LAW AND MORALITY:
THE WISCONSIN STATUTES ON CONSENSUAL SEXUAL BEHAVIOR

BY

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The role of the legal system as a significant social institution in a complex society is difficult to deny:

"A society's legal system is embedded in and generates a distinctive and more or less coherent (though continuously changing) set of legal roles, norms, and organizations, together with characteristic patterns of interrelation between the legal order and the other institutional realms of the society." (Schur 1968, p. 4)

The issue of the proper relationship between law and morality has long been of concern to legal philosophers. It is only recently, however, that sociologists have begun to question the relationship of law to society, and within that framework, the issue of socially and legally "moral conduct."

One particular category of moral conduct is sexual behavior. Some types of sexual behavior, and the laws and social norms associated with it, have been dealt with in the sociological literature. Schur's work on abortion and homosexuality (1965), and Davis' studies of prostitution (1961), are perhaps the most noteworthy. However, many aspects of sexual laws and behaviors are as yet essentially unstudied by sociologists. Very little consideration has been given to the consensual heterosexual sexual behaviors of adultery, fornication, sexual perversion, and cohabitation. Dr. Kinsey and his associates alerted us to the prevalence of these behaviors over twenty years ago, yet they are all still violations of criminal law in nearly every American state.

The fundamental role of sexual behavior in a society makes it an important form of behavior to understand. To the extent that law is a significant form of social control, the legal norms regarding consensual sexual behavior are an essential element of its nature.
In this paper, I attempt to answer four basic questions about the legal control of consensual sexual behavior:

1. What are the conditions under which laws regulating such behavior develop?

2. What are the consequences -- for law enforcement, for the offenders, for the criminal law -- of these statutes?

3. Answers to the first two questions provide a basis for reconsideration of law in this area, which must focus on two additional questions:
   a. What is the behavior to be controlled and what is the reason for controlling it?
   b. If the behavior is to be controlled, how should society control it? Through legal or extralegal means? The more desirable mechanism may be determined through an evaluation of its consequences.

In an effort to narrow the focus, as well as to gain possible additional insights by concentrating on a single case, I decided to deal specifically with the relevant criminal statutes of the state of Wisconsin. The statutes can tell us several things. First, the statute itself defines the behavior over which control is sought by the criminal process. The legislative history of the statutes provides insight into how these laws are enacted and then continued in the criminal law. It is possible to identify social values and norms from the behaviors that are designated crimes. Secondly, by looking at the enforcement rates and procedures, we can learn about the problems involved in sanctioning certain behaviors, as well as make inferences about the proper relationship of these behaviors to other types of criminal laws.

A cursory view of the laws of all fifty states shows that Wisconsin's statutes are typical of most: They cover the same behaviors in much the same language. They differ basically in that Wisconsin
proscribes all four of these behaviors, while many states only make
two or three of the four criminal. As they are now codified (unamended
since the 1955 criminal code revision), the statutes in which we are
interested are:

Chapter 944 Crimes Against Sexual Morality

Sexual Crimes Between Adults with Consent

944.15 Fornication

Who ever has sexual intercourse with a person not
his spouse may be fined not more than $200 or imprisoned
not more than 6 months or both.

944.16 Adultery

Either of the following may be fined not more than $1000
or imprisoned not more than 3 years or both:

(1) A married person who has sexual intercourse with
a person not his spouse; or

(2) A person who has sexual intercourse with a person
who is married to another.

944.17 Sexual Perversion

Whoever does either of the following may be fined not
more than $500 or imprisoned not more than 5 years
or both:

(1) Commits an abnormal act of sexual gratification
involving the sex organ of one person and the
mouth or anus of another; or

(2) Commits an act of sexual gratification involving
his sex organ and the sex organ, mouth or anus
of an animal.

NOTE: Our specific concern is with the behaviors of
subsection 1, of heterosexual sodomy, fellatio
and cunnilingus; subsection 2 bestiality has
been excluded.

Obscenity

944.20 Lewd and Lascivious Behavior

Whoever does any of the following may be fined not
more than $500 of imprisoned not more than one year
in county jail or both:
(1) Commits an indecent act of sexual gratification with the knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes a sex organ; or

(3) Openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse.

NOTE: Subsection 3 proscribing "open association or cohabitation" is our focus in this statute. Subsections 1 and 2, while interesting, deal with "indecent exposure" and so in the typical instance are not concerned with behaviors to which all present have given consent.

As the statutory title of the section indicates, these are sexual behaviors between adults who engage in them voluntarily. They can be distinguished from the other sections of Chapter 944 (Crimes Against Sexual Morality) of the statutes by looking at the other section titles, and the behaviors they cover.

A) Sexual Crimes Without Consent
   1. Rape (forcible)
   2. Rape (statutory)

B) Sexual Crimes Which Affect the Family
   1. Bigamy
   2. Incest

C) Sexual Crimes Which Involve Children
   1. Sexual intercourse with a child
   2. Indecent behavior with a child
   3. Enticing a child for immoral purposes

D) Sexual Crimes Between Adults with Consent

E) Obscenity
   1. Lewd and lascivious behavior
   2. Possession of lewd, obscene or indecent matter
   3. Making lewd, obscene or indecent drawings
   4. Exposing minors to harmful materials.

F) Prostitution

"Sexual Crimes Which Affect the Family" could have been included since they may occur between consenting adults as well.
However, it was decided to exclude bigamy since it also involves several rather different issues about contractual relations and the marriage laws which are not common to the other behaviors chosen. Several authors also argue that incest should be treated as a consensual adult behavior (Packer 1968, Fisher 1968). Traditional reasoning about incestuous relationships proscribes them because of the tendency of inbreeding to produce defective children; both Packer and Fisher challenge this contention on the basis of lack of agreement among geneticists. Rather than attempt to resolve the dispute, it was decided not to specifically consider incest. However, much of what will be said about consensual adult behaviors is clearly applicable to incest when it takes place in that adult context. The fact that the data available indicate that incest occurs most frequently as a relation between a father and his minor daughter (Fisher 1968) was an additional reason for excluding it. Under the "Obscenity" section, subsections (2) and (3) which concern the possession and making of obscene matter, also arguably involve a question of the right of adults to voluntarily engage in certain sexually related behaviors. Since neither section is concerned with the act of sexual intercourse specifically, and since they are more profitably studied in the context of "obscene literature" and freedom of speech, they were not included here. Finally, all behaviors here are treated in their heterosexual context, for the basic reason that homosexuality has been the subject of extensive study elsewhere.

The behaviors we have chosen share three significant characteristics -- they are conducted 1) in private, 2) by adults who have 3) consented to participation.
The private quality of these offenses has particular importance in the enforcement of the laws proscribing them. Types of violations which typically occur in private have extremely low visibility and so are much more difficult to detect. Constitutional safeguards of individual rights impose additional restrictions on the police in their efforts to detect violators.

In addition to detection of violators, the enforcement of a law includes the process of imposing sanction on those detected. Offenses with low probabilities of detection may also go essentially unsanctioned (we speak here of formal sanctions), or when detected may have very high probabilities of being sanctioned (Black and Reiss, 1970). Which of these possibilities proves true is instructive in determining what role the particular law involved plays in the whole criminal law. To the extent that little effort is made to detect or sanction violators of a given law, that law may be seen to have a largely symbolic function in the law (Black and Reiss 1970; Gusfield 1963).

Juvenile offenses and juvenile rights are currently somewhat ambiguous. That these sexual behaviors occur between adults gives the offenders a clearly definable status within the law: they enjoy full constitutional protections, as well as being subject to full legal consequences. By limiting our discussion to adult behavior, we avoid any challenge to the appropriateness of law in protecting the young or immature from exploitation, a protection most feel is validly within the scope of the criminal law. (Task Force Report on the Courts).
The consensual quality of these behaviors is of dual importance. Most of the criminal laws are directed toward protecting people from being the 'victim' of someone else's behavior; for example, the laws proscribing theft, battery, and murder, all concentrate on the infliction of physical or economic harm by one person on another, and all assume that the one who suffers the harm did not wish it to happen. But there are other criminal laws for which this is not true, in which the element of involuntary suffering is absent. Some well documented examples of 'victimless crimes' are prostitution, gambling, and drug addiction, all of which involve willing participants. This quality has two important implications. First, it demands enforcement techniques from the police which do not rely on a citizen complainant for the detection of the violation. Secondly, if the law is not protecting the person or his property, it must be protecting something else. What other, broader social values and interests these laws protect is of great importance to understanding the role they play in the criminal laws and the society.

LAW AND MORALITY

In the 1950's and 1960's in the midst of the civil rights confrontations, a popular phrase came back into use: "You can't legislate morality." Like any cliche, this quick phrase ignores the real issues involved in the translation of community moral standards into laws. Rostow (1960) takes issue with this statement:

Men often say that one cannot legislate morality. I should say that we legislate hardly anything else. (p. 197)

Particular examples such as civil rights legislation and the temperance legislation demonstrate select areas in which we have indeed "legislated morality." But more importantly cultural norms of "right" and "wrong" are in evidence throughout all parts of the criminal and much of the civil code.
What the particular relationship is between law and morality depends upon the specific law involved. In some situations, strong moral sentiment about an issue may be the rationale for enacting it into law. The moral beliefs of the Temperance Movement about the effects of alcohol was the impetus for the 18th Amendment. On the other hand, the existence of a legal proscription may create in people's minds a moral quality for the behavior:

"It is the law of the United States which has made it immoral in the minds of the citizenry to imprison a man for his religious beliefs. In 1789, most communities probably did not regard such punishment as immoral because they could observe the imprisonment of a heretic without feeling any outrage and without attempting to intervene in the imprisonment. After several score years, however, Americans had swung around until the strength of their moral position equalled that of the law. By 1870, the idea of such powerful state sanction for disbelievers could evoke moral outrage and action on the part of the citizenry." (Duster 1970, p. 101).

Whether the legislation creates the morality or vice versa is an important issue in this area. As the two examples illustrate, it is also important to ask "whose law?" or "whose morality?" is involved. The extensive violations of Prohibition create doubts as to whether the moral sentiments were those of all the community, or only a small but vocal portion. Theories on the formulation of law differ on these questions as we will see later. But the relationship between law and morality is a good deal more complex than these issues alone.

A primary issue in the controversy over the relationship between law and morality is the appropriate role or domain of law. One of the most frequently quoted statements of the law's proper domain is that of John Stuart Mill:

"The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good either physical
or moral is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right." (Mill 1859, Ch.1)

This statement and its implications for law and lawmakers instigated a famous debate between H.L.A. Hart and Sir Patrick Devlin over law's relationship to "moral" behavior. Devlin rejects Mill's position, asserting the necessity for a social system to use law to control the moral behavior of its members:

"There is only one explanation of what has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behavior or moral principles which society requires to be observed, and the breach of them is an offense not merely against the person who is injured but against society as a whole... There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first state of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity..." (Devlin 1959, pp. 6-7; 13-14)

Hart's response to both Mill and Devlin is to side with Mill, but with a refinement of Mill's position which is most instructive. Hart recognizes a distinction between the enforcement of morality and the prevention of offensiveness to others. The state may properly protect the public from affronts to public decency; however, it should not prohibit conduct merely on the basis that it is immoral. He sustains this distinction by refusing to support regulation on the basis that some are offended simply by learning that conduct they disapprove of is indulged in by others. He draws his line between conduct which is consensual and done in private on the one hand, and conduct which is forced or thrust upon unwilling participants or witnesses on the other. Both of these types of conduct may offend the public, but
"a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value." (Hart 1963, p. 46)

Accordingly, Hart would accept the validity of such laws as public disorder statutes or zoning ordinances which exist to protect unwilling witnesses from offensive behavior. This distinction between morality and offensiveness is an important one for the laws regarding sexual behavior. Insofar as adultery, fornication, and perversion are purely private offenses, Hart would classify them as regulations of morality, an improper use of the law. In the case of cohabitation, however, a distinction must be made. The public behavior of the couple -- taking trips together, visiting regularly, etc. -- gives rise to the inference that in private the couple is sexually intimate. It is this semi-public quality of the behavior which might cause it to be classified as a regulation of offensiveness. This difference in the nature of cohabitation has distinct implications for the theoretical justification as well as the actual enforcement of this statute, as we will discuss later.

In addition to the question of what behaviors should be covered, the law-morality relationship has a second component: the sanctioning of the behavior and the enforcement of that sanction. Clearly much of what we might consider moral behavior is never codified into law, but is controlled through the processes of socialization and informal sanctioning. When legal sanction is given to support a proscription, informal sanctioning need not disappear. In some cases, particularly where the legal sanction is rarely enforced, the informal process may remain the primary one.
Gusfield makes an important contribution to our understanding of the creation of legal sanctions for behavior by distinguishing between symbolic and instrumental concerns of law (Gusfield 1963). An instrumental action is one which is a "means to a fixed end." (Gusfield 1963, p. 170). It is intrinsically and unambiguously the primary subject of the action. For example, a law which requires large industries to install anti-pollution devices is an instrumental law from the viewpoint of those who wish to breathe clean air and drink clean water. A symbolic action is one which stands for or symbolizes a much broader concern; it has acquired a meaning which is more comprehensive than its immediate import. Most issues or actions have both instrumental and symbolic aspects. Thus, the same anti-pollution law is symbolic of the obligations of industry to the environment, and the relationship of man to nature.

In the context of sexual behaviors, we will see that the consensual statutes embody both symbolic and instrumental concerns. The extent to which the symbolism prevails over the instrumentality has real implications for the enforcement of the sanctions imposed. The less instrumental a law becomes, the lower its probability of enforcement. Since enforcement is not full, selective or discriminatory enforcement may become the operation policy. The bases on which those selections are made are a significant element of the symbolic nature of the law, and the law-morality relationship.

The specific issue of enforcing a legal sanction must also be addressed within the legal restrictions which are its context. As Hart points out, invasion of personal privacy is encroachment upon a fundamental liberty. The Constitution is the codification of most of our principles of liberty and morality, thus, constitutional safeguards, both procedural and substantive, explicitly define much of the scope and technique of the enforcement process.
THEORIES OF THE FORMULATION OF LAW

Current sociological theory offers several explanations for the formulation of law. One school, the functionalist or consensus theory, is exemplified by the writings of P.A. Sorokin. This school views the law as the embodiment of common values and interests, the codification of the "collective conscience." It posits "that the premises of the culture mentality will largely dictate what sorts of things will be considered offensive enough to be made criminal." (Cohen 1966, p. 34)

In clear contrast to this common value approach are the interest group theories. Whereas the consensus model emphasizes a homogeneity of social values and interests, the interest group theories concentrate on the heterogeneous nature of social groups and values. These theories share the position that law is written and enforced to support certain interests of certain people or positions. They differ as to what types of interests are being protected.

