Ploscowe, *Sex and the Law* (New York: Prentice-Hall, 1951), 201.

TABLE 2. RECOMMENDATIONS FOR CRIMINAL CODE
PROVISIONS ON CONSENSUAL SODOMY

State	Year of report(s)	Recommendation(s)	Legislative adoption of recommendation
NY	1943 1950	Reduce to misdemeanor*	Yes (1950)
CA	1950 1951 1952	Separate sodomy provision into degrees based on use or threat of force	No
MI	1951	Separate sodomy provision into degrees based on use of force; make consensual sodomy into third-degree felony	No
IL	1953	Decriminalize consensual sodomy committed in private; reduce consensual sodomy committed in public to misdemeanor	No

* *Note:* The 1950 New York report did not recommend reducing consensual sodomy to a misdemeanor, but the committee overseeing the report made this change in the proposed bill it submitted to the legislature. Eskridge, *Dishonorable Passions*, 119.

The commissions' criticisms were directed at laws against consensual *homosexual* sodomy, which had become the primary target of sodomy prosecutions. As Stephen Robertson has shown, around 1930 the focus of sodomy prosecutions shifted from cases involving force or child victims to an emphasis on consensual activities.⁵² Sodomy arrests targeting consensual homosexual conduct rose dramatically after World War II, coinciding with the increased visibility of homosexual communities and Cold War fears of sexual deviancy. While sodomy statutes encompassed a wide range of sexual activities, both heterosexual and homosexual, prosecutions under these laws in the 1950s targeted consensual homosexual conduct, indicating political and social pressure to address homosexuality.⁵³ Consensual homosexual sexual activities were also often adjudicated as lewdness or vagrancy crimes.⁵⁴

⁵² Stephen Robertson, "Shifting the Scene of the Crime: Sodomy and the American History of Sexual Violence," *Journal of the History of Sexuality* 19, no. 2 (2010): 240–42.

⁵³ Eskridge, *Dishonorable Passions*, 75, 86–87; Bérubé, *Coming Out under Fire*, 259. This differentiation of consensual sodomy from forcible conduct may have served to distinguish homosexuality and pedophilia in the minds of some Americans, which might explain why the commissions were willing to propose the decriminalization of consensual sodomy.

⁵⁴ NYC Committee Report, 66–67.

In questioning the criminalization of consensual homosexual sodomy, almost all of the commissions relied upon Alfred Kinsey and his colleagues' 1948 *Sexual Behavior in the Human Male*, a national blockbuster. The book spent several months on national best-seller lists, ultimately selling almost a quarter million copies, and it inspired many other authors to try to capitalize on this commercial success with their own books summarizing Kinsey's findings. *Sexual Behavior in the Human Male* was even more widely known than it was read, since it was given extensive media coverage throughout the United States. Discussed in national magazines and small-town newspapers, the report became a national source of debate and controversy.⁵⁵

Kinsey established that a significant number of adult males engaged in same-sex physical intimacy, reporting that "at least 37 per cent of the male population has some homosexual experience between the beginning of adolescence and old age." His data showed that "persons with homosexual histories are to be found in every age group, in every social level, in every conceivable occupation, in cities and on farms, and in the most remote areas in the country." The fact that such a large percentage of adult men had participated in consensual homosexual activity called into question the assumption that homosexuality in and of itself indicated psychopathy, and it demonstrated that laws criminalizing consensual sodomy were not being and could not be effectively enforced. Since Kinsey argued that about 13 percent of the male population was "predominantly homosexual," an effective application of the statutes would have resulted in the institutionalization of approximately 6.3 million men.⁵⁶ Kinsey was a vocal opponent of both consensual sodomy laws and sexual psychopath statutes; he denounced both as "completely out of accord with the realities of human behavior" and argued that the "capricious enforcement which these laws now receive offers an opportunity for mal-administration, for police and political graft, and for blackmail which is regularly imposed both by underworld groups and by the police themselves."⁵⁷

Moving now to an examination of three of the most influential reports—New York, New Jersey, and Illinois—I will examine the arguments of commission members who sought to limit the definition of sexual psychopathy to crimes of violence and to remove consensual sodomy from the statutes' purview. These reports are representative of how discourse around the legal treatment of sexual psychopathy was shifting toward the conviction that consensual sodomy should not be criminalized. As we shall see, these three reports influenced discussions in other states, though attitudes were

⁵⁵ D'Emilio, *Sexual Politics*, 34; Sarah E. Igo, *The Averaged American: Surveys, Citizens, and the Making of a Mass Public* (Cambridge, MA: Harvard University Press, 2007), 237.

⁵⁶ Kinsey, Pomeroy, and Martin, *Sexual Behavior in the Human Male*, 623, 627, 660, 665.

⁵⁷ Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* (Philadelphia: W. B. Saunders Co., 1953), 20.

often more conflicted elsewhere. In California, for example, a debate raged between 1950 and 1952 between those who wanted a very broad definition of sexual psychopathy and those who wanted to restrict the definition to perpetrators of violent crimes. Even the California commission, however, recognized that the law should differentiate between consensual and forcible sodomy, urging the legislature to separate the crime into degrees. The California debates, which I will also discuss, demonstrate the extent to which ideas about the harm of consensual sodomy had changed.

NEW YORK

The first report in the country on sexual psychopath laws came not from a state commission but from a city committee that recommended statewide legal change. The report of the New York City Mayor's Committee for the Study of Sex Offenses, issued in 1943, influenced the work of other commissions, which adopted the committee's view that consensual homosexual sodomy should not trigger sexual psychopath laws. In addition to limiting the definition of sexual psychopathy to violent crimes, the committee recommended reducing the penalty for consensual sodomy, a position other commissions would support.

The thirty-member committee, comprised of lawyers, judges, law enforcement officers, psychiatrists, and other medical professionals, recommended enacting a sexual psychopath law to institutionalize any sex offenders who, "because of constitutional penchants for abnormal methods of satisfying sexual passions, are dangerous to be at large." The committee suggested that all sex offenders sentenced to prison should undergo a psychiatric examination, since "a considerable portion of sex offenders are abnormal." However, homosexual solicitation and acts between consenting adults did not fall under the sexual psychopath legislation that the committee envisioned. The committee's work showed that few individuals engaging in consensual sodomy were prosecuted as sex offenders. Although homosexual solicitation "receive[d] considerable police attention," those crimes were generally charged as disorderly conduct "of the degeneracy category" rather than as sex offenses.⁵⁸ The committee made it clear that it was not recommending the prosecution of homosexual adults engaging in consensual sodomy as sex offenders, noting that the sex-crime problem was not "the problem of the sodomist who seeks to satisfy his passion by non-heterosexual means or by unnatural methods." These recommendations influenced later commissions to argue that sexual psychopath legislation should only apply to violent offenders.⁵⁹

⁵⁸ NYC Committee Report, 9–10, 66–67.

⁵⁹ Part of the reason the NYC Committee Report became so well known is that several of the committee members went on to work for other state commissions or on the MPC Advisory Committee. NYC Committee Report, 3; California Final Report, 148; member

The Prison Association of New York, a private organization founded in 1844 to reform correctional facilities and improve criminal justice, attempted to put the committee's recommendation into action, but the state legislature repeatedly ignored the group's call to enact a sexual psychopath law. Members of the Prison Association consequently drafted a sexual psychopath bill for the legislature to review in 1947, enlisting the help of Morris Ploscowe, a magistrate judge who had worked on the committee and who would later become an outspoken critic of sexual psychopath laws because they were used to prosecute minor offenders.⁶⁰ Ploscowe's draft excluded disorderly conduct as a crime that would trigger the statute, as his experience established that the police only arrested individuals for disorderly conduct when they had engaged in homosexual sex in subway and theater toilets.⁶¹ He therefore "doubt[ed] whether the behavior involved [was] sufficiently dangerous or anti-social to warrant the use of the procedures provided for by the law."⁶²

Going against Ploscowe's recommendation, the statute that the legislature unanimously approved in 1947 applied to seven different sex crimes, including disorderly conduct.⁶³ Governor Thomas E. Dewey quickly vetoed the sexual psychopath bill in part because consensual, private sexual activity fell within its ambit.⁶⁴ Expressing his concern that "the bill does not distinguish between the different degrees of social harm" that resulted from sex offenses, Dewey argued that those "who commit their acts privately . . . are their own greatest victims." As a result, "incarceration for life of such persons as last described seems unnecessarily inhuman and least calculated to provide a cure."⁶⁵

The New York legislature's efforts to enact a sexual psychopath statute continued. In response to Dewey's veto, the legislature charged Dr. David Abrahamsen, a psychiatrist at the New York Psychiatric Institute, with

list for the Advisory Committee for the Criminal Law Project, 24 May 1951, box 3, folder 15, Model Penal Code Records, American Law Institute Archive, University of Pennsylvania Law School Library (hereafter cited as MPC Records).