The Marxist or "economic model" views law as a function of the control of production and distribution in the society. Orthodox Marxist theory views all "cultural values and social institutions as fundamental reflections of the underlying economic arrangements in a society." (Schur 1968, p. 70)

Lader (1966) uses a Marxist or economic model to explain our current abortion laws. He views these laws as the result of a decision by the Catholic Church to prohibit interference with the goal of procreation so as to ensure the perpetuation of a sizeable population of Catholics. The English adopted this view politically during the Industrial Revolution, "which would soon make it (England) the manufacturer to the
world, (and) demanded an increasing flow of workers. And if children were expendable at the mills and mines, and often eliminated before adulthood by the ravages of disease which medicine had not yet learned to control, the labor supply obviously had to be accelerated beyond the recent increase in births." (Lader 1966, p. 83) For this reason the powerful English industrialists exerted pressure on the Parliament to prohibit abortion.

This explanation is also used to explain the high birth rate in rural areas, where an agrarian economy demands that births be kept well ahead of deaths to assure a constant supply of ready labor.

The Elitist interest group model is exemplified by the writings of Howard Becker and Richard Quinney. This model sees enactment into law as a function of political power and authority in the society. Rather than being a statement of the norms of a majority,

"The content of the criminal law, then, including the kind of conduct prohibited and the nature of the sanctions attached, depends upon the norms of those groups in society which influence legislation, court decisions, and administrative rulings. In addition, these influential groups may not be in the majority in numbers, or even represent the interests of the majority in the population. (Quinney 1965, p. 55)

Becker designates those who exert pressure for moral reform as "moral entrepreneurs." These are people with sufficient interest in the enactment of the law to take the initiative to have it passed. Part of their job consists of convincing others that the law will serve some recognized value of society; whether or not it actually will is of little importance, so long as a persuasive campaign can be waged. Becker illustrates his argument with the Marijuana Tax Act of 1937. Actually a revenue measure, the bill was publicized by the Federal Bureau of Narcotics as a necessary step in the eradication of the evil
of drug addiction. Their efforts "included the diligent promotion of an image of marijuana users as vicious, debilitating, and a major threat to the general welfare. This promotion entailed the use of the Bureau's already considerable prestige as an authority in the field of drugs, and the dissemination, under its own name and through persons and organizations to whom it freely provided prepared materials, of its message to the mass media." (Cohen 1966, p. 35)

There are two elements of this process that are important to note. First, the Bureau's ability to amass sufficient funds to organize and carry out the publicity campaign was an essential factor in their successful effort to enact legislation. Second, the unorganized and unpublicized opposition never got its message to Congress, so that the Federal Bureau of Narcotics was able to "define" the law entirely as it wished rather than having to accommodate opposing interests.

The current procedure of hiring a lobbyist to "influence" legislation is another example of this political interest theory in operation. Those with the political authority (legislators) to enact legislation are schooled in the merits of each represented interest group's position and are often effectively persuaded to act in a particular group's interest.

The third interest group theory, the Cultural Conflict model, emphasizes the role of class and status in the enactment of legislation. Gusfield explains the Temperance Movement and the passage of the 18th Amendment in these terms:

"What Prohibition symbolized was the superior power and prestige of the old middle class in American society....It demonstrated the power of the old middle classes by showing that they could mobilize sufficient political strength to bring it about and it gave dominance to the character and style of old middle-class life in contrast to that of the urban lower and middle classes." (Gusfield 1969, p. 122)
Musto (1973) documents narcotics legislation in the United States from this perspective. Each new wave of drug legislation came at a time of specific anti-minority group sentiment:

"Chinese and opium smoking became linked in the depressions of the late 19th century, when Chinese were low-paid competitors for employment, and this connection intensified during the bitter discrimination shown orientals in the first decade of this century. The attack on marijuana occurred in the 1930's when Chicanos became a distinct and visible unemployed minority. Heroin, claimed to be an important factor in the 'crime wave' which followed World War I, was implicated in the 1950's as part of the communist conspiracy against the United States." (p. 245)

To the extent that a minority group became associated with a particular drug, that drug came to symbolize the disharmony between the minority and the rest of society. Prohibition of the drug was the means used to dissolve the cultural differences and avoid disruption of the social order.

Wherever possible throughout the following discussion I indicate which of these theories of the formulation of law offers an explanation for the development of laws concerning consensual sexual relations. A caution is in order, however, that the limited amount and quality of data available on the development of these laws makes any attempts to satisfactorily support a comprehensive theory a most elusive goal.

HISTORICAL PERSPECTIVES: THE HEBREWS, GREEKS, ROMANS, AND CHRISTIANS

All societies have norms which attempt to regulate sexual behavior. Because sexual attractiveness is an exchangeable commodity the process of regulating access to the objects of sexual desire, other people, is most complex. The fact that intercourse is also related to procreation has caused societies to link sexual behavior to the stable institution of the family to better control it. (Davis 1961)
Blake and Davis (1964) define values as the goals or principles in terms of which specific norms are claimed to be desirable. Norms, then, are the standards or rules that state what a person should or should not think, say, or do in given circumstances. When norms are supported by the official sanctioning power of the state, they are called laws.

Accordingly, our investigation of laws which regulate sexual behavior should begin by isolating and identifying the values which these laws preserve. An historical overview can be helpful to us here; however, as noted, adequate sources tracing the development of sexual standards are hard to find. Without comprehensive data, there are many things an historical perspective cannot tell us. What we can develop, however, is a picture of the cultural values whether shared or held by only certain groups, reflected in earlier cultures' sexual rules and the normative patterns used to enforce them. We can then compare that picture to what we know of our own norms and values.

Sexual norms traditionally link sexual behavior with child bearing and the family so we can best analyze them by focusing on marital norms. (Davis 1961) The early Hebrews had a system of arranged marriages, in which mates were chosen by the parents of the prospective bride or groom. Rather than being the simple union of two individuals, marriage united two families. It was an event of great significance to both families, both socially and economically. A 'bride price' was paid to the girl's family, as a symbol of these inter-family bonds, as well as recompense for the loss of her services to the home. Early marriages were encouraged; the legal age for boys was 13, for girls, 12. Large families were also encouraged, as is typical of agrarian societies. (Reiss 1960). Norm sets which assured a birth rate that kept step with
the death rate are found in many primitive societies (Davis 1961). Establishment of social norms which protected the economic functions of the family and procreation suggest a Marxist or economic model interpretation of the importance of the marriage and the family unit in this society.

Although marriage was a socially valued institution, sexual behavior was seen as sinful and corrupt in early Hebrew tradition. Within marriage, sexual behavior was presumably tolerated because of its procreative function. But while reproduction may be highly valued, pleasurable sexual relations are not necessarily desirable as they may tend to deflect the energies of the couple from more socially important activities. Pleasurable, or extra-marital sexual relations epitomized a rejection of God for indulgence of the flesh, indicating the importance of the religious values in shaping this cultural pattern.

In contrast to the rather strict religious and economic approach of the Hebrews, the Greeks and Romans had a much more diversified set of sexual norms.

The Greeks also encouraged marriage, some areas passing laws which penalized bachelors. Greek marriages were arranged by the parents and were, no doubt, much influenced by the economic functions of the family's role in the society. A Greek woman was socialized into either of two basic roles. As a wife, she was expected to be devoted and faithful, care for the house and raise the children. Greek wives were carefully secluded from men other than their husbands, and excluded from even their husbands' public lives. At the opposite extreme, Greek women could become common prostitutes, those who worked in the brothels or walked the streets.
But, in addition to these low-status prostitutes, the Greeks created a third class of women, the "hetaerae." These women came from alien populations, and enjoyed much higher status than the common prostitutes, playing the parts of exclusive call girls or mistresses. The "hetaerae" were skilled in the ways of pleasing men, and provided intellectual as well as sexual companionship.

"The 'hetaerae' were a focus of Greek culture and literary interests. Their portrait statues appeared in public buildings alongside those of the great men. They were the heroines of plays and poems. They were even influential in public affairs." (Davis 1961, p. 352)

It is an interesting example of functional differentiation to contrast the roles of wives and 'hetaerae' in Greek society. The fact that the sexual companions were brought in from other cultures suggests that Greek marriage functioned as an economic unit, separate from sexual desire and expression. The lower status of the "hetaerae" implies a protection of the marriage and family from distracting sexual influences. The importance of the functions of the family in socializing the young and producing sufficient population for civilization and production needs, are possible explanations for its protected status. Thus, roles associated with the family are more highly viewed than others in which sexual behavior is an integral part.

"The primacy of marriage as a sexual relationship is evidenced by the greater economic and legal security and the higher respectability accorded the status of being a wife as against any other role for a woman." (Davis 1961, p. 329)
These various cultural roles demonstrate the relative positions of men and women in the society. To the extent that women exist to provide for men, the role of the male is more highly prized by the culture. Whether this is a result of the physical size and strength typical of men, their relationship to childbirth, the patrilinear nature of the society, or whatever, is not important to resolve here. What is important, and will be developed later on in this discussion, is the pattern of differential evaluation of gender in relation to sexual standards.

The Romans' restrictions on women were somewhat less rigid. A Roman wife was able to participate in her husband's social life and acted on a much more visible level in society than the Greek wife. Nor did the Romans ever develop a class of women equivalent to the "hetaerae"; there existed a single class of prostitutes with very low social prestige. Still, the separation of sexual relations from marriage can be seen here, as well as the differential status of the sex roles.

In addition to the Hebrews, Greeks, and Romans, early Christian sexual norms are informative.

"Developing at a time when profligate sexuality seemed rampant to contemporary observers, it was easy for the early Christians to see uncontrolled sex as the cause rather than a symptom of the prevailing social disorganization." (Udry 1966, p. 129)

The Christian response was to return to the Hebrew tradition of viewing sex as sin and corruption. This view initially went far beyond that of the Hebrews, condemning both sexual relations and marriage as sinful indulgences.

"The basis for this negative feeling was the belief in the Second Coming of Christ. If Christ was soon to return to the earth, all men should spend their time contemplating
God and cleansing their souls, rather than enjoying sexual pleasures or raising families. Ultimately, these early Christians of the first few centuries accorded marriage, family life, women and sex the lowest status of any known culture in the world." (Reiss 1960, pp. 49-50)

Marriage was a second-rate choice for those who lacked the self-control necessary for celibacy in the early Christian doctrine (Corinthians I, 7). Perhaps the strong stigma, i.e., that they were undisciplined, weak individuals, attached to it lent such prestige to those who abstained from marriage, that the status differences were effective in imposing restrictions on intercourse for those who did engage in it. In any case, the sexual norms of this cultural group are clearly an outgrowth of their predominantly religious value structure. It was not until the Council of Trent in 1545-64 that marriage officially became a sacrament of the Church. Such a strong negative stigma was attached to sexual intercourse, indulgence of the flesh over the spirit, that many of the married couples abstained as well, having sexual relations only when they wished to produce a child. For many years, abstinence the night before a religious service was a prerequisite to attending. (Reiss 1960)

It is important to recognize just what the Christians did, however. Though officially degrading marriage and sexual relations, they realized the difficulty of prohibiting them entirely. Thus, rather than ignore the existence of these behaviors, the Christians brought them within the scope of the Church to be better able to control them. In time, strict rules regarding sexual behavior became part of official Christian doctrine, if not necessarily part of daily Christian life.

When these rigidly proscriptive Christian doctrines were brought to England, they appear to have set off a sort of counter-movement, the beginnings of what Reiss calls "courtly love" or "romantic love." (Reiss 1960)
In contrast to the Christian picture of the woman as the evil temptress, the adherents of romantic love idealized women as angels. The typical circumstance was that of the young knight who worshipped the aristocratic lady of the castle; he would compose songs for her, engage in battle for her honors, etc. At first, the distinguishing feature of romantic love was its rejection of physical expression. Love was felt to be required to stay free of both sex and marriage in order to last: free of sexual relations because all the norms confined that to marriage; free of marriage because it imposed duties and obligations on the couple with contradicted the idealistic notion of love freely given.

By the 16th century, however, the system of abstinence began to break down, and sexual intercourse became first the informal and then the formal reward for the young knight. Since these relationships were clearly adulterous, however, they created a conflict for many of the people who accepted the mixing of love and sex, but still clung to the Christian notions of fidelity in marriage. The 17th century saw the solution to the problem -- the object of romantic love became the single rather than the married woman. But because marriages were still arranged by families, this created new difficulties. At first, because no custom of courtship had yet developed, this shift in romantic love occurred only between engaged couples. It was not too long until this system of arranged marriages began to crumble, and by the late 19th century choosing a mate for emotional rather than economic compatibility occurred with increasing frequency. This result illustrates the accommodative process of the cultural conflict model. The traditional economic and isolated role of the family, maintained by arranged marriages, gave way to the values placed on loving one's husband or wife.
"One form of value pluralism arises when dominant values of a culturally distinct group are extended to become a basis for normative regulation of ethnic or religious populations having divergent values. The resultant social integrations follow from conquest, territorial, expansion, or migration, and are largely accommodative in nature. By definition or fiat, certain cultural practices of the minority cultural groups become crimes, subject to sanctions and penalties imposed by the dominant group or elite." (Lemert 1967, p. 7)

One obvious difficulty with these historical data is the tendency to generalization, and the implicit assumption of intra-cultural homogeneity. We have no real reason to believe that early Christian society, for example, was any less diverse than societies are today. The present day Catholic Church is a good example of three types of heterogeneity which should be distinguished. First, the different schools of thought within the leadership of the Church reflect a heterogeneity of "official doctrine" insofar as there is not an actual consensus on issues like abortion even though an official Church position has been issued by the Pope. Secondly, there is intra-faith diversity between leadership and membership in the Church. Statistics on the number of Catholic women who undergo abortion, and the number of Catholic couples who use some form of artificial birth control, demonstrate the diversity of positions between official doctrine and actual daily operation. Thirdly, the official doctrine and the membership position on all issue change over time. Lader (1966) documents this aspect of heterogeneity in regards to the abortion issue. At various times throughout history, abortion has been considered legitimate in the Catholic Church.

One "way of seeing order in normative systems is to look for the recurrence of rules from one society to another." (Davis 1961, p. 329) The family unit plays a central role in each of these examples. Although most of these cultures preferred monogamous marriage, the particular form is not so important as the existence of and value put on the unit itself. A high value placed on the family confers a high value on
family-related roles. Consequently, the wife enjoys more prestige than the prostitute or "hetaerae," the married man more than the bachelor. We can speculate that the primacy of the family derives from its role in socialization, but that may be to confuse the proper cause and effect relationship. Certainly the Hebrew tradition of arranged marriages implies that some of the value of the marriage comes from its economic significance in uniting the resources of two family units, as well as producing children as additional sources of economic support.

Thus, while the family is highly valued by each of these societies, each has its own set of norms which protect and regulate it. Davis argues that the real significance of sexual norms is not what they are, but that they exist. (Davis 1961) The sexual urge can be conditioned but not quelled. Since sexual activity requires intimate cooperation between people, its interactive aspect makes sexual attractiveness a quality that can be traded or exchanged.

"In satisfying any individual desire, people compete with others for the means of satisfaction, and social efficiency requires an orderly system for producing and distributing the means; but in the case of sexual desire the objects of satisfaction are themselves persons. Consequently, the task of assigning rights in the means of gratification becomes extremely complicated." (Davis 1961, p. 324)

Davis finds the mores or norms about pre- and extra-marital relations to be the result of attempts to lend some order to the distribution of sexual satisfaction. For example, the Greeks valued marriage, but they also valued sexual and intellectual companionship. Because their precise form of the family did not allow the two to be mixed, they developed a fairly elaborate set of norms which enabled them to preserve both without destroying either. It is possible that development of the class of "hetaerae" was a product of men's sexual
desires which could not be fulfilled in the marriage, and the ability of wealthy Greek men to "import" and keep women as mistresses. In that case, it is inaccurate to characterize all Greeks as supporting the social distinctions among women's roles; these distinctions become a function of the cultural values of the upper and middle class, much like Gusfield's example of temperence in the cultural conflict model of law. The Christians, on the other hand, devalued the non-functional aspects of sexual relations, and developed religiously based norms which strictly proscribed such behavior under any circumstances.

Lader's discussion of the origin of abortion laws leads one to consider whether the great value placed on procreation would not cause some cultures to encourage all procreative sexual relations, rather than confining them to the family. The fact that this was not the case with the Christians indicate that the economic value of procreation was tempered by other cultural values, for example, religious definitions of the proper role of sexual behavior in relation to God and the rest of society.

What we can learn from these examples is that the family unit is highly valued by each society, whatever its particular form. But each system developed its own normative pattern of regulation of the sexual component of the family, depending on other cultural and religious values, so as to control access to it. The extent to which these norms recur from one society to another indicates their primacy in relation to the family.

THE ENGLISH: COMMON LAW AND CANON LAW

At the time the British began to colonize the Americas, the norms of romantic love were clashing with those of the Christian culture. Since all the aspects of marriage and sexual relations were
still considered the domain of the Christian Church and religious leaders, very little was codified in the early English common law. Neither of the consensual acts of adultery nor fornication were criminal offenses. The common law imposed sanctions only when sexual behavior was public enough to create a public scandal, or involved the "corruption of minors," or was a result of force or coercion. The statute prohibiting sodomy covered only pederasty (sexual offenses involving children) and bestiality (sexual offenses involving animals) in its definition. (Floscove 1951)

However, sexual morality was considered an important part of the canon law. The Ecclesiastical Courts of the Church of England had jurisdiction over the morality of the clergy as well as the sexual behavior of laymen. The canon law's attempt to regulate the moral behavior of the citizenry was fraught with difficulties. An immediate problem with the Ecclesiastical Courts' approach was its failure to precisely define which behaviors were punishable. Taking its domain to be that of all sexual activity, much energy was expended and confusion created by trying to detect and punish all behaviors regarded as either sinful or immoral, with no really consistent definition of what that covered. Presumably, it included consensual and non-consensual behavior, but we do not know for certain. If the purpose of a law is to control behavior, failure to designate the behavior precisely frustrates the control function, and makes enforcement very difficult. Disagreements between law enforcers and citizens as to the behaviors that are proscribed may also serve to diminish respect for laws which proscribe behaviors that are not thought immoral by the people, as eventually happened in the case of the Ecclesiastical Courts' laws on sexual behavior.
In addition to the problems of too vague a scope, these
courts used a much less reliable method of proof than that employed
by the common law courts. Rather than proceeding against offenders
by means of indictment and jury trial as the common law courts did,
the Ecclesiastical Courts simply issued "articles of charge" to accused
parties and required them to affirm or deny under oath. Sanctions
were imposed if the accused admitted the charge, or if he was unable
to produce enough compurgators (citizen witnesses) to swear that he
was innocent. Informal arrangements were quickly devised by which, for
a certain sum of money, the accused could find sufficient supporters
of his innocence. The entire process requires the disavowal of guilt
by the individual rather than the proof of guilt by the tribunal; it
assured the accused no protections, in addition to encouraging acts
of perjury. The mockery this makes of the process of controlling
behavior can easily undermine the authority of legal proscription.

The typical sanction for sexual offenses was that of public
penance, which took the form of verbal confession in the public square,
the guilty party often adorned in a white sheet or other distinctive
dress. The Ecclesiastical Courts were also known to order the marriage
of the guilty parties, or excommunicate them, or require a pilgrimage
or other good work, but the usual approach was that of stigmatization
by public humiliation. Had this been used with some consistency it
may have had some effect, at least as an informal control mechanism,
but any deterrent value was essentially subverted by the practice of
accepting payment of a penalty as a substitute for doing penance. Not
surprisingly then, as May points out, "It was the Church's duty to
punish immorality, and yet by this pecuniary form of punishment the
church officials were in fact profiteering. It was to their interest, then,
not to discourage sexual breaches but to encourage them." (Foscoze 1951, p. 140)
May's statement suggests, although there were no statistics cited, that the canon laws were failing in their role of social control measures. The expanded jurisdiction of the common law courts about this time also supports this conclusion. Although there were sufficient violators to demonstrate the ineffectiveness of the canon law proscriptions, there must also have been sufficient numbers of believers to cause the recodification of these sexual norms. Rape, sodomy, and bestiality had all been made common law felonies by the time of Henry VIII.

The Puritan Revolution in England had an important effect on the legal control of sexual behavior. In 1640, at the time of the installation of Cromwell by the Puritans, adultery, incest, and repeated acts of fornication were made common law crimes. The Puritans as a religious group sought a purification of the Church, and a return to the simpler, more rigid ways of the early Christians. They deemed purification necessary for themselves and for others as well. This evangelistic aspect of their position made the law a perfect vehicle for reform. As a political party, the Puritans had sufficient, although temporary, power to influence the content of the law. The formulation of these first prohibitions of consensual behavior, then, appears to fit both the elitist model and the cultural conflict model of the development of law. Taking religious doctrine on morality to be the appropriate justification for punishing behavior, the Puritans simply imposed the more effective criminal sanctions of the common law on them and so imposed their own cultural values on English law and society.

The "Puritan Revolution" was soon over (in 1659), and the sexual offenses of adultery, fornication, and incest were removed from the common law; but rape, sodomy and bestiality remained. Jurisdiction
over consensual sexual behavior was restored to the Ecclesiastical Courts under Charles II at the Restoration in 1660. According to Blackstone, the decision to return these behaviors to the control of the Church was a "revolt against the hypocrisy of the times" during which violations of the common law proclamations were frequent. (Foscoke 1951)

At this same time, 1640-1660, many Puritans left England and came to the American shores. They brought with them their distrust of the Ecclesiastical Courts' ability to control sexual morality through religious law, and to enforce Christian attitudes toward sex. Sinful and corrupt sexual behavior required normative patterns of control with official sanctioning power. So, as the Puritans in England had done, the colonists wrote their religious doctrines into their criminal code.

It is impossible to know if a consensus of interest group model would best describe this legislative process. Again the data are framed in terms of a consensus model of values; however, we know that among the early settlers were many prisoners and lower-class English who "escaped" to the colonies. Dominance of these religious norms may have resulted from the status of the Puritan settlers in the colonies, or from their superior economic position and power in the new country. In that case, each of the interest group theories would account for some portion of the process.

Relying on the Old Testament, the Massachusetts Puritans made both adultery and fornication punishable offenses. Adultery was punishable by death; fornication by fine, marriage, or corporal punishment (Leviticus 20:10; Deuteronomy 22:23; Exodus 22:16-71). Even
with this religious justification, however, colonists appeared reluctant to impose the death sentence on these activities and it fell into disuse. In 1694 Massachusetts replaced that penalty for adultery with "whipping up to 40 stripes, exposure on the gallows for one hour, and the perpetual wearing of the letter 'A' sewn on the upper garments in open view." (Ploscove 1951, p. 144). Hawthorne's book, The Scarlet Letter is evidence of how severely an offender was stigmatized as a result of these formal sanctions. The other colonies' penalties were not all so severe as Massachusetts'. Virginia, for example, required the forfeiture of 1000 lbs. of tobacco for adultery, and 500 lbs. for fornication. However, all colonies defined the behaviors as violations of moral and so criminal law.

THE WISCONSIN STATUTES

When the Americans won their independence from Britain, one of the first things they did was to write a Constitution and establish a system of laws by which to govern their new country. Legislation enacted today must always be written and evaluated in regards to the Constitution to be sure that fundamental liberties are protected and rules of construction followed. However, because these sexual norms were a part of the law long before the U.S. Constitution was written, their satisfaction of substantive and procedural requirements was never questioned at the time of codification. It is only recently that laws regulating sexual behavior are being challenged in the courts as unconstitutional.

While the Americans rejected the English political system, they patterned the legal system of the United States partially after the English. The English common law was adopted by each state to form
the basis for its individual system of civil and criminal law. As new states came into the union, each adopted whatever parts of the common law it desired (all except Louisiana adopted the common law in civil areas; Louisiana follows the French civil code) to be incorporated into its state civil and criminal laws. The Wisconsin Constitution, Art. 14, Sex. 13, proclaims Wisconsin's continuation of the common law:

"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

It is important to note, however, that the court interpretation of the Wisconsin statutes indicate that, despite the Constitution's specific reference, the distinction between the common law and the canon law heritages was blurred and often lost altogether. Consequently, justification for legal sanctions which existed in the canon law are often stated as though they were also crimes at common law.

The Wisconsin Statutes were first codified in 1849, one year after Wisconsin was granted statehood. The process of compiling the 1849 statute book was one of gathering and organizing the existing laws of the territory of Wisconsin. This codification represented the accumulation of the state's laws, then, not a conscious effort to sit down and write the laws by which to govern the new state. The 1849 versions of the laws which proscribe consensual sexual behavior between adults were rather complex and poorly worded statutes, but each of the four offenses we are interested in did appear in this first volume of the criminal code. How far back into the territorial history they go is impossible to determine.

It becomes evident from reading the early versions of these statutes, and in many cases the current drafts as well, that the
precision of language that required to define a crime in all other areas of the code did not carry over to those of sexual nature. The implications of this vagueness are extremely important from a purely legal perspective. A very important protection in the law is the doctrine that a person cannot be punished for an act he could not reasonably know is a crime. Substantive due process requires that the law be written as narrowly and as precisely as possible, so as to give this advance warning of exactly what is proscribed. Vagueness and overbreadth are two substantive infirmities which can cause a law to be declared unconstitutional. The imprecision of language is also important from a sociological viewpoint. Confusion as to what the law covers creates obvious problems for the policemen who try to enforce that law. To the extent that statutory language suffers from overbreadth (that is, the reasonable interpretation of the language would lead to the proscription of clearly legal behavior in addition to that which is intended to be illegal) it creates the opportunity for misuse of the laws by enforcing them against those who are not actually in violation. The vagrancy laws of many states are being rejected by the courts for just this reason; their language is so broad that the police are able to use them as dragnet laws to pick up any "suspicious person," including those who do not fit the intended definition of vagrant. (Kadish 1967)

In an effort to overcome the definitional problems of vagueness and overbreadth, we will, in this next section, attempt to define exactly what is made criminal by each of these statutes.
1) ADULTERY AND FORNICATION

Wisconsin Statute 944.16 proscribes the crime of adultery. At Roman law, in keeping with their differential evaluation of the sex roles and the strict isolation of the family, adultery could only be committed with a married woman. The Puritan common law definition was the same:

"A married man might have sexual intercourse with a single woman and not be guilty of adultery or any other crime. A married woman was guilty whenever she had sexual intercourse with a man who was not her husband, whether that man was married to someone else or was single. In such a case, both the married woman and the paramour were guilty of adultery."

(Ploscowe p. 146)

The Ecclesiastical Courts used a different definition, not distinguishing on the basis of the gender of the married partner. The religious proscription of adultery held it immoral if any married person had intercourse with someone other than his or her spouse, that other person being either married to someone else or single. This definition was also taken by several states, as a heritage of the canon law.

The Wisconsin definition of adultery is that of the Ecclesiastical Courts. Any person, married or single, who has intercourse with another person's spouse is guilty of adultery; both the married person and the "offender" (whether married or single) are guilty of the offense. Drawing on a New Jersey case, State vs. Lash (1838) 16 NJ Law 380, the Wisconsin court in 1919 stated its reason for punishing this behavior. The statute which the Wisconsin court was interpreting was defined as at canon law, but the Court voiced the common law policy for punishing the offense:

"Adultery was a common law crime, consisting of intercourse by any man, married or single, with a married woman not his wife, and was condemned because it tended to introduce spurious
heirs into a family and to adulterate the issue of an innocent husband and turn the inheritance away from his own blood to that of a stranger." State vs. Roberts, 169 Wis, 570, 572 (See also Hood vs. State, 56 Ind. 263, 1877)

We see in this interpretation the normative pattern of isolating the family from the rest of the culture in order to preserve its functioning as an economic unit. The corruption of the blood line and diversion of the transfer of property were the essential evils of this act, and probably account for the much harsher penalties imposed for adultery than for fornication. Logically, a married woman who could not bear children could not conceive a "spurious" heir and so did not fit within the law's intent; but no evidence was found that this distinction was ever recognized. This also illustrates the normative pattern of the differential status of sexual roles that was evident particularly in the Greek and Roman sexual norms, and clearly exists, though perhaps to a lesser extent, today.

The early versions of Wisconsin's fornication statute, 944.15\(^2\) make clear that, although adultery could involve either a married man or a married woman or both, the essential element of the crime of fornication was that the female was single and presumably chaste. These offenses were actually distinguished by the marital status of the woman, and originally imposed a different penalty depending on whether the woman was a virgin or not. Fornication was defined by statute to be intercourse with a single woman, by any man either married or single.

"By the canon law it was the unlawful sexual intercourse of a single person with another of the opposite sex, whether married or not; while by the common law it was such intercourse between a man, whether married or single, and unmarried woman.... It was the status of the female that determined whether it was fornication or adultery." State vs. Roberts supra., p. 572

The combined effect of these early Wisconsin adultery and fornication statutes was that a married man who had intercourse with a
single woman was guilty of both offenses. This result was affirmed by the court in State vs. Roberts when it rejected the defendant's contention that if a married man was convicted of intercourse with a single woman, his crime was adultery not fornication. The court refused to overturn the lower court conviction for fornication, taking the status of the woman to be controlling in this case, as it was at common law. Roberts' argument was not without precedent since in 1880, the Wisconsin court had held that "A married man, by having sexual intercourse with an unmarried woman, committed the crime of adultery." State vs. Fellows, 50 Wis. 65. The following year, in State vs. Shear, 51 Wis. 460, it was held that "adultery could be committed only by a married man or with a married woman." These early cases imply that when either party is married, the crime is solely that of adultery. To make a married man guilty of adultery with a single woman is clearly a departure from the "spurious heir" argument. It indicates the influence of religious values of marriage in this definition of the offense.