⁶⁰ Prison Association of New York, *The One Hundred and Third Annual Report of the Prison Association of New York* (New York: Publishers Printing Co., 1947), 39; Robertson, *Crimes against Children*, 219; Ploscowe, *Sex and the Law*, 229.

⁶¹ Eskridge, *Dishonorable Passions*, 118–19.

⁶² Morris Ploscowe to Charles D. Breitell, Counsel to the Governor, 31 March 1947, in "Veto Jacket" for Senate Bill no. 2790, 38 (hereafter cited as Veto Jacket).

⁶³ Senate Bill no. 2790, 1947 Leg., 107th Sess. (NY 1947); Eskridge, *Dishonorable Passions*, 118–19.

⁶⁴ Thomas C. Desmond to Charles D. Breitell, Counsel to the Governor, 24 March 1947, in Veto Jacket, 10.

⁶⁵ Thomas Dewey, memorandum filed with Senate Bill no. 2790, 9 April 1947, in Veto Jacket, 3. This concern for individuals' sexual privacy did not explicitly mention homosexual activity, but private consensual homosexual sodomy was implicit in Dewey's statement, given that New York courts did not generally prosecute private heterosexual consensual sodomy. NYC Committee Report, 66.

conducting an empirical study of sex offenders to serve as the basis for a future sexual psychopath law. Abrahamsen's two-year study, published in 1950 and based on 102 sex offenders incarcerated at Sing Sing Prison, determined that although most of the offenders had been diagnosed as "sexual psychopaths" or "psychopaths," only two offenders were genuinely psychopathic.⁶⁶ This finding reinforced the concerns of both jurists and psychiatrists that sexual psychopathy was too amorphous a concept for consistent diagnosis.⁶⁷ Abrahamsen concluded that the only offenders who should be confined to mental hospitals for treatment were those who used force or victimized children, indicating that men who had engaged in consensual sodomy should be excluded from the sexual psychopath law.⁶⁸ These judgments were influenced by Kinsey's work, as demonstrated by the fact that Abrahamsen invited Kinsey to speak at a 1949 forum that the New York State Department of Mental Hygiene cosponsored, saying that he was "most anxious to become more acquainted with [Kinsey's] valuable ideas, because they have quite some weight in our fight against crime."⁶⁹ While Abrahamsen was conducting his study, Governor Dewey appointed a blue-ribbon panel, the Committee on the Sex Offender, which consulted Abrahamsen, Kinsey, and other experts to craft a revised sexual psychopath proposal for the legislature. At Kinsey's urging, this bill included a provision reducing consensual sodomy to a misdemeanor.⁷⁰ Dewey's objection, supported by Abrahamsen's study, carried the day; in 1950 New York enacted a sexual psychopath law that did not apply to those convicted of consensual sodomy and also amended its criminal code to reduce consensual sodomy from a felony to a misdemeanor.⁷¹

The New York legislature's decision to change the definition of sexual psychopathy to include only violent crimes influenced the subsequent work of state commissions, although the initial impact of the New York debates was limited. The next commission to issue a report, the Massachusetts Special Commission Investigating the Prevalence of Sex Crimes proposed a statute in 1948 that only applied to violent sex offenders. However, because of the way that the commission structured its recommended law, individuals engaging in consensual homosexual sodomy would nevertheless have been subjected to psychological examinations and increased judicial review. Anyone convicted of the specified crimes was to "be examined and

⁶⁶ 1950 New York Report, 26–27.

⁶⁷ Sutherland, "The Sexual Psychopath Laws," 550–51; Bowman and Rose, "A Criticism," 178–79.

⁶⁸ 1950 New York Report, 31.

⁶⁹ David Abrahamsen to Alfred C. Kinsey, 1 February 1949, correspondence folder labeled "Abrahamsen, David," Kinsey Institute for Research in Sex, Gender, and Reproduction (hereafter cited as Kinsey Institute).

⁷⁰ Eskridge, *Dishonorable Passions*, 119.

⁷¹ Law of 11 April 1950, chap. 525, 1950 NY Laws 1271, sec. 15.

a complete investigation made of his past history and of his character.”⁷² Whether the individual exhibited violent propensities only became a factor *after* this investigation, not before. As a result, men convicted of consensual sodomy would have been investigated even if they were not violent and would never be committed under the law. This procedure suggests that the Massachusetts commission concurred with the then-prevalent view that homosexuals had a propensity for violence, such that the courts were justified in investigating their lives for these hidden predilections. The revised statute the Massachusetts legislature enacted ignored the commission’s recommendation to limit the law to violent offenders. The amended law applied to anyone convicted of a sexual crime, including consensual sodomy, whose behavior was repetitive or compulsive.⁷³

While the work of the New York City Mayor’s Committee for the Study of Sex Offenses had a limited effect in Massachusetts, it did set the path for other commissions. The Virginia Commission to Study Sex Offenses, which published its report in 1951, proposed limiting the scope of the state’s sexual psychopath statute, which at the time applied to anyone convicted of “any criminal offense which indicates sexual abnormality,” to apply only to individuals who committed felonies punishable by death or life imprisonment.⁷⁴ Such a change would have dramatically limited the use of the statute and would have excluded crimes such as consensual sodomy. However, the Virginia legislature ignored the commission’s report; in fact, it left the sexual psychopath statute completely unchanged.⁷⁵

NEW JERSEY

The New York report similarly shaped the work of the New Jersey Commission on the Habitual Sex Offender, which likewise distinguished nonviolent crimes from sexual psychopathy. However, the New Jersey commission extended the work of the New York City committee by explicitly addressing the problem of including consensual sodomy under the purview of sexual psychopathy. With the help of Paul Tappan, a criminologist with doctorates in both sociology and law,⁷⁶ the seven-member commission conducted an exhaustive review of expert material, inviting over seven hundred authorities in the medical, legal, religious, and educational fields to hearings held throughout the state, and sent questionnaires to three hundred additional

⁷² Massachusetts Report, 8, 38.

⁷³ Law of 10 June 1954, chap. 686, 1954 MA Laws 725.

⁷⁴ Act of 7 April 1950, chap. 463, 1950 VA Laws 897; Virginia Report, 11.

⁷⁵ The Virginia legislature amended the statute in 1970. Act of 6 March 1970, chap. 62, 1970 VA Laws 58.

⁷⁶ University of California Academic Senate, “Paul Wilbur Tappan, Criminology and Law: Berkeley,” in *University of California: In Memoriam, April 1966* (Berkeley, 1966), 107, <http://content.cdlib.org/view?docId=hb658006rx&brand=calisphere>.

psychiatrists, school principals, and parent-teacher groups.⁷⁷ Commission members also met with Kinsey before formulating their report, inviting him “to suggest what methods [he] consider[ed] most feasible for the handling of the sex deviate.”⁷⁸ The commission’s report relied upon the work of scholars like sociologist Edwin Sutherland and jurist Morris Ploscowe, both avid critics of the sexual psychopath law.⁷⁹ Members also drew from the New York City report and specifically thanked the Group for the Advancement of Psychiatry (GAP), an activist association aimed at promoting social change and comprised of approximately 150 members of the American Psychiatric Association.⁸⁰ GAP had argued as early as 1949 that sexual psychopath laws should only apply to crimes involving violence or age disparities, taking the position that sexual acts between consensual adults, even where illegal, should not fall under the rubric of sexual psychopathy.⁸¹

The New Jersey commission attacked the assumptions underlying sexual psychopath statutes. Its report ridiculed the figure of the homicidal sex fiend as “publicized creatures of . . . well-stirred imagination.” Denying that sex offenders progressed from minor offenses to more serious, violent sex crimes, the commission questioned whether the statutes were actually being used against dangerous criminals. Given the lack of effective treatment for sex offenders, the commission characterized indefinite commitment as an “atrocious policy” and concluded that sexual psychopath statutes were generally futile. To highlight the injustice perpetrated by the sexual psychopath laws, the commission provided a summary of the first fourteen cases adjudicated in an unspecified jurisdiction in the state, including “the following of a white female by a negro (no assault or approach to ‘victim’)”; a “non-aggressive homosexual, convicted of passing bad checks”; a “patient addicted to indecent exposure when he [was] intoxicated”; and an individual “discovered exposed who had been propositioned and manipulated by a wanton female in a movie theatre.”⁸²

The New Jersey commission determined that most men who engaged in sexual contact with other men did not represent a true threat to the public. The commission emphasized that sexual psychopath statutes were primarily

⁷⁷ New Jersey Report, 11–12.