What the Roberts case does is to make clear the fact that fornication can be a lesser included offense of adultery if the woman is single, and so if the man is married he may be convicted of either offense. In reading State vs. Roberts, it also becomes clear that the court was somewhat forced to take this position as to Roberts' argument because the statute of limitations had already run for the crime of adultery; thus, if he could not be found to have committed fornication, his conviction would have to be overturned.

The legal result of the Roberts decision was an overlap of offenses which served to confuse rather than clarify the law. The confusion remained for many years, until in 1955 there was an attempt
to reword the statutes. Professor Frank Remington of the Law School was a member of the Legislative Council, which was commissioned to do the code revision as a set of recommendations to the State Legislature. But rather than being a policy-making group, the Council saw its function as one of codification and clarification of the existing laws. Since there had been no real revision, but a great deal of case law, since the 1849 code was enacted, this in itself was quite a task. The Council did attempt to remove some laws but it was fought at each step by a committee appointed by the State Bar Association. Although this latter committee did not have the power of veto, Remington felt that any Council recommendations which were opposed by the Bar committee had no chance of being accepted by the Legislature. Consequently, even minor changes recommended for the consensual sexual behavior statutes were rejected.

The Council’s first approach was to write a statute which punished both adultery and fornication under one heading, thus consolidating and clarifying the offenses. A draft of this wording is as follows.

"Adultery and Non-Marital Intercourse. Whoever intentionally has sexual intercourse with another, not his spouse, may be fined not more than $200 or imprisoned not more than 6 months or both. If one of the parties is married, both may be fined not more than $500 or imprisoned not more than 1 year or both."

The Legislative Council Comment to this revision is informative.

"This section covers pre-marital and extra-marital sexual intercourse. Any person who has sexual intercourse with a person to whom he knows he is not married is guilty under this section. If one of the parties is married, the penalty for both is higher. In that case the act is considered more undesirable because it affects an innocent party."

The Comment goes on to say that no longer would a married man be guilty of both fornication and adultery for intercourse with a single woman,
since the fact of either being married requires the charge be that of adultery. As the comment indicates, the immediate intent of the revision was to clarify the definition and scope of each offense. The woman's marital status would not be the determinant, an apparent rejection of the Roman law and common law codifications of role evaluations and economic roles of the family. The result of this draft would be a more expedient approach to protection of the family -- one offense if only a "potential" family was involved, another if an existing family was protected. The grading of the offenses to give adultery a greater punishment further supports the conscious protection of the marriage.

Whatever their reasons for rejecting other drafts, the Bar committee's actions in the revision process give us insight into the process of legislating. It is Remington's interpretation that the political power of the Bar committee with the legislature was so great that to press for revision without their approval was useless. Although this was not actually the state of initial enactment of a norm into law, the elitist theory of law is relevant to this role of political authority in the definition and continuation of law. One might also argue the relevance of a cultural conflict model if there was evidence of differential status between the Legislative Council and the Bar committee.

There is no record of why this particular revision was not accepted; it certainly appears on its face to solve the Roberts problem, as well as clarify and simplify what were to date very complexly worded statutes. We know only that the 1955 Criminal Code, as revised, maintains the two separate statutes, one each for adultery and fornication. The wording that was enacted is not a clear solution
to the Roberts problem, requiring at least one of the partners to be married to another to commit the offense of adultery, but leaving out any mention of marital status in the fornication statute. Nor are there any cases since this revision which have determined its effect on the Roberts decision. Consequently, it still seems a married man who has intercourse with an unmarried woman is able to be guilty of both offenses, although he is most likely to be charged with adultery.

At the time this combination draft was offered, a separate draft was also written which required that for the crime to constitute adultery, the partner must either know or believe that the individual was actually married. The element of knowledge of all aspects of the offense is typical of statutes as previously mentioned. Professor Remington explained that this draft was rejected because the Bar committee found the addition unnecessary. They wished to retain the law as it was at common law (even though the draft they finally enacted was really the canon law definition), and no element of intent was necessary.

What we are left with in Wisconsin insofar as adultery and fornication are concerned seems to be this:

- single man and single woman -- fornication
- single man and married woman -- adultery with fornication as lesser included offense
- married man and single woman -- adultery with fornication as lesser included offense
- married man and married woman (not his wife) -- adultery with fornication as lesser included offense

Maintenance of the lesser included offenses may have been a tactical decision or it may have resulted from lack of knowledge of the confusing state of the law. Whichever, the existence of a less included
offense is of great functional importance in issues of sanctioning. If the type or quality of evidence is not available to support a conviction for the greater offense, the power to sanction is not lost. A jury is often willing to convict for the lesser included offense while rejecting the greater.

Lesser included offenses are also important to the prosecution technique of plea-bargaining. Convincing a defendant to plead guilty to a lesser included offense by reducing the charges may streamline and speed-up his processing by the system. This is extremely functional for the legal system, although not always so for the defendant.

2) SEXUAL PERVERSION

Homosexuality is a sexual orientation that has come under some scrutiny from sociologists (Schur 1965, Davis 1961). A variety of theories about its 'cause' have been advanced, as well as many 'solutions' suggested. We know that many famous individuals throughout history have been homosexual. In Greek and Roman cultures it was not unusual for a husband to have his young male lover for anal and oral intercourse in addition to his wife and/or his prostitute. Yet, by the Christians at least, and by the Hebrews as well, the behavior has been variously viewed as abnormal, sinful, or sick. The Christian position may have been a part of their reaction to the sexual excesses of the Romans and Greeks. As other indulgences of the flesh, homosexual expression was seen as a weakness which took time away from worthy Christian pursuits.

Wisconsin's "homosexuality statute" is 944.17(1), entitled "Sexual Perversion." The language of the statute is again very broad; it contains no specification of the homosexual or heterosexual nature of the contact, nor the married or unmarried status of the parties
involved. As discussed previously this lack of precise definition is quite problematic for enforcement. This is particularly with this statute because of the historical as well as current confusion over what it covers.

A revision of the traditional "sodomy statute," Wisconsin Statute 944.17(1) assumes a consensus as to its coverage which is not altogether accurate. The original language of the Wisconsin statute proscribed "sodomy, or the crime against nature, either with mankind or any beast" (Wisconsin Revised Statutes 1849, c. 139, 15), and shared a vagueness of definition atypical of criminal statutes with nearly every other state's attempt to deal with the behaviors.

Laws of this type can be traced at least to the time of Henry VIII (25 Henry III, C.6), and show a consistent lack of precise definition. Henry's statutes prohibited

"buggery with mankind or beast under penalty of death. But buggery includes only genital-anal contact between man and man or man and woman, and what is now termed bestiality --genital contact with animals. It did not include fellatio (oral-genital contact) or cunnilingus (oral-vaginal) contact."

(Ploscowe 1951, p. 198)

At least arguably, this original use of "buggery" was an attempt to prevent non-procreative sexual intercourse between men or between a man and a woman. Enacted, as it was, with the crimes of rape and bestiality, it is possible that this common law proscription referred to sodomy committed by force rather than with consent. The consensual behaviors of adultery and fornication were not part of the common law except during the period of the Puritan Revolution. The introduction of the term sodomy would seem to add fellatio and cunnilingus to the list of perverse behaviors if one accepts Webster's definition of the word.
Sodomy: Carnal copulation with a member of the same sex or an animal, noncoital copulation with a member of the opposite sex. Webster's 7th New Collegiate Dictionary

However, the medical definition of sodomy has a much narrower scope, and would suggest that the term sodomy was assumed to be synonymous with buggery, and did not proscribe any additional behaviors. That too would be consistent with a value placed on reproductive or procreative sexual activity, which then condemns any non-coital or non-procreative sexual behavior.

Legislatures' consistent refusal to designate the precise scope of the "crime against nature" makes it nearly impossible to determine with certainty just what behaviors were or were not included and, hence, enforced at a particular time. In 1910, in State vs. Whitmarsh, 26 S. Dak. 426, the South Dakota court gave voice to its revulsion at dealing with "abnormal" forms of sexual behavior:

"We regret that the importance of this question (whether oral-genital contact, fellatio, is a crime against nature) renders it necessary to soil the pages of our reports with a discussion of a subject so loathsome and disgusting as the one confronting us." (p. 429)

The task of defining the offense has been left to the courts and the decisions are not entirely consistent. Some states include fellatio (the Whitmarsh court did) but not cunnilingus, others not even fellatio.

The revision of the Wisconsin sodomy statute is helpful, but the statute still suffers from vagueness. It states that "said crime (of sodomy, or the crime against nature, with mankind or beast) may be committed by the penetration of the mouth of any human being by the organ of any male person as well as by the penetration of the rectum; proof of emission shall not be required." Wisc. St. 1898, c. 186 § 4591. This would clearly cover only fellatio, but is not limited to homosexual contacts, prohibiting heterosexual fellatio as well.
The Legislative Council Comment, to the revision of this statute in 1955, defines the scope of the current 944.17 (1) as follows:

This section covers a number of abnormal sexual activities which are considered sufficiently undesirable to be penalized. Sec. (1) covers acts which are described by the medical terms of cunnilingus, fellatio, and sodomy."

An early draft of this statute included a subsection (2) which expressly excluded married couples from prosecution for any of the behaviors covered. This sentence was not made part of the final form of the statute and leaves one with the clear impression that married couples’ behavior is subject to these proscriptions as well. A limitation of the scope to either homosexual or non-marital relations, or both, would be consistent with normative limitations of access to sexual relations to marriage. Because these are sexual behaviors, restriction to the marital state would be consistent with encouraging marriage. Perhaps because they are non-procreative, they are proscribed in marriage as well, as contrary to the function of the family in replenishing the population.

A recent Wisconsin case rejects the possible application of this statute to married couples. In Jones vs. State, 55 Wis. 2d 742 (1972), the defendant argued that 944.17 (1) was unconstitutionally overbroad because it could by its language be applied to behavior between married couples. The court voiced its rejection of that scope of the statute in two parts.

1) The facts in Jones were those of a forced act of homosexual anal intercourse on one prison inmate by another. On those facts, which the court found to be clearly within the plain language of 944.17(1), the judge refused to allow Jones to argue a hypothetical fact situation to avoid punishment. That force was involved also made the situation less conducive to consideration of other possible applications for the statute.
2) But in rejecting Jones' argument, the court provided us with some useful dicta:

It is beyond reasonable argument to claim that sec. 944.17(1) Wisconsin Statutes, was enacted to control or prohibit the consensual and private sexual intimacies of married persons. No citation of authority has been given which shows a conviction or even a prosecution of married persons under this or a similar statute in this state or elsewhere. We cannot believe that this statute can or will be used to threaten or prosecute married couples in violation of their rights of privacy." (Jones, supra., p. 746)

The court's statement about lack of authority for such an interpretation is not entirely accurate. The brief for the defendant did cite the Griswold decision (discussion infra) which overturned a statute prohibiting distribution of birth control measures to unmarrieds. Jones' attorney would clearly have strengthened his argument, however, if he had cited the Indiana case of Cotner vs. Henry, 394 U 2d 873 (1968). In that case a husband was sentenced to prison for the act of consensual sodomy with his wife, under the Indiana statute "Crime against nature." 4

The sodomy statutes are notable for another peculiar aspect. Responding to charges of vagueness in the definition of "crime against nature," the court in Honselman vs. People, 168 Ill. 172 (1897) rejected the argument that the indictment or the complaint must specify the particulars of the offense charged.

"The Legislature has not seen fit to define it (crime against nature) further than by the general term, and the records of the court need not be defiled with the details of different acts which may go to constitute it. A statement of the offense in the language of the statute is all that is required." (p. 174)

The rule of law is that the criminal complaint or indictment must specify the elements of the defendant's behavior that are charged to be criminal. This is the application of the Constitutional guarantee of a defendant's Sixth Amendment right "to be informed of the nature and
cause of the accusation" against him. Notification of the specific charges is essential to the preparation of the accused's defense and protection of his rights.

Requiring that the indictment charge only a "crime against nature" clearly violates the Sixth Amendment guarantee. Since it is not at all clear what "crime against nature" or "sodomy" include, the defendant is left to guess at the particulars of his offense. The unwillingness of courts and of legislators to discuss this indelicate behavior can deprive the defendant of a fundamental constitutional protection.

No Wisconsin case found parrots this tolerance of indefiniteness in such situations. However, March 3, 1973, articles appearing in both the Capital Times and The Wisconsin State Journal are testimony to at least one judge's analogous frustration with the legislature's vague choice of language. Judge James E. Doyle, US District Judge for the Western District of Wisconsin, is quoted as saying:

"The validity of the imprisonment of a potential defendant should not be consigned to a legal limbo because the legislature is unable to bring itself to employ specific language. There is no reason by a criminal statute should not describe in clear language the kinds of sexual activity which is to be prohibited. The parts of the anatomy, male and female, have names. The forms of sexual activity in which these anatomical parts are employed also have names."

Although Judge Doyle dismissed the case, his comments imply that he would find the statute, 944.17(1), unconstitutionally vague on an appropriate set of facts. Clearly, this is one Wisconsin judge who will not tolerate "delicately worded" complaints or indictments neither.

Criticisms of this sort have prompted a few state legislatures to overcome their embarrassment and specify the behaviors they wish to prohibit. The New York, Minnesota, and Washington revisions delineate the following as criminal offenses:
1. carnal knowledge by or with the mouth of man by man
2. carnal knowledge by or with the mouth of man by woman
3. carnal knowledge by or with the mouth of woman by man
4. carnal knowledge by or with the mouth of woman by woman
5. carnal knowledge by the anus of man by man
6. carnal knowledge by the anus of woman by man
7. carnal knowledge of any animal or bird by man
8. carnal knowledge of any animal or bird by woman
9. sexual intercourse with a dead body (necrophilia)

(McKinney's Consolidated laws of New York, 130.00, 130.20, 130.38; Minnesota statutes, 617.14; and revised code of Washington, 9.79.100)

3) LEWD AND LASCIVIOUS BEHAVIOR: COHABITATION

The last Wisconsin statute with which we deal here comes under the section of Chapter 944 titled "Obscenity" (rather than under the heading "Sexual Crimes Between Adults with Consent). Section 944.20 is labeled "Lewd and Lascivious Behavior," and it proscribes (1) sexual behavior in public, (2) indecent exposure, and (3) cohabitation. Our interest in this statute is limited to subsection (3), cohabitation, which fits our criteria of being a consensual, adult, and private behavior.

944.20 (3) defines the offense in these terms:

"Whoever openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse."