⁷⁸ Joseph P. Murphy to Alfred C. Kinsey, 24 October 1949, correspondence folder labeled “New Jersey Commission on Habitual Sex Offender,” Kinsey Institute; Paul W. Tappan to Alfred C. Kinsey, 7 November 1949, correspondence folder labeled “Tappan, Paul W.,” Kinsey Institute.

⁷⁹ Sutherland was a staunch opponent of sexual psychopath laws. Sutherland, “The Diffusion,” 142–48; Sutherland, “The Sexual Psychopath Laws,” 543–54.

⁸⁰ Gerald N. Grob, *From Asylum to Community: Mental Health Policy in Modern America* (Princeton, NJ: Princeton University Press, 1991), 29, 32–33; Manfred S. Guttmacher to Alfred C. Kinsey, 20 February 1948, correspondence folder labeled “Guttmacher, Manfred,” Kinsey Institute.

⁸¹ Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry, *Psychiatrically Deviated Sex Offenders*, 2.

⁸² New Jersey Report, 14–16, 28–29.

applied against minor criminals who were neither dangerous nor aggressive, noting that “the vast majority of the sex deviates are minor offenders, most of whom never come to official attention.” Based on Kinsey’s findings, the commission pronounced that there was “no real doubt” that “a very large number” of men in New Jersey had committed sexual acts falling under the criminal law and could be committed to a state mental hospital as a result of the sexual psychopath statute.⁸³ The statute, in short, was unreasonable.

The commission concluded that the state must distinguish between “those sexual deviates whose conduct in the community offends good taste and morals,” such as homosexuals, and dangerous and aggressive felons who threatened the community.⁸⁴ With this statement, the report distinguished homosexuals and pedophiles and in doing so identified homosexuals as benign sexual deviants, not dangers to society whose conduct should be criminalized. In order to ensure that minor criminals did not fall within the statute’s purview, the commission recommended reducing the number of crimes that would trigger the law and requiring that the defendant’s conduct involve violence or an age disparity with the victim. These changes would guarantee that men convicted of consensual homosexual sodomy would not fall under the statute. Gone from the commission’s list of crimes indicating sexual psychopathy were lewdness, indecent exposure, disseminating obscene literature or pictures, indecent communications with females, and, surprisingly, incest.⁸⁵ There is nothing in the commission report that explains why it excluded incest, and indeed the commission emphasized the danger of offenders who targeted children. Commission members may have believed that the revised statute could be applied to all cases of sex crimes against children, regardless of the familial relationship between the adult and minor.

The commission issued its report on 1 February 1950.⁸⁶ Just over four months later, on 8 June 1950, the New Jersey legislature amended its 1949 statute to incorporate all of the commission’s suggestions.⁸⁷ Beyond influencing the laws of its own state, the New Jersey commission’s report had a significant impact on the work of other commissions. Four of the five commission reports that followed cited it as reference material, and two of them—the Pennsylvania and Illinois commissions—drew heavily upon the New Jersey report to criticize sexual psychopath legislation.⁸⁸ In fact, the 1951 report of the Pennsylvania Joint State Government Commission Subcommittee on Sex Offenders primarily consisted of a summary of the New Jersey commission’s findings and the 1950 New York report, reprinting the

⁸³ *Ibid.*, 13, 18.

⁸⁴ *Ibid.*, 17.

⁸⁵ *Ibid.*, 9.

⁸⁶ *Ibid.*, 4.

⁸⁷ Act of 11 April 1949, chap. 20, 1949 NJ Laws 65; Act of 8 June 1950, chap. 207, 1950 NJ Laws 454.

⁸⁸ Michigan Report, 24n12, 135, 156; Pennsylvania Report, 15–24; Illinois Report, 27, 30; California Preliminary Report, 25, 45, 48, 267; California Final Report, 120–24.

recommendations of both. Like New Jersey, the Pennsylvania commission relied on Kinsey's findings; its report estimated that, according to Kinsey's work, "there were at least 2,275,760 male sexual deviates in Pennsylvania in 1940" and thus subtly denounced a penal law that categorized so many citizens as criminals.⁸⁹

ILLINOIS

Another influential state commission to voice its opposition to the inclusion of consensual sodomy within the definition of sexual psychopathy was the Illinois Commission on Sex Offenders, formed in 1951. The legislature created the commission after considering a bill that would have dramatically expanded the state's 1938 sexual psychopath statute to apply to individuals who had not committed a crime but were nevertheless considered potentially dangerous. Because of the serious implications of such a law, the legislature dropped the proposed bill and instead formed a commission to study the issue. The commission, comprised of five senators and five representatives, held public hearings and assembled a group of approximately 150 volunteers to provide input on the report, including doctors, social workers, lawyers, teachers, sociologists, and law enforcement officials. Instead of expanding the statute, as the legislature had contemplated, the commission sought to circumscribe its scope by limiting mandatory psychiatric evaluations to violent crimes and crimes against children, although it granted courts the discretion to make referrals in other cases.⁹⁰

Like New Jersey, the commission also recommended that "punishments for homosexual acts be modified to discriminate between socially distasteful and socially dangerous conduct." It urged the legislature to classify consensual homosexual conduct in public places as a misdemeanor, "at least for the first offense." The Illinois report went much further than New Jersey's, however, insisting that private sexual conduct should only be criminalized where "a substantial age disparity exists between the offender and his victims."⁹¹ Under this formulation, private homosexual activity between consenting adults would not be criminalized. In making these recommendations, the commission drew upon the insights of key players from earlier commissions. Paul Tappan, who had drafted New Jersey's report, worked as a consultant for the Illinois commission. Like New Jersey's report, the Illinois report cited Edwin Sutherland, Morris Ploscowe, and Manfred Guttmacher, a renowned psychiatrist and the chief medical officer of the Supreme Bench of Baltimore, Maryland.

Up until this point, no state commission had recommended the complete decriminalization of consensual sodomy, even though some states, such as

⁸⁹ Pennsylvania Report, 11–12, 15–24.

⁹⁰ Illinois Report, iv–v, 3, 44.

⁹¹ *Ibid.*, 2.

New York, did not typically prosecute the crime.⁹² These recommendations were all the more striking given that the commission's chairman, Senator Marshall Korshak, believed that "peeping toms, homosexuals, and others convicted of lesser crimes" could be rehabilitated after psychiatric treatment and that parents could prevent their children from "growing up to become . . . sex offender[s]" by "fac[ing] up to reality and seek[ing] psychiatric help."⁹³ According to Korshak's view, treating homosexuals who were convicted of consensual sodomy as sexual psychopaths would assist in their rehabilitation, as it would mandate psychiatric treatment. In recommending that the sexual psychopath law not apply to those convicted of consensual sodomy and urging the decriminalization of consensual sodomy itself, the commission indicated that treatment was a matter of private choice, not public necessity.

Kinsey's work was once again central to the Illinois commission's findings. Members of the commission met with Kinsey on three separate occasions and identified him in their report as an advisor.⁹⁴ One of these meetings took place at the May 1952 conference of the Illinois Academy of Criminology, a professional organization devoted to promoting research and disseminating studies on criminal justice.⁹⁵ Members of the academy were concerned that the legislature would pass a "hasty and ill advised revision" of the sexual psychopath law; they felt that "the present law should be abolished and [were] in essential agreement with the findings of the New Jersey studies."⁹⁶ The academy consequently focused its three-day-long conference on the issue of sex offenders, inviting Kinsey to share the results of his studies with the commission members, who had agreed to attend the event. One of the academy's members was Professor Francis Allen from Northwestern University Law School, who was also the chairman of one of the commission's working groups.⁹⁷ Allen "agreed with Kinsey's skepticism about using the criminal law to punish immorality rather than third-party harms." Members of the commission, many of whom were familiar with the Chicago police department's practice of harassing and blackmailing gays, were also convinced by Kinsey's assessment that sodomy laws led to police corruption.⁹⁸

⁹² NYC Committee Report, 66.

⁹³ "Sex Offenders Seldom Reform, Officials Say," *Chicago Daily Tribune*, 21 September 1952; Marshall Korshak, "Preventing Sex Crimes," *Chicago Daily Tribune*, 11 December 1952.

⁹⁴ Alfred C. Kinsey to Marshall Korshak, 18 July 1952, correspondence folder labeled "Illinois Sex Offenders Commission," Kinsey Institute; "Kinsey Praises Group Study on Sex Offenders: 4 Sectional Meetings Set for Today," *Chicago Daily Tribune*, 26 September 1952; Illinois Report, iv–v, 52.

⁹⁵ Lloyd E. Ohlin to Alfred C. Kinsey, 14 May 1952, correspondence folder labeled "Illinois Academy of Criminology," Kinsey Institute.

⁹⁶ Lloyd E. Ohlin to Alfred C. Kinsey, 27 February 1952, correspondence folder labeled "Illinois Academy of Criminology," Kinsey Institute, 1.

⁹⁷ Illinois Report, 52; "About the Illinois Academy of Criminology," in *Illinois Academy of Criminology*, <http://www.illacad.org/about.html> (accessed 25 October 2014).

⁹⁸ Eskridge, *Dishonorable Passions*, 120.

In 1955 the legislature amended the 1938 statute. Rather than being described as individuals with “propensities to the commission of sex offenses,” sexual psychopaths were now defined as those with “propensities toward acts of sexual assault or acts of sexual molestation of children.”⁹⁹ This removed homosexuals who were convicted of consensual sodomy from the purview of the sexual psychopath statute. Although the legislature did not follow the commission’s recommendation to decriminalize consensual sodomy, six years later Illinois would become the first state to remove private consensual sodomy from its criminal code when it adopted the MPC.

CALIFORNIA

Unlike these other commissions, the California Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process—which produced its preliminary report in 1950, its final report in 1951, and a follow-up report summarizing legislative changes in 1952—initially sought to expand the already broad definition of sexual psychopathy in the state’s statute. The original formulation of the California law, enacted in 1939, applied to any crime committed by a person whose sexual psychopathy had been established by affidavit, which could be filed by anyone.¹⁰⁰ Unlike the other jurisdictions discussed above, California retained its enthusiasm for criminalizing all forms of sexual deviancy and prosecuted more sexual psychopaths than any other state, adjudicating men under its sexual psychopath statute until the 1970s.¹⁰¹ After the commission issued its preliminary report calling for an increased use of the statute, California intensified its efforts to commit sexual psychopaths to psychiatric institutions. In the first ten years of the statute’s existence, the state only averaged fifty commitments per year.¹⁰² Between 1953 and 1958, however, California committed an average of almost 350 men per year.¹⁰³ By the mid-1960s, it was institutionalizing an average of 800 offenders each year.¹⁰⁴ The treatment methods it employed were also some of the harshest of any state, going beyond individual and group therapy to castration, lobotomies, and electric shock therapy.¹⁰⁵

⁹⁹ The first quote is from the Act of 6 July 1938, 1938 IL Laws 28; the second quote is from the Act of 7 July 1955, 1955 IL Laws 1144. This presumably would have excluded gay men arrested for consensual sex, but this was not necessarily always the case, as *People v. Chapman*, with which this article opened, illustrates.

¹⁰⁰ Act of 6 June 1939, chap. 447, 1939 CA Laws 1783, sec. 1; *People v. Barnett*, 27 Cal.2d 649, 653, 656 (1946); *People v. McCracken*, 39 Cal.2d 336, 352–53 (1952).

¹⁰¹ Jenkins, *Moral Panic*, 88.

¹⁰² California Preliminary Report, 47.

¹⁰³ Frank T. Lindman and Donald M. McIntyre, Jr., *The Mentally Disabled and the Law* (Chicago: University of Chicago Press, 1961), 303.

¹⁰⁴ Samuel Jan Brakel and James L. Cavanaugh, Jr., “Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States,” *New Mexico Law Review* 30, no. 1 (2000): 72.

¹⁰⁵ Eskridge, *Gaylaw*, 62.

The six-member commission, comprised solely of members of the House of Representatives, urged intensified application of the statutes against sexual psychopathy even as it acknowledged significant problems with definitions, fairness of implementation, and treatment protocols. In its preliminary report, the commission recognized that sexual psychopathy was a vague concept, noted that judges and prosecutors used the state's sexual psychopath law only when the evidence available was insufficient to support a criminal conviction, and acknowledged that there was "very little in the way of successful treatment" for individuals institutionalized as psychopaths. Like other commissions, the California commission considered Kinsey's research, which undermined its recommendations, before issuing its preliminary conclusions. After the legislature appointed the commission in November 1949, the commission invited "psychiatrists, neurologists, judges, district attorneys, police chiefs, public defenders, parole and probation officers, educators, and representatives of interested civic organizations" to testify at public hearings. In addition to its five meetings in Los Angeles and San Francisco, the commission convened in Sacramento to hear testimony from Kinsey himself. It noted that Kinsey's research demonstrated that "at some time or another, 95 percent of the male population commits a sex offense for which he might be prosecuted." The commission included a long excerpt from Kinsey's testimony in the appendix, which included Kinsey's statement that individuals who engaged in homosexual activity were rarely dangerous to children or violent.¹⁰⁶ This statement echoed the New Jersey commission report, which explicitly undermined the social narrative of homosexual men as dangerous predators.

The California commission members nevertheless recommended expanding the sexual psychopath law and concluded that "greater use of the Sexual Psychopath Act would assist in the elimination of persons who are a serious menace to society." The commission did not just promote the use of the sexual psychopath law but also emphasized the need to better enforce all of the state's sex-crimes statutes. The commission had determined that the state's sex-crimes statutes were "extremely comprehensive," such that "there is nothing that can be added in the way of prohibitions" and that California's penalties were as severe as those of any other state. The commission consequently concluded that the problem was a matter of enforcement and identified ways in which crimes could be better investigated and prosecuted.¹⁰⁷ In 1950 the legislature responded, revising the sexual psychopath statute to expand the likelihood that individuals could be forced into psychiatric treatment while limiting the law's application to convicted offenders. Under the 1949 statute, a defendant was subject to the statute only if a judge exercised his discretion and ordered the defendant's psychiatric evaluation.¹⁰⁸ After

¹⁰⁶ California Preliminary Report, 9, 27, 114.

¹⁰⁷ *Ibid.*, 47–48, 72–73, 75–76.

¹⁰⁸ Act of 28 July 1949, chap. 1325, 1949 CA Laws 2311.

the 1950 amendment, a judge, the prosecution, or the defendant could make a motion for an evaluation.¹⁰⁹ However, while more parties could petition the court to have the defendant diagnosed as a sexual psychopath, the 1950 law applied only to individuals *convicted* of a crime, whereas the 1949 version reached anyone *charged* with a crime.¹¹⁰ Given the significant number of offenders institutionalized each year, this limitation does not appear to have circumscribed the law in any meaningful way.

Although the legislature amended the sexual psychopath law in 1950, the California commission proposed additional changes in its 1951 final report. These recommendations diverged from the commission's original stance, proposing that indeterminate sentences be limited to lewd and lascivious conduct involving a child, sex crimes involving force or a threat thereof, and "a felony involving sexual significance," a reference to nonsexual offenses that involved a sexual element for the perpetrator. Under this formulation, consensual homosexual sodomy would not have been subject to the sexual psychopath law. Also in that report, the commission urged the legislature to differentiate sex crimes, including sodomy, fellatio, and cunnilingus, into first- and second-degree crimes that would carry different prison sentences based on the use or threat of force.¹¹¹

It is not clear why the California commission's final recommendations departed so dramatically from its preliminary conclusions, although they are likely related to the increasing number of studies that cast doubt on the usefulness of sexual psychopath statutes and differentiated homosexuality from violent crime. The commission had noted objections to sexual psychopath statutes in its preliminary report, describing the New Jersey commission's work as "an excellent attack on the problem" and noting the commission's "severe criticism" of sexual psychopath laws.¹¹² It had also quoted the New Jersey commission's conclusion that sexual psychopath laws should distinguish between sexual "deviates" whose behavior "offends good taste and morals," such as homosexuals, and those who are "dangerous and aggressive," like rapists and pedophiles. The California preliminary report additionally accepted the conclusions of the New York City report that sex offenders differed little from other criminals, as both were motivated by socioeconomic factors as much as by psychological ones. The commission also referenced GAP's report on sex offenders, indicating that members had consulted this reform-minded document as part of their work.¹¹³ However,

¹⁰⁹ Act of 14 April 1950, chap. 6, 1950 CA Laws 438. Some defendants viewed commitment under the sexual psychopath act as preferable to incarceration in state prison. Frederick J. Hacker and Marcel Frym, "The Sexual Psychopath Act in Practice: A Critical Discussion," *California Law Review* 43, no. 5 (1955): 767–68.