We must recognize that the "private" character of this offense is quite different from that of the other three. As noted earlier, the definition of cohabitation requires that the behavior have a semi-public quality about it. This might arguably remove it from our
category of adult, consensual, private behaviors. However, there is a difference between the "public" quality of this act and other public offenses, like public disorder or indecent exposure, for example. In the commission of the offense of cohabitation, it is the public behavior of the couple which calls attention to the violation, but this public behavior is not itself the punishable behavior. Rather the criminal behavior is that which is implied by the public behavior, but actually takes place under conditions of privacy. In contrast, the crime of indecent exposure takes place entirely in public, there is no need to infer the private behavior from what actually occurs in public to constitute an offense.

This semi-public quality of cohabitation is a unique one and creates a rather different picture for enforcement than exists for the purely private offenses of adultery, fornication, and perversion. The types of enforcement techniques, quality and type of evidence necessary, and substantive and procedural safeguards are all affected by this public-private combination of behaviors, as we will discuss in the next section.

Any sexual intercourse that might occur between an unmarried man and woman would clearly be covered by sec. 944.15 Fornication or 944.16 Adultery. Either adultery or fornication charges can rest on a single act of sexual intercourse. 944.20(3), on the other hand, is able to cover the situation of repeated or continuing behavior; intercourse need only be implied, however, not proven. The significant Wisconsin case on this point is a 1934 decision, State vs. Brooks, 215 Wis. 134.
"Lewd and lascivious behavior is a defiance of the usual conventions recognized in our laws as standards of decency. It is a continuing offense, and the willful creation of the reputation of the relation of the parties is an affront to society... The law seeks in such an instance to prevent a course of conduct which in public estimation constitutes an example detrimental to the morals of the community."

The behavior must be continuing, but it is not necessary for the couple to "set up house" and live together as a family; regular visits, weekend trips and the like are enough to "imply" sexual intimacy and offend the public. It is hard to determine the historical rationale of this proscription; possibly it grew out of the times when couples were only seen together on "dates" arranged by their parents, in strictly supervised situations, so that constantly being together was considered to be in disregard of their parents desires.

This statute illustrates a different approach to control of sexual behavior. The adultery, fornication and sexual perversion statutes can be explained as part of a pattern designed to encourage marriage and protect the family, by protecting the blood-line and ensuring procreation. To the extent that this statute prohibits marital relations without a marriage ceremony it can be seen as a safeguard for the obligations of the marriage contract and the traditional concept of the family. Children born to an unmarried couple may become wards of the state, or receive inadequate or improper socialization from an impaired family unit. In this vein, this statute is much like the previous ones; this may actually be the "popular" basis for the proscription. However, a careful reading of the statute and its history demonstrates that protection of children is not the "real purpose" of the proscription. Cohabitation is prohibited in the official rationale because it is thought to offend the "community standards" of decency.

The statute puts a premium on the vivid imaginations of one's neighbors,
since, intercourse need only be inferrable, and is not a necessary
element of the offense. The Legislative Council Comment from the
1955 revision says in support of this section:

"This conduct is considered particularly undesirable
because of the openness of association which offends the
public."

This explanation for the legal proscription reminds us of
the position taken by H.L.A. Hart on legal regulation of morality
discussed previously. While agreeing with Mill that a "harm to
others" standard for the domain of law was the proper one in most
areas, Hart makes a distinction between physical or financial harm to
others in the enforcement of morality, and the quality of "offensiveness"
of some behavior or material. Hart further refines this "offensiveness"
stand by adding that emotional distress caused by the mere knowledge
of another's behavior is not enough; the action or material must somehow
be thrust on the unwilling individual.

Hart forces us to look very closely at the possible functions
the cohabitation statute may have. It is typically considered a
legitimate use of law to protect the young and immature from exploitation
or corruption. For that reason, we restricted our discussion of sexual
behaviors to adults. The legal logic is that the young (defined by
legal age limits) lack the maturity of judgment and experience which
enable one to choose between things on a rationale basis. Thus it is
often said that a party to an offense is too young to have the capacity
to consent to the behavior and so is not culpable (see, for example,
statutory rape) for its commission.

Thus it can be argued that the semi-public quality of cohabitation
puts the behavior in a position of creating a "bad example" for young
people who witness the public behavior, and make the proper inference,
by "forcing" them to confront a life-style alternative to that of
traditional marriage. A society that desires to preserve its family structure, would want to socialize its youth to that style, and so would use the legal norms to prohibit such exposure. (Ginzburg vs. New York, 390 US 629, 1966)

Arguably, this can be seen as a legitimate use of criminal law under the Hart formulation. However, nothing in the history of this statute suggests that it is aimed strictly at the young. In fact, the language used indicates the detrimental aspect is the example of immorality made for all the members of the public. In this context, the statute appears to be intended to protect people from the distress incurred by mere knowledge of another's behavior, and is transformed from a regulation of morality into one of "offensiveness."

Whether or not one has a Constitutional right to be protected from being "offended" or exposed to "offensive" matter is uncertain at this time. The obscenity cases have dealt with this issue over many years' time, but a new direction seems evident in recent cases.

Probably the best known statement on this point until very recently was Roth vs. US, 354 US 476 (1957). In that case, the Supreme Court made its famous statement that that obscenity is material which is "utterly without redeeming social importance." (Roth, p. 479)

The implication of the Court's decision that all but obscene matter is protected by the First Amendment from state regulation, is that one individual cannot prevent another from exposing himself to matter which is personally offensive to the first person but not obscene by this criterion.

To the extent that Roth addressed obscene matter to be viewed by the individual in private circumstances, the question of its offending someone else is not relevant. But, recognizing that distribution and
public access are essential to disseminating these "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" (Roth p. 479), Roth does address the middle ground where individual preferences must meet and compromise. In these situations, the Court seemed to say, individuals have a right to be free of exposure to obscenity, but not to be protected from anything that is merely offensive to them while not obscene.

Roth has been the statement of the test until only recently. On June 21, 1973, the Supreme Court handed down decisions in five obscenity cases. The principle decision, Miller vs. California, 13 Cr. L. 3161, has greatly narrowed the Roth rule. The new test for regulating material as obscene is

"(a) 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. Kois vs. Wisconsin, 408 US 279, 230 (1972) quoting Roth

(b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Miller, p. 3164)

Rejection of uniform criteria is a clear indication that the individual's right to be protected from obscenity depends on whether or not his standards for "serious value" are the same as enough of his neighbors. To the extent that they are in accord, the individual can be constitutionally protected from "patently offensive" material.

The full implications of this new standard will not be known for awhile. It will be an interesting example of the formulation of law to see how each community determines what its contemporary standards are. Justice Douglas, dissenting in Miller, finds the offensiveness standard license to ignore the First Amendment altogether. In addition, he argues,
"The 'offensive' standard is unconstitutional in another way. Coates vs. Cincinnati, 402 US 611 found unconstitutionally vague and overbroad an ordinance which prohibited three or more persons to assemble on the street and conduct themselves 'in a manner annoying to persons passing by.' "Conduct that annoys some people does not annoy others. Thus the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all." (Coates, p. 614)

This new direction of the Court's decisions includes an effort to distinguish social values other than First Amendment rights which must be considered in these cases:

"These include the interest of the public in the quality of life and of the total community environment, the tone of commerce in great city centers, and, possibly the public safety itself." (Paradise Theatres I vs. Slaton, 13 Cr. L. 3171)

We also see in these decisions a reaffirmation of principles not considered to be affected by the narrowing of Roth. The Miller opinion cites several cases which were decided while Roth was still the test:

"This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles," Stanley vs. Georgia, 394 US 557, 567 (1969); Ginzburg vs. N.Y. 390 US 629, 637-643 (1968); ..."

The implications of all this are not entirely clear. There exists under these new decisions a right to be free of "patently offensive" sexual material, as defined by community standards, which clearly did not exist under Roth. Since all of the cases are cast in terms of the First Amendment freedoms of speech and press, there is some question as to their generalizability to behavior. The Miller standard is framed specifically in reference to sexual matter and may be ungeneralizable to areas such as zoning ordinances or public disorder statutes on the question of offensiveness. Arguably, however, there does exist a
right to be protected from offensive conduct, as well as to continue keeping it from juveniles, such as that implicit to the offense of cohabitation. One may dispute the jurisprudential, sociological or practical propriety of using the criminal law in this way, but legally it seems it is now quite proper.

To summarize, in this first section we have tried to answer the question, "Under what conditions are the laws regulating sexual morality developed?" We have reviewed three jurisprudential perspectives on the appropriate role of law, as well as outlined four sociological explanations for the development of laws. Taking the family to be a universally valued social institution, we discussed different cultures' use of normative proscription to control sexual behavior and so regulate the family. Poor historical data precludes much analysis as to which theory of the development of law best describes how these norms were devised. We are able to identify some of the values relating to the family which are involved, however.

Strict isolation of the institution of marriage from sexual expression existed in the Greek and Roman days functioned to discourage diversion from the more practical family concerns of running the household and raising the children. The economic model explains this use of law to serve economic cultural functions. Hebrews and Christians had clear religious bases for their rejection of sexual behavior, and used their norms as a means of keeping the family from sexual corruption.

Since sexual intercourse is necessary to perpetuation of the race, however, each culture realized the necessity of its performance in the marriage. Taking reproduction as the only legitimate purpose of sex, the Christians limited it to its procreative forms of expression,
and forbade indulgence in sex for pleasure. The degree to which this norm, as well as that of solely economic family functions, clashed with the norms of romantic love illustrates a process of cultural accommodation to new, conflicting elements. The result, the bases of our current laws, was a modification of the economic view of the family to include sexual expression, rather than perceiving sexuality as behavior from which the family should be protected.

Finally, we can see the use of sexual norms as a means to structure sex roles. The differential evaluation of the roles of men and women is evident in each case, and is an example of cultural norms being used to order and structure the society.

Given the English common and canon laws as the most immediate bases for our own statutes, we have defined as precisely as possible what behaviors are considered criminal sexual relations between consenting adults. The strong influence of the Puritans, and through them much of Christian doctrine, is quite evident in our current laws.

The development of moral law in the American colonies appears to fit either an elitist model of law, or a cultural conflict theory. The Puritans' frustration with the Church's failure to control sexual morality apparently motivated them to impose criminal sanctions through their criminal laws.

Like most other states, Wisconsin followed this lead in its early statutes, mostly a compilation of territorial laws. We can see from Professor Remington's comments how the operation of a politically powerful group, the Bar committee, affected in the revision of the criminal code in 1955, as explained by the elitist model.
To the extent that the early Greek, Roman, Hebrew, and Christian cultures intended their sexual norms to preserve the family, Wisconsin's statutes appear to do the same. Prohibitions of adultery and fornication still evidence protection of the family as a significant social institution, both as the institution through which property was owned and passed on, and as the regulator of access to sexual activity with its implications for reproduction. The sanctions against sexual perversion may be traced to the family's procreative role, also an economically important role. Proscriptions of cohabitation limit access to the marriage element of sexual intimacy to those willing to assume the additional obligations of the family, and finally, the cohabitation statute introduces us to the use of legal norms to protect public moral sentiments from being "offended."

II. Consequences

In this section we address the question: "What are the consequences -- for law enforcement, for offenders, for the criminal law -- of these statutes?"

VICTIMLESS CRIMES

In his well known book, Crimes Without Victims, Edwin M. Schur includes three different behaviors as "victimless crimes": abortion, homosexuality, and drug addiction. Schur distinguishes these from other crimes as being "the combination of an exchange transaction and lack of apparent harm to others." (Schur 1965, p. 171) That is, the behavior takes place as a willing, voluntary exchange of a good or service between two people, and inflicts no physical or financial harm on anyone else.
Schur recognizes, as others have argued, that "victims" can be found for these behaviors. For example, the unborn fetus is sometimes said to be the victim of the abortion (Granfield 1967; see Lader, 1966, for excellent argument to the contrary). This argument classifies the act of abortion as that of murder; it rejects the position that the mother and the doctor-abortionist are the only two participants in the act, seeking to broaden that to include the unborn child (in some cases, the rights of the father are also argued). In the case of drug addiction, three victims are frequently mentioned. First, the addict himself, who is "victimized" by the pusher and the others who make a profit from his habit. Secondly, the citizens who are robbed or mugged by the addict in order to support his habit. Third, "straights" whom the addict in turn gets started using drugs. This third category is only a variation of the first, and violates the traditional notion of victim is being one to whom a wrong is done against his will. The second category might be called "secondary crime" and is an example of what Lemert calls "secondary deviance."

"Secondary deviation refers to a special class of socially defined responses which people make to problems created by the societal reaction to their deviance." (Lemert 1967, p. 40)

This victim is a result of the secondary, not the primary violation and so is not a victim of drug addiction in the traditional sense either.

Lacking the traditional victim to fill the role of alerting public authorities, and embodying the physical or mental harm produced by the offense, these behaviors are considered "victimless crimes." Given these criteria, adultery, fornication, sexual perversion and cohabitation also can be classed as victimless crimes. Unlike forcible
rape or battery, these behaviors do not involve force or coercion, an element the criminal law seeks legitimately to prevent. By definition, both partners to fornication, adultery, sexual perversion or cohabitation engage in the behaviors voluntarily. Fornication, for example, is defined as consensual intercourse between two unmarried adults. The only potential victim of this crime could be a child conceived by the act. However, no harm is necessarily visited upon a child by being born. To the extent that a society stigmatizes illegitimate children, it is the perpetrator of the harm upon that child, not its mother and father. Nor does the history of this proscription evidence real concern for the child as the victim; rather it is the social institution of marriage which is being protected. Acts of sexual perversion are even more victimless, if you will, since they are restricted to those behaviors which cannot produce children.

Adultery conceivably has a victim if one recognizes a loss of affection and sexual attention as a harm to the spurned spouse. This assumes a partial rejection of the spouse by the adulterous partner; it also assumes that the extra-marital activity is a cause of a failing marriage. It is quite possible, however, that 1) adultery is a result of a failing marriage, 2) the act of adultery is irrelevant to the marriage, that is, the non-adulterous partner has no emotional reaction to it, or 3) the marriage itself may be the victim because the couple simply gives up on it, a combined function of the "cause and result" possibilities. The Legislative Council Comment evidences some concern for the spouse in the 1955 revision: "The act is considered more undesirable because it is done with the realization that it probably will affect a third party."
This position is somewhat weakened by additional facts about the revision of this statute. As noted previously, in revising the Wisconsin Criminal Code, the Legislative Council drafted one version of the adultery statute which required that knowledge or belief of the married state of the partner be an essential element of the offense. This version was rejected by the Bar committee on the grounds that the crime was as it had been defined at common law; the element of knowledge was not necessary because the real offense was against the blood-line, not the spouse.