¹¹⁰ Act of 14 April 1950, chap. 6, 1950 CA Laws 438; Act of 28 July 1949, chap. 1325, 1949 CA Laws 2311.

¹¹¹ California Final Report, 141–42.

¹¹² *Ibid.*, 120; California Preliminary Report, 45.

¹¹³ California Preliminary Report, 25, 30, 45.

the California commission's final report included more extensive discussions of studies critical of sexual psychopath statutes, including several that had been published in 1950 after the commission issued its preliminary report. These included a study by three psychiatrists from St. Elizabeth's hospital in Washington, DC, who concluded that the majority of the men adjudicated as sexual psychopaths were not "of sufficient menace to justify indefinite commitment" and that few could be successfully treated and rehabilitated.¹¹⁴ The California final report also provided lengthy accounts of New York's study of sexual offenders at Sing-Sing Prison, a study commissioned by the Ohio Program Commission's Committee on Sex Crimes, and the work of Karl Bowman, superintendent of the Langley Porter Clinic in San Francisco. All three of these studies emphasized the difference between homosexuals, violent criminals, and pedophiles, indicating a need to reform penal codes and sexual psychopath statutes. Bowman's work likely had particular sway given that it was funded by the California legislature, which had appropriated \$100,000 in 1950 for his research on sex offenses.¹¹⁵ The increasing number of studies criticizing sexual psychopath statutes and the criminalization of consensual sodomy likely contributed to the California commission's final report.

The legislature followed few of the commission's final recommendations, although it did introduce a law in 1952 that made psychiatric evaluations mandatory only in cases of sex crimes involving children or force. However, judges retained the discretion to order psychiatric reviews in all other cases, regardless of whether they were sex offenses. The sexual psychopath statute therefore applied to anyone convicted of sodomy, irrespective of the age of the victim or whether the defendant used force. The legislature did not separate the crime of sodomy into degrees based on the use of force; instead of lessening the punishment for consensual sodomy, as the commission recommended, the legislature increased it by adding the possibility of an indeterminate sentence. Whereas sodomy had previously been punishable by a minimum of one year and a maximum of twenty years in jail, the amended provision provided for a minimum of one year in prison and gave the court discretion to impose an indeterminate sentence.¹¹⁶

Like the California commission, the Michigan Governor's Study Commission on the Deviated Criminal Sex Offender, which issued its report in 1951, recommended differentiating between consensual and forcible sodomy in the criminal code. However, while it sought to reclassify consensual sodomy as a third-degree felony, recognizing it as a lesser crime, the commission also recommended making consensual sodomy punishable by a maximum of five years in jail or an indefinite term ranging from one day to life, a significant sentence. Despite praising New York's sexual

¹¹⁴ California Final Report, 134, 138–39.

¹¹⁵ California Final Report, 107–40.

¹¹⁶ Act of 17 April 1952, chap. 24, 1952 CA Laws 382.

psychopath law as the “best existing program of legislation for the handling of convicted sex offenders” and citing the New Jersey report and Kinsey’s study of male sexual behavior as references, the Michigan commission did not advocate reforming the state’s sexual psychopath law so that it would not apply to consensual homosexual sodomy.¹¹⁷ Shortly after the report’s publication, the Michigan legislature narrowed the parameters of sexual psychopath legislation to apply only to persons who exhibited compulsive sexual behavior, used force in sexual relations, or assaulted children.¹¹⁸ The legislature did not follow the commission’s recommendation to amend the sodomy statute to differentiate between consensual and forcible sodomy.

As the Michigan and California commission reports demonstrate, even commissions unwilling or hesitant to change their sexual psychopath laws nevertheless recognized the juridical need to differentiate between consensual and forcible sodomy. This separation of sodomy from violence contributed to a discourse that would inform the authors of the MPC and result in their decision to decriminalize consensual sodomy.

THE MODEL PENAL CODE

Despite the antihomosexual animus behind the sexual psychopath statutes, which proliferated in the context of a sex-crime panic and Cold War fears of homosexuality, the state commission reports adopted a reformist approach to consensual homosexual activity. Starting in New Jersey in 1950, almost every commission discussed Kinsey’s data and their demonstration that a large number of citizens were engaging in homosexual conduct.¹¹⁹ The

¹¹⁷ Michigan Report, 24n12, 32, 37, 135, 150, 156–57, 190, 193. The sodomy provision at the time did not distinguish between consensual and forcible conduct. M.C.L.A. § 750.158 (1931). One of the commission members, Warren Dunham, was especially familiar with Kinsey’s work; in the 1950 report on sex deviates that he submitted to the Michigan Department of Mental Health, Dunham relied upon Kinsey’s studies and Kinsey’s testimony to the New Jersey and California commissions. Dunham stated that Kinsey’s “influence was distinctly present” in his report, which described the sexual psychopath statute as “an inept piece of legislation.” H. Warren Dunham to Alfred C. Kinsey, 15 May 1951, correspondence folder labeled “Dunham, H. Warren,” Kinsey Institute; H. Warren Dunham, *Crucial Issues in the Treatment and Control of Sexual Deviation in the Community: A Report of the State Psychiatric Research in Detroit* (Lansing, MI: State Department of Mental Health, 1951), 45.

¹¹⁸ Act of 9 April 1952, chap. 73, 1952 MI Laws 80.

¹¹⁹ There were two other state commission reports issued after the American Law Institute voted to remove consensual sodomy from the Model Penal Code. Oregon’s 1956 report noted that the state’s sexual psychopath statute could result in the imposition of a life sentence on a minor crime and as a result recommended that the sexual psychopath law no longer apply to indecent exposure or “interfering with privacy of another (Peeping Tom)” (Oregon Report, 24). The Oregon commission did not consider whether the statute should apply to consensual sodomy. Minnesota’s 1959 report did not discuss homosexuality or consensual sodomy, but the committee’s proposed legislation provided for presentence psychiatric evaluations for sex crimes “except where the act of sodomy is committed between consenting adults” (Minnesota Report, 12).

New Jersey, Pennsylvania, Virginia, and Illinois commissions all questioned whether their criminal laws could be effectively enforced in light of Kinsey's studies and consequently suggested amendments to their sexual psychopath statutes. Additionally, many of the commissions proposed changing their sodomy laws to reduce the punishments for consensual sodomy. The California and Michigan commissions urged their legislatures to differentiate between consensual and forcible sodomy in their criminal codes, while the New York commission suggested reducing consensual sodomy to a misdemeanor. The Illinois commission went further, recommending that consensual sodomy committed in public be reclassified as a misdemeanor and proposing that private consensual sodomy be decriminalized.

As the discussion of the state commission reports demonstrates, however, legislatures did not necessarily accept the commissions' viewpoints. Although the New Jersey and New York legislatures adopted their commissions' recommendations, most legislatures either rejected the recommendations or only incorporated certain of the commissions' ideas. The Michigan legislature enacted some of its commission's proposals concerning its sexual psychopath law but ignored the commission's recommendation to amend the sodomy provision to differentiate between forcible and consensual acts. Likewise, the Illinois legislature reduced the scope of its sexual psychopath statute but did not alter its sodomy laws. The Pennsylvania and Virginia legislatures, on the other hand, completely ignored the recommendations of their respective commissions.

While the commission reports did not always lead to legislative change in their states, their calls for reform of sexual psychopath and consensual sodomy laws were realized in the ALI's decision to exclude consensual sodomy from the MPC. A group of prominent judges, lawyers, and law professors had founded the ALI in 1923 with the purpose of simplifying and clarifying American law, as well as adapting legal codes to meet changing social needs.¹²⁰ The ALI's first projects involved restatements of legal subjects to reduce uncertainty among judges and lawyers as to the state of the law. Between 1923 and 1944, the ALI developed restatements for nine areas of law, including contracts, property, torts, and trusts. Thereafter, it continued producing restatements of law, as well as formulating model statutes.¹²¹ In 1950 the ALI, aware of the variation among states' criminal provisions, turned to criminal law and its administration. The ALI decided to create a model statutory code that would both inspire legislatures to update their penal laws and assist them in their efforts. Its Advisory Committee

¹²⁰ Herbert F. Goodrich and Paul A. Wolkin, *The Story of the American Law Institute, 1923–1961* (St. Paul, MN: American Law Institute Publishers, 1961), 5–7; Geoffrey C. Hazard, Jr., *The American Law Institute: What It Is and What It Does* (Rome: Centro di Studi e Ricerche di Diritto Comparato e Straniero, 1994), 3.

¹²¹ "Overview: Projects," in *The American Law Institute*, <http://www.ali.org/index.cfm?fuseaction=about.instituteprojects> (accessed 22 October 2014).

for the Criminal Law Project, which Herbert Wechsler led as the reporter, headed the endeavor, while subcommittees drafted the individual code provisions. Louis B. Schwartz served as the associate reporter responsible for the sexual offenses section, which he presented to the advisory committee for debate and review. After the advisory committee gave its approval, the Council of the ALI, an elected volunteer board of directors, voted on the provisions and then sent each section to the entire ALI membership for a final decision. The resulting product was a clear, comprehensive penal code crafted by highly respected experts that became one of “the most successful academic law reform projects ever attempted.” Even before the MPC was finished, its tentative drafts served as models for criminal code reform.¹²² Within two decades of its completion, more than two-thirds of the states had undertaken new codifications of their penal laws. Although not all states enacted the MPC’s provisions, virtually all used the MPC as a starting point and followed its format.¹²³

Just like the state commissions, the MPC advisory committee based its sex-offenses provisions in large part on Kinsey’s studies. Indeed, the ALI not only sent Kinsey a copy of its draft sex-offenses provision, requesting his comments and suggestions, but also explicitly acknowledged the ALI’s “indebtedness to [Kinsey’s] researches.”¹²⁴ It additionally relied upon the state commission reports and the nation’s experience with sexual psychopath laws to emphasize the deficiencies in existing criminal laws on sex offenses. By highlighting the problematic nature of sexual psychopath statutes, the advisory committee was able to establish that it was necessary to take a different approach to sex crimes. It eliminated the dominant framework for understanding sex offenders, leaving a gap where the sexual psychopath had been. The advisory committee then employed Kinsey’s data to demonstrate the pervasiveness of sexually deviant conduct and to argue for the exclusion of consensual, private sodomy from the MPC. The MPC proved highly influential in sodomy law reform; by 1978 twenty-two states had decriminalized consensual sodomy through legislative criminal code revisions.¹²⁵

KINSEY’S INFLUENCE ON PENAL REFORM

While the ALI’s previous model code efforts were crafted solely by legal professionals, the ALI invited prison administrators, sociologists, and psychiatrists to join the advisory committee that was drafting the MPC.¹²⁶

¹²² Robinson and Dubber, “The American Model Penal Code,” 326.

¹²³ Gerald E. Lynch, “Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part,” *Buffalo Criminal Law Review* 2 (1998): 297–98.

¹²⁴ Louis B. Schwartz to Alfred C. Kinsey, 8 July 1955, correspondence folder labeled “Schwartz, Louis B.,” Kinsey Institute.

¹²⁵ Kane, “Timing Matters,” 214; Bernstein, “Nothing Ventured,” 364.

¹²⁶ Goodrich and Wolkin, *The Story of the American Law Institute*, 9–11, 23; member list for the Advisory Committee for the Criminal Law Project.

Several members brought a familiarity with Kinsey's research and previous involvement in the state commissions to their work on the MPC. Both Paul Tappan from New Jersey and Morris Ploscowe from New York served on the MPC advisory committee, and both reiterated their opposition to the criminalization of consensual sodomy.¹²⁷ In 1951 Ploscowe published *Sex and the Law*, which applied Kinsey's sociological research to legal principles.¹²⁸ In it he opposed sexual psychopath legislation, since the laws had been used to prosecute minor offenders instead of isolating dangerous criminals. He argued that since Kinsey had demonstrated that there were six million homosexual acts each year for every twenty convictions, consensual sodomy laws were practically unenforceable, and given that homosexuality was a stage in the developmental process and not a choice, "it might be desirable to eliminate the legal prohibitions against adult homosexual behavior altogether."¹²⁹ Ploscowe's strong views would have a substantial impact on the advisory committee's decision to exclude homosexuality from the MPC.

Another advisory committee member, Manfred Guttmacher, also relied upon Kinsey's research to question the validity of sexual psychopath laws. Guttmacher chaired the Forensic Committee of GAP, whose 1949 report, "The Psychiatrically Deviated Sexual Offender," warned against "blindly going with the tide" of sexual psychopath laws, which were more likely to "lead to abuse rather than cure." GAP in fact revised its preliminary report after reviewing Kinsey's 1948 study; Guttmacher professed that "Kinsey's findings were the points by which [GAP] steered."¹³⁰ GAP met with Kinsey in 1948 to discuss his findings, which Guttmacher praised as "a bold, vast project, brilliantly conceived, patiently and sensitively executed, and carried out with the greatest honesty" and which Guttmacher considered to be "one of the really important works of our times."¹³¹ The most significant implication of Kinsey's findings, in Guttmacher's view, was that the criminal law was unrealistic given Americans' sexual practices, and he was convinced by Kinsey's insistence that the criminal prohibition of consensual sodomy provided opportunities for blackmail and police corruption.¹³² Guttmacher's

¹²⁷ Tappan played a surprisingly large role in both the New Jersey report and the drafting of the MPC, considering that he was a sociologist and not an attorney. Tappan earned a JSD, not a JD. University of California Academic Senate, "Paul Wilbur Tappan."

¹²⁸ David Allyn, "Private Acts/Public Policy: Alfred Kinsey, the American Law Institute and the Privatization of American Sexual Morality," *Journal of American Studies* 30, no. 3 (1996): 421–22.

¹²⁹ Ploscowe, *Sex and the Law*, 209, 213, 229.

¹³⁰ Manfred S. Guttmacher, "The Kinsey Report and Society," *Scientific Monthly* 70, no. 5 (1950): 293.

¹³¹ Manfred S. Guttmacher to Alfred C. Kinsey, 20 February 1948, correspondence folder labeled "Guttmacher, Manfred," Kinsey Institute; Guttmacher, "The Kinsey Report," 293–94.

¹³² Guttmacher, "The Kinsey Report," 294; Manfred Guttmacher and Henry Weihofen, "Sex Offenses," *Journal of Criminal Law, Criminology, and Police Science* 43, no. 2 (1952):

work with GAP informed his views on the MPC, leading him to strongly advocate against the criminalization of consensual sodomy.

Guttmacher also collaborated with GAP's chairman and fellow MPC advisory committee member William Menninger to oppose the army's exclusion of homosexuals from the military.¹³³ Relying upon Kinsey's study as evidence, Menninger wrote a letter in 1950 to Major General Clovis Byers, the deputy assistant army chief of staff, in which he argued that homosexuality was "a personality distortion and an evidence of psychological immaturity. It is, therefore, primarily a medical problem and in the most enlightened terms is not to be dealt with as 'sin' or as a 'crime.'" He strongly attacked the army's discrimination against homosexuals, arguing that it "sets up a potential witch hunt" for homosexual tendencies, "which every *normal* individual shows."¹³⁴ Menninger's belief that homosexuality was a psychiatric rather than a legal concern was typical of psychiatrists involved in criminal law reform at the time. These medical professionals saw their intervention as providing a more humane approach to homosexuality, which they did not believe should be treated as a criminal matter.¹³⁵

Herbert Wechsler, the MPC advisory committee's chair, was a professor at Columbia Law School and would later serve as the director of the ALI from 1963 to 1984.¹³⁶ He too was well versed in the findings of the sexual psychopath commissions and Kinsey's work. During one of the early committee meetings, on 15 June 1951, Wechsler discussed the validity of the sexual psychopath laws, indicating that the committee should consider the New Jersey report in making its determinations. He also commented that Kinsey's data would "lead me [Wechsler] to think there are things in the New York Penal Law that ought not to be there."¹³⁷ Similarly, in a 1952 article, Wechsler conceded that scientific research had undermined the basis for sexual psychopath laws, citing the New Jersey and Michigan commission reports. He also referenced Ploscowe's treatise *Sex and the Law* and Guttmacher's *Sex Offenses*, demonstrating how the committee members' work reinforced itself.¹³⁸

156. Guttmacher's respect for Kinsey's work was such that Guttmacher offered to have Kinsey interview him and his identical twin on their sexual histories. Manfred S. Guttmacher to Alfred C. Kinsey, 24 April 1948, correspondence folder labeled "Guttmacher, Manfred," Kinsey Institute.