In Wisconsin, adultery is a ground for divorce (247.07(1)). The non-adulterous spouse has recourse to the civil courts for a divorce action, as well as for compensation for infliction of emotional harm. However, since adultery need not cause emotional harm, there is no need to assume a victim. These facts, in addition to the nature of the behavior as consensual between the people directly involved, support its classification as a victimless crime.

Cohabitation is perhaps the best example in terms of being victimless. A couple who live, visit, or travel together, may be imprisoned or fined on the grounds that their behavior is offensive in its implication to the public. The fact of marriage clearly implies sexual intercourse between a couple (in many states it is a duty; failure to consummate the marriage is ground for its annulment); so it is not the implication of the intimacy alone which is offensive, but its occurrence outside the marriage context. As discussed earlier, one justification of "obscenity" laws is the protection of the young from corruption by exposure to bad example. Conceivably, a young person who was adversely affected by the knowledge that a couple cohabited, could be called a victim of the behavior. However, the statute is not
worded to protect the innocence of the juvenile, but rather the
moral self-image of the community. This self-image and the institution
of the family as the center for sexual activity are the perceived
victims of this offense.

CONSEQUENCES FOR ENFORCEMENT

The lack of a victim has considerable significance for the
way these laws are enforced. Violations of the civil law are brought
to the legal system by the individual who feels himself to be the
victim of the violation. For example, if two people enter into a
contractual agreement, and one feels that the other is not abiding by
the agreement in some way, he may hire an attorney and bring a civil
action for breach of contract. Because it is a "private wrong" it
is up to the private individual to enlist the court's aid to vindicate
his interests. Nor can a civil action be brought by just any person
who imagines himself to be injured. He must suffer sufficiently
direct injury in the eyes of the law or the action will be dismissed
for "lack of a cause of action for which relief can be granted."

In the situation of a criminal violation, the process is somewhat
different. Even in the majority of criminal violations, which clearly
have a primary victim, the individual victim does not actually initiate
a prosecution. The offense must be brought to the attention of public
officials -- the police, public prosecutor, or district attorney --
either through the victim's complaint or by their own surveillance work.
A decision is then made as the propriety of tracking down and prosecut-
ing the offender. For example, if a young woman comes to the police
station to report that she has just been raped, the police will ask
her a series of questions about the incident: where and when did it
occur? did she know her attacker? did he beat her up or threaten her
with a weapon? did she resist? The purpose of this questioning is
to gather information on the alleged crime but also to make a sub-
jective judgment about the girl's credibility and the sufficiency of
evidence to support a rape charge; the issue is whether finding and
prosecuting the attacker is "worth it" in terms of expendable manpower
and time resources. Often with an accusation of rape, the girl will
get no further than this single interview with the policeman on duty.
But if she succeeds in convincing him of the merits of her complaint,
the police department will submit a report of the offense to the
District Attorney's office. The District Attorney in turn will make
the same subjective judgment of the girl's story, and may discourage
her from pressing charges if he feels the evidence is insufficient.
If, however, the District Attorney decides to prosecute, the girl's
role in the process changes drastically. The criminal prosecution,
unlike the civil, is brought entirely by the state. The District
Attorney becomes the instigating party to the prosecution; the girl,
termed the complainant, will have only to testify at the trial to tell
her side of the story. While she is the real victim of the crime,
the state assumes the burden of investigation, prosecution and incarceration,
in such a way that the interests being vindicated become those of all
the public. This philosophy reflected by the criminal law, that
violations are offenses against society rather than against the individual,
makes it very different indeed from a violation of the civil law. In
the Cotner vs. Henry case mentioned previously, the prosecution was
begun upon a complaint by the wife after she and her husband had
quarrelled. One she realized what the result could be, she attempted
to withdraw her complaint. The prosecutor refused to drop the charges,
and there was nothing she could do to force him to stop prosecution.
It is typically the role of the police to detect violations of the law and begin the criminal processing of the offender. Black and Reiss (1970) make an important distinction between "reactive" and "proactive" enforcement techniques of the police. Reactive enforcement is activated by a citizen complainant notifying the police of the offense. Proactive enforcement occurs when the police witness the incident or detect the violation through their own surveillance, that is, without a citizen complainant bringing it to their attention. It is not uncommon for police to use a combination reactive/proactive approach as well, in which the complainant's information is followed up by police surveillance. Detection of drug violations exemplify this combination technique.

Taking the four consensual sexual behaviors to be just that, behaviors committed in private, voluntarily, by adults, there is no ready complainant like the rape victim to bring the offense to the attention of the public officials. The exceptional quality of cohabitation as a semi-public behavior requires special note here. Of the four offenses, this one is the most likely target of reactive enforcement, and will often demand a combined proactive/reactive technique. An article by Richard Rhodes titled "Sex and Sin in Sheboygan" (Playboy, August 1972) illustrates the dual nature of enforcement of this law. The police were alerted to a possible offense by a neighbor who saw "something funny going on over there." With that tip off, the police then instituted their own surveillance of the apartment building:

To establish that Jim Decko was behaving lewdly and lasciviously, the Sheboygan Police Department observed the behavior of the lights in his girlfriend's apartment and the behavior of his car." (p. 130)
If the lights went off after Decko arrived and his car remained in front of the apartment for a substantial part of the night, the implication was that he and his girlfriend were sexually intimate. The Decko case never went to court so we cannot know if such evidence would have satisfied a judge or jury; but the article does illustrate the methods that might be used to obtain evidence under the statute.

A similar but more dramatic example may be seen in the recent drug raids which have "made the news" because the narcotics agents involved entered the wrong houses. Because evidence of drug violations can be quickly disposed of, narcotics agents have developed the procedures of "rushing" the house and "strong-arming" the inhabitants. Originally legitimated by the "No Knock" provisions of statutory authority for arrest, some of those who use these procedures have come to totally ignore all constitutional protections of defendants' rights. Questionable even when they have the right house, use of these tactics on those who are actually innocent has magnified their dangers, illustrating another difficulty of relying strictly on proactive enforcement.

Adultery, too, may initiate a citizen complaint if, as in Cotner vs. Henry, the spouse should discover the offense being committed. In that situation the police need do no gathering of evidence on their own, if the complainant agrees to testify in court. In 1953, the Wisconsin Supreme Court decided the case of Datka vs. State, 266 Wis. 124, a prosecution under the Wisconsin adultery statute (351.05). The court noted that if direct proof of the act of illicit intercourse cannot be obtained,

"The act of sexual intercourse may be inferred from the man and woman occupying the same bed and room, being seen together in bed, or from being found partially disrobed in the same room."
In Datka, the wife found her husband and a single woman in bed together, made a complaint to the police and testified at the trial. The police role was strictly a reactive one.

With the possible exceptions noted, it is quite likely that in most of these situations only the participants to the offense even know that it occurred. How then is the legal system to learn of these offenses in order to punish those who engage in these behaviors?

Students of police behavior are quite familiar with such proactive techniques as the use of informers in narcotics offenses, or the plainclothesman posing as a "customer" to catch the prostitute. Because the drug addict must buy his drugs from someone, and will have evidence of his habit (needles, narcotics, etc.) around him shortly after a buy, it is possible for the police to catch him on a timely tip by an informer. Reliance on others to supply him makes the addict especially vulnerable to the informer technique, since he cannot entirely control who knows about his habit. The prostitute, particularly the streetwalker, must solicit business from among the general public, and so is also vulnerable to being discovered.

However, sexual activity between consenting adults creates much less risk of this sort of exposure of the illicit activity. The couple need not rely on other people to "supply" them with anything, nor do they engage in their crimes in public. Consequently, the informer system and the plainclothesmen approach are poorly suited to detecting these clandestine behaviors. Lacking any real victim who will complain to the police, and any additional contacts of the offenders who can inform on these activities, if the police are to enforce these laws, they must often use purely proactive techniques to detect the offenders themselves. One means available for gathering evidence on the unsuspecting
with which we are all familiar is the use of electronic surveillance
or "bugging" equipment. The dangers of violating the individual's
Fourth Amendment rights are intensified in these situations, and so
the police must work within the procedural limitations which have been
imposed by the constitutional law.

In Katz vs. US, 393 US 347 (1967), the Supreme Court ruled
inadmissible as a violation of Fourth Amendment guarantees evidence
obtained from a wiretap on a public phone booth used by the defendant.
The emphasis of the opinion was on the expectations of the individual
when he stepped into the phone booth:

"For the Fourth Amendment protects people, not places.
What a person knowingly exposes to the public, even in
his own home or office, is not a subject of Fourth Amendment
protection.... But what he seeks to preserve as private,
even in an area accessible to the public, may be
constitutionally protected." (Katz, p. 348)

In Katz no warrant had been obtained to properly authorize the tap
and so the evidence was inadmissible in court. But the focus on
protection of the individual's expectations of privacy is instructive
to an understanding of later cases. Katz does not hold that the search
warrant could not have been procured and so does not mean that surveillance
of the home is never justified. But it does emphasize that "no
greater invasion of privacy (would be) permitted than was necessary
under the circumstances." (Berger vs. State of NY, 388 US 41, 57)

This principle of a constitutionally protected privacy is
clearly a most significant one in regards to social control of sexual
behavior. A series of Supreme Court decisions have developed the
principle on related sets of facts.
In Griswold vs. Connecticut, 381 US 479 (1965) the Supreme Court struck down a Connecticut statute which made the use of contraceptives by married couples a criminal offense. Relying on several parts of the Bill of Rights, including the First Amendment right of association, the Fourth Amendment protection against unreasonable searches and seizures, and the Fifth Amendment provisions against self-incrimination, the Court found that though no specific "right to privacy" is guaranteed by the Constitution, that "zones of privacy" are created by these various guarantees. Within one of these zones of privacy is the marital bedroom: "A state statute which makes it a criminal offense for a married couple to use contraceptives is invalid as invading their right of privacy, a right older than the Bill of Rights." The opinion goes on to say,

"Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." (487)

In a frequently cited concurring opinion, Justice Goldberg used the Ninth Amendment to reach the same conclusion. Reserving to the people all rights not enumerated, the Ninth Amendment has been something of a "sleeper" in constitutional law. Its usefulness in questions similar to that in Griswold as well as other aspects of privacy will depend on future Court decisions.

Stanley vs. Georgia, 394 US 447 (1968), an "obscenity case," is considered a landmark decision on this issue of privacy. Stanley was convicted under a Georgia statute which made knowing private possession of obscene matter a criminal offense. Holding the statute to be a violation of Stanley's First Amendment freedoms, the Court said:
"Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." (Stanley, p. 565)

While this case is not entirely on point, it is an illustration of the Court's insistence that much of what the individual does within the "privacy of his home" is his personal business and not a proper target for state control.

If the private home and the marital bedroom are protected from state control it would seem that use of these laws against marital sexual perversion as argued in Jones vs. State, supra, is unconstitutional. The next question becomes, what about pre-, non, or extra-marital bedrooms? The 1972 decision in Eisenstadt vs. Baird, 405 US 438, held that single individuals have protectable rights as well. Convicted under a Massachusetts statute which made it a crime to distribute contraceptives to anyone not married, William Baird appealed the conviction on the grounds that the statute was unconstitutional. The Supreme Court made the following points in finding the statute in violation of the Fourteenth Amendment "equal protection clause."

1) By allowing contraceptives to be available to married persons regardless of whether they were living with their spouse, or for what purpose the contraceptives were desired (contraception, prevention of disease, etc.), the purpose of the statute could not be upheld as the promotion of marital fidelity, nor its effect to deter extra-marital relationships.

2) If the distribution of contraceptives to married persons is permitted under state law, the "equal protection clause" requires it be permitted to unmarried persons as well.
3) The right of privacy gives an individual, married or single, the right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

A very recent decision (Jan. 23, 1973), Roe vs. Wade, 41 LW 4213, dealing with state abortion statutes is also important to note. In Roe, a pregnant single woman challenged the Texas criminal statute as being unconstitutionally vague and overbroad. The statute involved prohibited abortion in all cases except when necessary to save the mother's life (Texas Penal Code, 1191-94 and 1196). Ruling the statute a violation of the Fourteenth Amendment equal protection clause, the Court said, "the right of privacy, however broad, is broad enough to cover the abortion decision."

Clearly the significance of these cases reflects on, but is not limited to the ability of a policeman to obtain a warrant to search someone's bedroom. The concept of married as well as unmarried person's rights to privacy and control over sexual decisions is not new to the law, but is clearly undergoing further development at this time. The composition of the Supreme Court is a most significant consideration in predicting the future of these decisions. The recent (June 21, 1973) obscenity cases show the mark of a clearly more conservative Court than existed when Earl Warren was Chief Justice, and decisions such as Katz, Stanley, and Griswold were handed down. Under the "Burger Court" (June 23, 1969 to present) the concept of personal privacy illustrated in Katz and Stanley was considerably narrowed in US vs. Orito (13 Cr. L. 3192) decided on June 21, 1973. Orito, a case out of Wisconsin in which a man was convicted for transporting obscene matter, held that "the zone of privacy that Stanley protected does not extend beyond the home."
(Crito, p. 3192) The language of these cases suggests that obscenity rulings are to be read in context, that is, they are not necessarily generalizable to other situations; however, to an extent every decision is precedent for broader application. We may see quite a change of direction in the privacy area soon.

Where a fundamental personal right such as privacy, has been found to be involved, the state statute which would violate that right must "be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest." (Criswold) It is certainly questionable in light of these recent cases, how "compelling" the state interests reflected by Wisconsin's consensual sexual behavior statutes would be found to be. Whatever method Wisconsin police could use to gather "in the room" evidence of these violations would likely run afoul of the Fourth and Ninth Amendment protections.

The lack of a victim and the low visibility intensify the problems of enforcing these laws. In addition to procedural impediments to detection, there are other serious questions as to the constitutionality of these statutes which create substantive limitations on prosecution as well.

The historical background of and values reflected by these statutes are clearly interwoven with religious teachings. The First Amendment of the Constitution of the US says in part,

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof..."

The first phrase, called the "Establishment Clause," is designed to guarantee government neutrality in issues of religion. "When government activities touch on the religious sphere, they must be secular in purpose, even-handed in operation, and neutral in primary
impact." (Gillet vs. US, 401 US 437, 1971). Thus, we have constitutional assurance and requirement of the separation of church and state.

The second phrase, the "Free Exercise Clause," is to protect against government compulsion in regard to religious matters. Thus, the government cannot regulate, interfere with, or prefer one religion to another.

Use of the Establishment Clause argument for reform will at least force legislators to specify the secular harm they feel is prevented by the consensual sex statutes (Harris, 601). Evidence on the enforcement of these laws argues that they are not enforced with an even hand, however, there is no data to support an argument that enforcement differs overtly on the basis of one's religious beliefs. On the other hand, the carrying into law of the Christian reverence for pre-marital chastity, for example, evidences a preference for the beliefs of one religion, and is arguably in violation of the Free Exercise Clause.

In a UCLA Law Review Comment, "Limiting the State's Police Power: Reaction to John Stuart Mill" (1970, 605-627), the author labels this the "morality effect," which, he argues,

"uses secular legal institutions to proscribe conduct which offends the morals of certain groups regardless of whether the offender is a member of such groups. The morality effect is strongest when the conduct to be proscribed is most closely related to the religious principles of the majority of the population, and it diminishes the less religiously offensive the conduct becomes."

Another constitutional attack rests on the basis of "substantive due process" under the Fifth and Fourteenth Amendments. For our purposes, substantive due process requires that the means chosen by the legislature to regulate the behavior have a rational and substantial relationship to the purpose of the statute, and that if the statute in
anyway encroaches upon a fundamental right, it must be drawn as narrowly and as precisely as possible. We have seen the semantic problems with Wisconsin's statutes already.

An argument under this doctrine against the Wisconsin statutes is related to the second requirement. Under this, in order for a state law to justifiably impinge constitutionally guaranteed rights, it must be to serve a "compelling" state interest. What constitutes a compelling interest is a question of special application, but the cases cited earlier (Griswold, Eisenstadt) suggest that prevention of pre-marital intercourse and like behaviors are insufficient. Judge Doyle's comments also lend support to an argument that some of the Wisconsin statutes are too vague and imprecisely drawn to fulfill the requirements of substantive due process.

These restrictions on the written statute as well as the techniques available for enforcement reflect significantly on the policeman's legal authority to make an arrest for a violation of these statutes. In addition, we must recognize the operation of the element of discretion in the enforcement process.

While "full enforcement" is the official standard for public operations, the structural, legal, and personal pressure imposed on police departments and officers make full enforcement of all the laws an impossible dream. Beginning with the arrest standards themselves we can see how vast the policeman's discretion is in his decision to arrest and process an offender.

"The common law governing arrests by police officers at the time of the Constitution was only slightly different from that applicable to arrests by private persons, since at that time professional police services were only beginning to emerge. With respect to felony, the officer could arrest without a warrant if he had reasonable belief that a felony
had been committed by the person arrested. For misdemeanors, an officer could arrest without first obtaining a warrant only when a misdemeanor amounting to a breach of the peace was committed in his presence." (Remington 1969, p. 327)

The "reasonable grounds to believe" standard for felony arrests is still a fairly universal policy. Of the crimes we are discussing, adultery, fornication, and sexual perversion are all felonies. This standard clearly leaves a good deal to the discretion of the arresting officer. It also leaves a number of serious questions yet unanswered by court decisions.

1) does the standard vary with the seriousness of the offense?

2) must the officer investigate beyond initial appearances before arresting?

3) may evidence that would be inadmissible in court form the basis of his belief?

4) may "police expertise" be considered in formation of the belief?

5) must the officer be able to determine the specific crime the offender has committed?

6) may the officer arrest more than one suspect if there is clearly only one offender? (Remington 1969)

The standard for misdemeanor arrests has undergone alternation since the common law. Arrest is now permitted for all misdemeanors which occur in the officer's presence, whether or not they are breaches of the peace. Wisconsin now allows arrest on the basis of "probable cause" (an equivalent standard to that of reasonable grounds to beliefs) if there is reason to believe that the individual will cause more harm or cannot be arrested after proof of the crime is found.

The Wisconsin statutes make cohabitation a misdemeanor. Under the "inpresence" standard, a couple could presumably be arrested for the public behavior that is the clue to their violation, that is,
while on a week-end trip, etc. Under the probable cause standard, presumably, the individuals involved could be arrested on the basis of a tip even though not together at the time.

The range of discretion in the decision of the police to arrest is quite great, for both felonies and misdemeanors. Once they are aware of the violation, a number of considerations go into the decision to arrest.

The exercise of discretion by the police is usually a question of whether or not to invoke the legal process. Theoretically, the police are not assumed to have discretionary powers; their role is simply to administer the policies enacted by the other parts of the legal system. Yet a variety of practical reasons necessitate the exercise of discretion; the form that discretion takes is a function of several interacting influences, which may be explained in theoretical terms.

Several surface reasons necessitate the exercise of discretion in police work. One obvious cause is the ambiguity of language itself. Laws are the formal statements of the norms, both proscriptive and prescriptive, of the society. The law must be stated broadly enough to cover a variety of situations; to specify it to the point of unquestionable applicability would effectively render it useless. Bridging the gap between the general rule and its specific applications necessitates discretion on the part of the police.

Full enforcement of all laws at all times may be the ideal, but it is a practical impossibility. The demands of the police, in terms of time, effort, and areas of responsibility, are simply too great for the available enforcement resources to handle. The police force must make a discretionary allocation of resources.
"The police and other enforcement agencies are given the
general responsibility for maintaining law and order under
a body of criminal law defining the various kinds of con-
duct against which they may properly proceed. They are
then furnished with enforcement resources less than adequate
to accomplish the entire task. Consequently, discretionary
enforcement occurs in an attempt to obtain the best results
from those limited means." (Cressey and Ward 1969, p. 185)

Discretion for this reason is a functional approach by the
police to their role. Since the policeman cannot deal with everything
at once, he must limit himself to a realistic portion. This may
result in 1) a decision not to enforce a law which could be enforced,
or conversely, 2) a decision to enforce a law that could be ignored.
For example, failure to enforce the applicable laws against
Senator Edward Kennedy following the "Chappaquidick Affair" is an
instance of a decision not to enforce, in that specific case a combination
of political and personal factors were likely influential part of that
decision. In contrast, it is often argued that police enforce laws
selectively by class, making it more likely for a lower class individual
to be arrested and processed than one from the middle or upper class.
The question now becomes, how does he decide?

The police officially view their function in terms of three
general priorities: 1) preservation of the peace; 2) protection of
life and property; and 3) enforcement of the laws. The determination
of whether or not to invoke the legal process becomes a function of
their interpretation of how behaviors fulfill or threaten these
official priorities and whatever personal priorities they develop. The
criteria on which the interpretation is based can be viewed as a com-
bined result of three basic theories: value structure, labelling theory
and role conflict.
The most immediate structural pressure on individual police officers is that of the police force. Through training and internal control mechanisms the police force socializes its members to its organizational values. For example, a predominant value has come to be that of efficiency. "The pressure put on the individual policeman to 'produce' -- to be efficient rather than legal when the two norms conflict" (Cressey and Ward 1969, p. 251) is communicated to the officers through the use of "clearance rates." The clearance rate, a statistical measure of crimes followed through to prosecution emphasizes the quantity not the quality of enforcement, and is used to evaluate the competence of the officer and the overall force. Used as criteria for promotion, the rates are an extremely effective internal control mechanism. "Meeting these standards tends to become an end in itself" (Skolnick 1966 p. 181) and forms a strong basis for the officers' exercise of discretion, in context of conforming to the values of the police force. With laws such as the ones we are discussing, the difficulty of gathering sufficient evidence may create a standard of reluctance to try to enforce these laws because of the negative effect on clearance rates.

The individual officer's interaction in the community, in his role of enforcement agent, exerts profound influence on his interpretation of behaviors. A frequently cited phenomena is the policeman's tendency to stereotype or label groups of people.

While some of this tendency may be attributable to individual prejudices, a great deal is a function of the constant element of danger in police work. Consequently, the policeman is trained to be "suspicious," to anticipate potentially dangerous situation so as not to be caught off-guard. "A stereotyping perceptual shorthand is formed
through which the police come to see certain signs as symbols of potential violence." (Skolnick 1966, p. 54) Response to danger must be fast; labelling guarantees an effective base from which to react. Perceiving people in terms of labels becomes essential both to self-defense and role performance for the policeman; he depends on his set of expectations to maintain his operability and fulfill his function.

(Incorrect application of these labels may produce a self-fulfilling prophecy: finding crime where one looks for it, and perpetuating the cycle. The officer may incur violence simply by anticipating it. Yet, it is understandably a secondary concern to one who is only too aware that if he does not anticipate violence he may be dead.)

While it is important to the policeman's functioning, the labelling tactic is an extremely dangerous form of discretion. The decision may be made not to invoke the legal process when a person who is positively labelled is concerned; yet, in the same circumstances, a negatively labelled person may elicit the full force of the law. The need to react quickly, produces a reliance on labels, which determines much of the policeman's perception of various behaviors.

The ambiguity of their role definition creates severe role conflict for the police, adding a further dimension to their evaluative criteria.

Most people are extremely ambivalent toward the police, simultaneously demanding and rejecting their existence. The policeman is at once their superior and their servant -- capable of protecting their rights, and of taking them away. Most public demands of the
police are pressures to respond to personal problems. "More than one-half of the calls coming routinely to the police complaint desk... appear to involve calls for help and some form of support for personal or interpersonal problems." (Quinney 1969, p. 159) The expectation is for discretionary enforcement of the laws, defined in terms of individualized application; be lenient with me, but not with them.

The judicial and legislative branches of the legal system perceive the police as their administrative extension. The policeman's role is to apply the policies they have made; that is of particular difficulty when as we have seen neither the legislatures nor the courts will specifically define the behaviors. While these branches recognize the policeman's need to exercise discretion, only certain discretionary behaviors are legitimate: those which expedite the legal process and limit the pressures on the courts are acceptable; those which effect questions of constitutionality and individual rights are not. The legal system's expectation is one of discretionary enforcement which alleviates categorical pressures on the courts, denying individualized application of the laws.

Servant and superior, the policeman is expected to consider the individual, to fulfill the demands of the public. As their legal inferior, the courts expect categorical enforcement of the laws by the police. The result is the communication to the police of a role definition which is both contradictory and ambiguous, exerting further influence on the exercise of discretion.

As the legal enforcement agent, the police are subject to a variety of pressures which serve to influence their exercise of discretion. Through training and internal control, the police force socializes the
officers to the organizational values. The element of danger in police work introduces the need to rely on labelling in enforcing the laws. Lacking a clear role definition from the public and the legal system, the police experience role conflict. In terms of Lemert's risk-taking, the police response has been to incorporate the most operable aspects of each role definition, in context of the other pressures under which they must perform. Where individualized application of the laws fulfills the demands of the organizational values and need to respond to danger, the policeman's discretion is exercised in those terms. Where the public demands conflict with the other interacting pressures, the policeman's decision is made in categorical terms. The result is an exercise of discretion shaped by the interacting influences of structural values, labelling and role conflict.

Because they must be enforced within this discretionary context of the policeman's role, the next question becomes, "Are these sexual behavior laws actually enforced?" It is impossible to determine enforcement rates with any accuracy since the data are so scarce. Arrests for violations of the four statutes we are dealing with are not tabulated individually. The Madison Police and the State of Wisconsin take their cue from the Uniform Crime Reports, and sexual offenses are classified as either "rape," "prostitution," or "other sexual offenses." This alone is an indication that the numbers of these four offenses are not very large. What we will attempt to do is to draw some inferences about rates of enforcement from what statistics are available.

Fosco (1951) provides this table on adultery arrests for 1948. Clearly the statistics are too old to tell us much about today's enforcement practices, but they are still of value.
TABLE 1

Arrests for Adultery, 1948
Police Department Reports

<table>
<thead>
<tr>
<th>Location</th>
<th>1948</th>
<th>1953</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baltimore</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Boston</td>
<td>262</td>
<td></td>
</tr>
<tr>
<td>Wilmington</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>Los Angeles</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Duluth</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

(Floscove 1951, p. 157)

The first Kinsey study was also published in 1948 (Sexual Behavior in the Human Male; Sexual Behavior in the Human Female was published in 1953) and suggests a rather different rate of activity from the arrest records.

TABLE 2

Per Cent of Sample Population Which Engages in the Following Sexual Behaviors (1948, 1953 publ.)

<table>
<thead>
<tr>
<th>Sexual Behavior</th>
<th>Male</th>
<th>Female</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extra-marital intercourse</td>
<td>50%*</td>
<td>26%*</td>
<td></td>
</tr>
<tr>
<td>(by age 40)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-marital intercourse</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(by education completed)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>College</td>
<td>67%</td>
<td>60%</td>
<td></td>
</tr>
<tr>
<td>High School</td>
<td>84%</td>
<td>47%</td>
<td></td>
</tr>
<tr>
<td>Grade School</td>
<td>98%</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>Marital Oral-Genital (male and female)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>College</td>
<td>60%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>High School</td>
<td>20%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grade School</td>
<td>11%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* These are accumulative incidence rates; they tell the number of respondents who have ever engaged in the behavior up to the time of the interview.
These statistics were among the data which prompted Kinsey to state:

All of these and still other types of sexual behavior are illicit activities, each performance of which is punishable under the law. The persons involved in these activities, taken as a whole, constitute more than 2% of the total male population. Only a relatively small proportion of the males who are sent to penal institutions for sex offenses have been involved in behavior which is materially different from the behavior of most males in the population. But it is the total 95% of the male population for which the judge, or board of public safety, or church, or civic group demands apprehension, arrest and conviction when they call for a clean-up of the sex offenders in the community. It is, in fine, a proposal that 5% of the population should support the other 95% in penal institutions. (Male, p. 393)

While it is not the case that each of the four behaviors we have chosen to deal with are illegal in every state (nor that Kinsey's statement refers to only those four behaviors) the data and interpretation suggest a prevalence of sexual offenses which, if the statutes were enforced, would require legal treatment of thousands of "normal," upstanding citizens, a majority of whom would be middle class, and thus, "caught" for violations of their own legal norms. Madison, Wisconsin's Police Department, at least in recent years, appears to have chosen not to enforce the statutes proscribing consensual adult behavior.

TABLE 3

Final Dispositions by the Madison Police Dept.

<table>
<thead>
<tr>
<th></th>
<th>1970</th>
<th>1971</th>
<th>1972</th>
</tr>
</thead>
<tbody>
<tr>
<td>fornication</td>
<td>0</td>
<td>0</td>
<td>2\textsuperscript{1}</td>
</tr>
<tr>
<td>adultery</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>perversion</td>
<td>0</td>
<td>2\textsuperscript{2}</td>
<td>2\textsuperscript{3}</td>
</tr>
<tr>
<td>cohabitation</td>
<td>\textsuperscript{4}</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

\textsuperscript{1} both a reduction from a rape charge
\textsuperscript{2} one reduced from rape; the other non-consensual in conjunction with rape
\textsuperscript{3} both non-consensual in conjunction with rape
\textsuperscript{4} two were in connection with prostitution charges
A study just now being completed by Professor John DeLamater of Sociology at the University of Wisconsin, shows the level of premarital sexual activity among undergraduate university students.