¹³³ William C. Menninger to Manfred S. Guttmacher, 9 August 1950, correspondence folder labeled "Guttmacher, Manfred," Kinsey Institute.

¹³⁴ William C. Menninger to Major General Clovis Byers, 3 July 1950, correspondence folder labeled "Guttmacher, Manfred," Kinsey Institute, 1, 2 (emphasis in original).

¹³⁵ Schmeiser, "The Ungovernable Citizen," 219, 226–27; Denno, "Life before the Modern Sex Offender Statutes," 1354.

¹³⁶ "Herbert Wechsler," Columbia University, http://c250.columbia.edu/c250_celebrates/your_columbians/herbert_wechsler.html (accessed 25 October 2014).

¹³⁷ Advisory Committee Meeting Minutes, 15 June 1951, box 3, folder 17, MPC Records, 45–46, 102–8.

¹³⁸ Herbert Wechsler, "The Challenge of a Model Penal Code," *Harvard Law Review* 65, no. 7 (1952): 1106, 1112.

THE FIRST DRAFT

The MPC advisory committee approved Schwartz's draft of the sexual offenses section of the MPC on 7 January 1955. The explanatory comments to the draft cited both the Kinsey studies and the sexual psychopath state commission reports in explaining why it chose to exclude consensual sodomy from the MPC. The section entitled "Deviate Sexual Gratification" began with the statement: "The sexual impulse finds expression in a variety of ways other than heterosexual copulation. Substantial numbers of males and females find themselves drawn to members of their own sex." The drafters cited Kinsey's study on female sexuality in support of this assertion, identifying from the beginning the central role that Kinsey's work played in the decision to exclude consensual sodomy from the MPC. The section continued with a lengthy criticism of sexual psychopath laws, including the argument that "they permit too ready an inference of public danger from relatively minor episodes of deviate sexuality." The advisory committee acknowledged that its position was "largely based on the facts gathered and presented in the New Jersey Report," which it praised for a thorough investigation of the issue and its reliance on experts from a wide range of disciplines.¹³⁹

The reformist intentions of the MPC advisory committee were made clear in its assertion that "no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities." This complete disavowal of the criminal law's role in regulating consensual homosexual sodomy was a particularly radical statement in light of the fact that every state at that time criminalized these acts. The argument was reinforced with the insistence that these laws, though typically unenforced, could lead to blackmail and that any possibility of prosecution could prevent individuals from seeking psychiatric assistance.¹⁴⁰

The document's appendices provide further evidence that the sexual psychopath commission reports and Kinsey's studies influenced the advisory committee's decision to exclude consensual sodomy from the MPC. The appendices included excerpts on the frequency of sexual deviation from Kinsey's *Sexual Behavior in the Human Male* and from Isabel Drummond's 1953 *The Sex Paradox*. The appendices identified conflicting authorities' opinions on whether homosexuality could be cured, which the advisory committee relied upon in arguing that "the so-called sexual psychopath laws . . . are seriously questionable insofar as they prescribe or permit long or indefinite sentences until 'cure.'" The appendices also included passages by Guttmacher and Ploscowe, which the advisory committee used

¹³⁹ Draft of Article 207—Sexual Offenses, 7 January 1955, box 8, folder 8, MPC Records, 134–36.

¹⁴⁰ *Ibid.*, 137.

to identify the “fallacies underlying present laws” and the shortcomings of sexual psychopath statutes.¹⁴¹ Much of this supporting documentation demonstrates the extent to which the advisory committee drew upon the sexual psychopath statutes, the commission reports, and the Kinsey data, all of which contributed to its decision to exclude consensual sodomy from the MPC.

A COMPLETE REVERSAL

While the second draft of the sex-offenses provision, produced in March 1955, was substantially the same, the April 1955 draft that followed completely reversed course by including a provision criminalizing consensual sodomy, albeit only as a misdemeanor.¹⁴² The comments to the section began with a “special note” in which the Council of the ALI remarked that although the advisory committee had unanimously approved the exclusion of consensual adult sexual activity from the code, the council voted in favor of criminalizing consensual sodomy at its March 1955 meeting. The note further explained that while some of the council members personally agreed with the advisory committee’s position, they feared that excluding consensual sodomy would be “totally unacceptable to American legislatures and would prejudice acceptance of the Code generally.” However, other members of the council believed that consensual sodomy properly belonged in the MPC because “sodomy [was] a cause or symptom of moral decay in a society and should be repressed by law.”¹⁴³

Dissension had resulted in a pragmatic decision preserving criminalization, but the draft reflected a fragmentation among council members. Despite the reversal, the comments to the April 1955 draft were almost identical to the one appended to the earlier version, which had excluded consensual sodomy. The comments contained the same criticisms of sexual psychopath laws, maintaining that “atypical sex practice in private between consenting adult partners” did not harm the community and was only a concern for spiritual authorities, while the fact that the laws existed, even if they were typically unenforced, opened possibilities for blackmail. It is probable that keeping these comments appended to a draft that otherwise supported the criminalization of consensual sodomy was a way for dissenting council members to convey their opposition. This interpretation is supported by the council’s decision to point out that the Danish, Swedish, and Swiss penal codes did not punish private consensual sodomy, while Germany’s contained “broad and severe provisions directed particularly

¹⁴¹ Ibid., 135, 137, 143–45, 150–53.

¹⁴² Council Draft no. 8 of Article 207—Sexual Offenses, 1 March 1955, box 5, folder 6, MPC Records; Model Penal Code Tentative Draft no. 4, 25 April 1955, box 7, folder 3, MPC Records, 93.

¹⁴³ Model Penal Code Tentative Draft no. 4, 25 April 1955, 276.

against male homosexuality.”¹⁴⁴ The implication that the United States, by criminalizing consensual sodomy, was aligning itself with a recently totalitarian and genocidal state could not have been lost on the council members. It is telling that this criticism was one of the few new statements that the council added to the comments.

THE FINAL DEBATE

In the final debate, the ALI reversed course once more, with the entire membership voting to exclude consensual sodomy from the MPC.¹⁴⁵ At the ALI annual meeting on 19 May 1955, two judicial heavyweights took opposing views: Judge John J. Parker of the Fourth Circuit Court of Appeals, who had been nominated to the Supreme Court by President Hoover in 1930 but whose confirmation failed by one vote, argued in favor of criminalizing consensual sodomy, while Judge Learned Hand, the highly influential retired chief judge of the Second Circuit Court of Appeals and a founder of the ALI, argued against including such a provision.

The debate began with Louis Schwartz setting out the opposing views. He stated that the advisory committee had “tried to base the criminal law with regard to sex offenses on danger to society rather than moral indignation” and that it had “not done it just on our authority as lawyers” but also by relying upon “leading psychiatrists and sociologists of the country.” When the debate turned to sodomy, he noted that the advisory committee had “collected a lot of information—psychiatric, sociological, statistics and observations of the Kinsey report, and so on”—that demonstrated that courts rarely prosecuted consensual sodomy. The existence of the laws, however, created opportunities for blackmail and distracted the police from addressing more serious crimes. Schwartz agreed with the council’s decision to add the consensual sodomy provision, explaining that this was important “not so much because of disagreement on the policy” but rather because “public feeling in this country was so strong that a Code which did not punish even slightly this sort of behavior, would be discredited.”¹⁴⁶ Although members of the council believed that consensual sodomy should not be criminalized, they recognized that most Americans did not share their views, and they feared that omitting a provision on consensual sodomy would create opposition to the entire MPC. Rather than jeopardize what would ultimately become a decade-long project, the council opted to include consensual sodomy in the model code.

¹⁴⁴ *Ibid.*, 277–78.

¹⁴⁵ The provisions of the draft MPC were put to a vote before the entire ALI membership as the committee and council finalized them. As a result, the decision on whether consensual sodomy should be criminalized was decided seven years before the MPC was completed.

¹⁴⁶ Advisory Committee Meeting Minutes, 19 May 1955, box 4, folder 19, MPC Records, 83–84, 127–28.

Judge Parker, who served on both the advisory committee and the council, was one of the first to speak, maintaining that members of both groups supported a criminal provision on consensual sodomy. He recognized that consensual sodomy was rarely prosecuted but believed that it was "important that [consensual sodomy] be denounced by the Criminal Code in order that society may know that the state disapproves." He also argued that since every state criminalized consensual sodomy, the public would not understand the ALI's reasoning, which would mean that the ALI's "work would be discredited in the minds of many people whose good opinion we should desire to retain."¹⁴⁷

Judge Hand responded by admitting that he had voted to retain the prohibition against criminal sodomy at the council meeting because he feared that omitting it would prejudice the MPC. However, he confessed that he had "always been in great doubt" about his decision; he believed that consensual sodomy "is a matter of morals, a matter very largely of taste, and it is not a matter that people should be put in prison about." Judge Hand protested that "criminal law which is not enforced practically, Mr. Chairman, is much worse than if it was not on the books at all. It is merely an expression of moral disapprobation."¹⁴⁸ Put another way, a law prohibiting consensual sodomy that six million Americans broke, as Kinsey had established, was much worse than not having a law at all. Judge Hand's argument was extremely persuasive, "for most of the membership were lawyers in the Northeast [who] would have been impressed by the conversion of the man they viewed as the greatest judge in America."¹⁴⁹

After Hand's powerful statement, few felt compelled to add to the discussion. Only two additional ALI members joined in, with one stating that the ALI was going to be criticized no matter which position it took and that he "prefer[red] to be criticized by people who [he thought] represent[ed] an outmoded and unsound viewpoint, rather than be criticized by the more modern and up to date." The other asked Schwartz whether medical experts understood homosexuality to be a disease, since this would impact whether gays could be held accountable for their actions.¹⁵⁰

The ALI then voted, deciding thirty-five to twenty-four to eliminate the consensual sodomy provision from the MPC.¹⁵¹ William Eskridge has argued that this was a slim margin of victory, given that both Schwartz and Wechsler, the leaders of the project, opposed the criminalization of consensual sodomy.¹⁵²

¹⁴⁷ Ibid., 128–29.

¹⁴⁸ Ibid., 129.

¹⁴⁹ Eskridge, *Dishonorable Passions*, 124.

¹⁵⁰ Advisory Committee Meeting Minutes, 19 May 1995, 130–31. The members' names were Wyhoffen and Stewart.

¹⁵¹ "The Law: Sin & Criminality," *Time Magazine*, 30 May 1955.

¹⁵² Eskridge, *Dishonorable Passions*, 124.

The ALI's decision was extremely significant, as its exclusion of consensual sodomy from the MPC was the inspiration for sodomy law reform throughout the United States.¹⁵³ Until 1980 almost all sodomy law repeals were the result of states rewriting their entire penal codes, and the MPC influenced every single one of those revisions.¹⁵⁴ This is of course not to say that the MPC was the only factor that influenced penal code revisions. As Melinda Kane has argued, the party composition of the state legislature, along with individual court decisions, whether neighboring states had decriminalized sodomy, and public opinion, also contributed to states' decisions. However, this does not change the fact that the MPC was an important driving force, as legislatures relied upon the MPC and the opinions of the eminent jurists and scholars who had been involved in drafting it.¹⁵⁵

Most of the state legislatures that revised their criminal laws according to the MPC's recommendations did not focus on the absence of a consensual sodomy provision.¹⁵⁶ Two states, Arkansas and Idaho, reinstated their consensual sodomy laws after legislators realized that their new penal codes did not include such a provision.¹⁵⁷ The gay liberation movement deliberately chose to avoid drawing attention to the sodomy law reform of the MPC, recognizing that the ALI's recommendation was controversial and not readily acceptable for many Americans.¹⁵⁸ The window of opportunity for decriminalizing consensual sodomy through legislative efforts quickly closed, however, as religious conservatives became a more powerful voice in American politics in the late 1970s and early 1980s.¹⁵⁹ Realizing that changes to sodomy laws would not go unnoticed, gay rights advocates shifted their attention to litigation. However, efforts to overturn sodomy laws met with as much resistance in the courtroom as in the legislature, with the Supreme Court upholding the constitutionality of consensual sodomy statutes in 1986.¹⁶⁰ The more effective approach had been through the MPC, which pushed legislatures to eliminate victimless crimes and separate immorality from criminality.

The MPC's decriminalization of consensual sodomy was based on the idea of deregulating private conduct that did not pose a danger to the public. Legislatures revising their penal codes in the 1960s and 1970s adopted the

¹⁵³ Ellen Ann Andersen, *Out of the Closets & into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2005), 63.

¹⁵⁴ John D'Emilio, "Back To Basics: Sodomy Law Repeal," *National Gay and Lesbian Task Force*, 25 February 1997, <http://www.qrd.org/qrd/orgs/NGLTF/1997/sodomy.law.repeal-02.25.97>; Robinson and Dubber, "The American Model Penal Code," 326; Bernstein, "Nothing Ventured," 363; Eskridge, *Gaylaw*, 106.

¹⁵⁵ Kane, "Timing Matters," 234; Robinson and Dubber, "The American Model Penal Code," 322, 326.

¹⁵⁶ Eskridge, *Gaylaw*, 106.

¹⁵⁷ *Ibid.* Six other states decriminalized consensual heterosexual sodomy but kept its homosexual counterpart a crime. *Ibid.*; Eskridge, *Dishonorable Passions*, 176–84.

¹⁵⁸ Bernstein, "Nothing Ventured," 361.

¹⁵⁹ D'Emilio, "Back to Basics."

¹⁶⁰ Bernstein, "Nothing Ventured," 364–65; *Bowers v. Hardwick*, 478 US 186 (1986).

same approach to criminal law as the Model Penal Code. As a result, these early decriminalization efforts did not change the social condemnation of homosexuality or end police harassment of homosexual men and women. However, it did remove one significant state justification for permitting discrimination, which impacted gay and lesbian employment, education, and custody rights.¹⁶¹ It would also later provide support for the Supreme Court's 2003 decision in *Lawrence v. Texas*, which ruled consensual sodomy laws unconstitutional.¹⁶²

CONCLUSION

The ALI's decision to exclude consensual sodomy from the MPC demonstrates the extent to which legal debates had shifted. Instead of focusing on whether the criminal law should penalize consensual sodomy, the central question was whether the public would accept a penal code that did not criminalize this activity. By the mid-1950s, a group of professionals had coalesced and begun speaking out against a legal regime that characterized homosexuality as dangerous, deviant behavior properly regulated by sexual psychopath laws; this group of lawyers, psychiatrists, and sociologists may have still viewed homosexual sex as morally questionable, but they insisted that it was not criminal. As I have demonstrated, the development of these legal views of consensual homosexual sodomy and the emergence of professionals who publicly espoused them did not begin with the MPC but rather can be traced back through the state commission reports on sexual psychopath laws. Relying in large part on Kinsey's studies, the state commissions questioned the appropriateness of criminalizing acts that such a large number of citizens committed. This discourse was replicated in the ALI's work, which can thus be viewed as part of the slow transition within medical and legal circles away from a belief in the necessity of criminalizing consensual homosexual sex.

The sexual psychopath commission reports contributed to the ALI's decision by providing a forum in which reformist ideas concerning consensual sodomy could be expressed. By questioning the assumptions underlying the sodomy laws, highlighting the importance of Kinsey's work, and connecting professionals across the nation, the commission reports helped transform the legal definition of homosexuality from a dangerous psychopathy to a non-punishable, although perhaps morally questionable, sexual practice. Perhaps most importantly, the discussions leading up to the MPC set a firm precedent for distinguishing homosexuality from pedophilia and other forms of sexual violence. It is therefore both ironic and fitting that the deeply homophobic sexual psychopath statutes, through the commission reports they engendered, advanced the path to the decriminalization of consensual sodomy.

¹⁶¹ Bernstein, "Nothing Ventured," 363–64; D'Emilio, "Back to Basics."

¹⁶² 539 US 558, 572 (2003).

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