**TABLE 4**

**Lifetime Sexual Behavior**

<table>
<thead>
<tr>
<th>Behavior</th>
<th>Percentage who have ever engaged in it</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male oral contact with female genitals -- cunnilingus</td>
<td>Male (N=111) 49%</td>
</tr>
<tr>
<td></td>
<td>Female (N=124) 64%</td>
</tr>
<tr>
<td>Female oral contact with male genitals -- fellatio</td>
<td>Male (N=111) 53%</td>
</tr>
<tr>
<td></td>
<td>Female (N=124) 60%</td>
</tr>
<tr>
<td>Heterosexual intercourse</td>
<td>Male (N=111) 68%</td>
</tr>
<tr>
<td></td>
<td>Female (N=124) 63%</td>
</tr>
</tbody>
</table>

In addition, six females and seven males reported that they were living with a "lover" at the time of the interview, i.e., cohabiting.

Tables 3 and 4 demonstrate that while 50%–60% of these undergraduates have violated the sexual perversion statute at some point, over a three year period, Madison police processed only four cases under the statute and none of the four involved consenting partners. Likewise, some 63%–68% have violated the law against fornication; yet only two fornication dispositions are revealed, again neither involving consensual behaviors. Finally, about 5% of these undergraduates would meet the strictest definition of cohabiting (i.e., "setting up house"), yet there were only two prosecutions under the cohabitation statute for consensual behavior.

In contrast to the Madison data, are the following police data from Sheboygan, Wisconsin for the year 1967.
TABLE 5
Number of arrests in Sheboygan, 1967

<table>
<thead>
<tr>
<th>Offense</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adultery</td>
<td>35</td>
</tr>
<tr>
<td>Lewd and Lascivious Behavior</td>
<td>27</td>
</tr>
<tr>
<td>Fornication</td>
<td>11</td>
</tr>
<tr>
<td>Perversion</td>
<td>1</td>
</tr>
</tbody>
</table>

(Rhodes 1972, p. 130)

Thus there were a total of 74 arrests in one year in Sheboygan, compared to ten convictions over three years in Madison, under exactly the same statutes. Clearly, to compare the arrests for one year with the final dispositions for a different three-year period is not very systematic. However, the vast discrepancies in the totals in Tables 3 and 5 do suggest very different patterns of enforcement in the two areas.

It is fairly clear that full enforcement of these laws is not the case, and that selective enforcement is the rule. Selective enforcement is not necessarily inconsistent with other principles of fairness, so long as it is done fairly, uniformly, and based on rational criteria. We have no evidence to suggest that what enforcement there is of these laws is discriminatory rather than uniform. However, the type of law involved does lend itself to misuse in police operations.

LaFave (1965) documents the use of arrest to "harass" prostitutes, as well as insure regular check-ups for venereal disease. The arrest is not a "serious" one, i.e., not intended to move the offender through the whole legal system, but constitutes a discretionary enforcement technique for a visible but uncontrollable sort of offense.

As we have discussed, these sexual behaviors are particular low visibility offenses. Typically, due to manpower constraints and "priority lists," low visibility criminal behavior is the least likely
to be actually detected, reported, arrested or adjudicated. However, the discrepancy between Madison and Sheboygan's arrest rates for these offenses indicate that some areas do devote considerable energy to the detection of these offenders. The decision to utilize manpower in this way is a significant one for a department to make. The difficulty of detection multiples the cost to a department of enforcing these laws, and serves to divert police attention from more serious offenses, as well as important social services. (Kadish, 1967)

Another selective use of these statutes is evident from the Madison disposition data; these charges are often used as a reduction from greater, and frequently violent, sexual offenses. From the Table it is clear that Madison prosecuted only one couple out of the ten dispositions in the three-year period for the type of consensual behaviors we are interested in. It is not unusual for charges to be reduced to obtain convictions, especially charges for rape, since the statutory and case law make it very difficult to build a convincing case for forcible rape. This is the same relationship we discussed in regards to the use of fornication as a lesser included offense of adultery. Consequently, these statutes are enforced in terms of being chosen as the charge in those situations in which a greater crime has been committed but cannot be proved. This is an extremely functional aspect of selective enforcement, allowing a faster, more efficient processing of an offender through the system, and is consistent with the structural pressure for high clearance rates.

Requiring the police to find and prosecute low visibility behavior creates an opportunity for bribery and police corruption. The social stigma attached to homosexuality often opens up prominent citizens to blackmail to protect their reputations (Schur 1965).
Wisconsin has no recorded cases of extortion of public officials on the basis of their extra-marital activities, but it is not clear that it has never happened. Commenting on the dangerous abuses of the Wisconsin sex laws, Representative Lloyd Barbee of Milwaukee cited extortion as a particular abuse with this type of law. There is no reason to think that the price of silence for some individuals would be less for adultery than for homosexuality.

CONSEQUENCES FOR THE OFFENDER

The impact of these laws on the "actors" is also important to consider. As we have seen, they are rarely enforced, and so have no direct impact on specific violators who are not detected. However, this fact intensifies their effect on the individual who is detected and processed. The result is to exaggerate the selectivity of the enforcement and to emphasize the arbitrariness of the process. Uncertainty about the actuality of punishment undermines the ability of the law to deter behavior.

Much has been written about the effect of labelling an activity as "deviant" on those who engage in that activity. Perhaps the best known and most succinct statement of this labelling theory is that of Howard Becker:

"...social groups create deviance by making the rules whose infraction constitutes deviance, and applying these rules to particular people and labelling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an "offender." The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label." (Becker 1963, p. 9)
Labelling theory is appropriate to both formal and informal sanctions, since its emphasis is on the process of creating deviance through the dynamic of social interaction. Consequently, labelling through the legal system is only one aspect of this process.

It is important to clarify the precise meanings of the terms normal and deviant as they are used here. One meaning of "normal" is a purely statistical one — whatever the average number or behavior is, is the normal one. The extremes are the deviants. Kinsey's data can be used in this way: thus, the normal sexual behavior is that which is typically practiced. In many instances, those who do not violate these laws are the real deviants by this definition.

Another meaning of the term, particularly when dealing in religious and legal areas, is as an embodiment of religious and legal rules or standards. This, a consensus model approach, views norms as the rules written to preserve the common values important to the society; and in our situation, what is normal or more properly, normative behavior, is behavior which conforms to those rules. In many cases, this means that deviant becomes the equivalent of "sinful" as we can see has happened historically with the behaviors of concern here.

Where statistics on frequency of behavior are used in his discussion, the statistical meaning of the term normal is employed and should be noted as such. However, the bulk of the discussion concerning norms as embodiments of social values (whether of the whole group or actually an interest group) will employ the broader meaning.

If a couple is processed through the legal system for violation of one of these statutes, they have been formally sanctioned and effectively labelled. Our data on the prevalence of these activities allows the
conclusion that some, if not all, are not even deviant behaviors in the statistical sense of that term. To a large extent these laws codify the morals of a small group in the society. It is surely important to ask if the legal system should lend itself to labelling as felons or misdemeanants people who are doing nothing different from many of their neighbors.

Removal of legal sanction would not put an end to individuals being labelled as deviant for their sexual practices. The social or informal sanction would still be available to those who are adverse to this conduct. The force, or effectiveness of the label, would then be a much more realistic reflection of actual social norms. As Sutherland puts it, "When the mores are adequate, laws are unnecessary, when the mores are inadequate, the laws are ineffective." (Sutherland and Cressey 1955, p. 11)

It is possible that with unenforced laws like these, social stigma attaches even though legal stigma is never applied. Research into moral stigmatization of these sexual behaviors would be a useful project. Becker’s study of marijuana users indicates the significance of subcultures in maintaining and transmitting the deviance. Adultery, fornication and perversion are really solitary acts not particularly conducive to group support, although they might be so in “group sex” situations. It is conceivable, however, that an unmarried couple may find it necessary to limit their social contacts to others who either tolerate or also engage in pre-marital intercourse. Another issue for research would be the extent to which individuals self-label in committing these behaviors. There are no physical manifestations of their conduct to “give them away” to others (Goffman 1963) and force recognition of their deviance. But social and legal norms might force some individuals to adopt a self-image or life-style which accords their deviant status.
We see that there are widespread consequences of these laws. The implications for law enforcement are many. In addition to both procedural and substantive restrictions on the police's ability to detect violators, the low visibility and victimless nature of these behaviors create a need for police to exercise discretion in their decision to arrest.

Discretionary police enforcement is a function of a variety of demands and values brought to bear on the police, which can be explained by the use of three theoretical variables: the value structure of the community, the department, and the individual; the existence of role conflict; and the development of police "expertise" which leads to labelling. So long as discretionary or selective enforcement is uniformly and fairly applied, the inherent "evils" impose no real cost on the system. Actually, failure to enforce laws is extremely functional for the system insofar as it promotes speedy and efficient handling of those cases that do enter the system. However, the potential abuses of harassment and corruption create costs for the system which must also be considered.

These laws are consequential for the offenders as well. The social impact of legal sanction has been documented (Schwartz and Skolnick, 1960) and the specific sanction for a "morals offense" carries a high cost for the offender. On the other hand, our data evidence a high rate of participation in these violations and raise the question of what the criminal law's proper role is in the labelling of sexual offenses committed between consensual adults.

REFORM

With that in mind, in this last section, we consider the issue of reform in this area of the criminal law. Two questions must be considered:
1) What is the behavior to be controlled and what is the reason for controlling it?

2) If the behavior is to be controlled, how should society control it? Through legal or extra-legal means? The more desirable mechanism may be determined through an evaluation of its consequences.

THE BEHAVIOR AND REASONS

Davis (1961) emphasizes the interactive aspects of sexual behaviors in discussing law and why they are controlled. Because sexual activity requires intimate cooperation with individuals, there is tradable or exchangeable quality to sexual attractiveness. Competition for the desired object becomes extremely complicated, though, when that object is another person. The frequency of the activity, and its potential for creating socially disruptive situations motives a society to control sexual behavior and establish some norms for the regulation of acceptance to it. What the specific norms are is not so important as the fact that they exist.

Given these factors, and the intrinsic relationship of sexual behavior to reproduction, societies tend to link sexual controls to the marriage and the family. The procreative aspect of sexual intercourse made it a necessary object of control in early societies in which survival demanded a birth rate higher than the death rate. Control of sexual relations meant control over the continuance of the society; linking it to the potentially stable marriage relationship provided a concrete institution through which to control this vital force. (Davis, 1961)

We have seen various cultural norms which regulate sexual behavior and reflect a social value, whether shared by some or all, placed on the institution of the family. Arranged marriages in Hebrew and Greek cultures emphasized the economic significance of the family unit.
Uniting two families, rather than just two individuals, marriage meant a sharing of and benefitting from economic resources -- both material goods, and children, the courses of additional help and income to the family. The family role in passage of property from one generation to the next was protected by the prohibition of adultery, which "tended to introduce 'spurious' heirs into the family" and so divert the passage of wealth from the proper blood-line. Prohibitions of sexual perversions -- sodomy, fellatio, cunnilingus -- may have also resulted from the social need for childbirth, which could not occur with these non-procreative relationships.

The important role of the family unit moved some cultures to encourage early marriage: the legal age for marriage among the Hebrews was 13 for boys and 12 for girls; many parts of the Roman Empire passed laws which penalized bachelors. Another means of encouraging marriage is to proscribe all sexual activity which takes place outside of or in detriment to it. Thus prohibitions on pre-marital intercourse (fornication and cohabitation) or extra-marital intercourse (adultery) intended to encourage people to enter into and sustain marriage.

From these rather pragmatic beginnings, the sexual norms were gradually imbued with a moral tone of "ought" and "ought not." Both Hebrew and Christian norms derived support from religious doctrine on the appropriate roles for men and women in relation to God. Procreative sex was necessary; pleasurable sex was a diversion of energies from more "worthwhile" pursuits.

"'We Christians', said St. Justin in the second century, 'either marry only to produce children, or, we refuse to marry, are completely continent.'" (Lader 1986, p. 81)

As we have seen our current statutes which regulate sexual behavior were first put into the criminal law by the early Puritan colonists.
Frustrated by the inability of canon law and the Ecclesiastical Courts to control sexual behavior, the early Americans codified their religious norms into legal ones.

A combination of familial and religious values, laws regulating consensual sexual behavior are unique among criminal laws. They deal with an activity which is made legal, in fact it is still considered a duty, under some circumstances, but illegal under others. The critical circumstance is the legal relationship between the individuals involved. Unlike most criminal laws which proscribe a specific activity for all people, the laws on sexual behavior carve out role and status occupants who may not participate.

The historical origins of these laws indicate "legitimate structural reasons" for institutionalizing the control of sexual behaviors. To the extent what we wish to maintain the family unit in its traditional form, it is reasonable to regulate procreative sexual relations. However, many of the original justifications for these norms are no longer legitimate, or are at least open to challenge.

The economics of family size has changed considerably. No longer basically agrarian, the American economic system does not require the ready supply of cheap labor needed to run the farm. The value now placed on providing an education and opportunity for high standard of living for all citizens argues for much smaller families, to make it possible for society to meet the costs. Nor is maximum procreation necessary to the survival of the society; it is, in fact, coming to be seen as a destructive element in our country. Consequently, the legitimation of sexual relations purely on the basis of procreative need and desirability of large families is clearly questionable doctrine.
In addition, religious doctrine toward the pleasurable aspects of sexual relations has changed considerably. Sex for pleasure is seen as healthy, not sinful, to a large portion of Americans. One marriage manual, Sexual Harmony in Marriage by Butterfield (1955), used by Presbyterian clergy and typical of many gives the following advice:

"Any position is proper which permits full satisfaction for both parties. All parts of the body are proper for use if they can be made to contribute to the general goal without giving offense to the taste or feelings of either partner and if neither partner is harmed thereby." (Heimer 1969, p. 212)

The technological (if not legal) availability of contraceptive devices further removes the sexual act from its necessary relationship to reproduction. Adultery need not produce "spurious heirs," nor will fornication necessarily create children who then lack a proper family unit to grow in.

This removal of sexual intercourse from inevitable reproduction and the disappearance of the justification for maximum procreation require us to rethink the bases on which our current laws rest. If we take as axiomatic that our society wishes to preserve the family unit in its traditional form, then some form of control to channel procreation is necessary. The question is, what level of intervention by the criminal law is justified by the consequences of the behavior?

We have drawn a picture of these statutes as laws which are deeply rooted in religious norms, can be classified as victimless crimes, and are basically unenforceable and unenforced. These characteristics and the changes discussed above have led many people to suggest that these laws do not belong "on the books"; that it is an improper use of the criminal process to maintain them as criminal behaviors. In 1955, the American Law Institute (ALI) released the Tentative Draft of the Model Penal Code sections dealing with sexual offenses. Recommending
that all consensual sexual activity between adults be removed from the criminal code, the ALL Comments stated:

"The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control the morality of the actor. Apart from the question of constitutionality which might be raised against legislation avowedly commanding adherence to a particular religious or moral tenet, it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions." (Comments 207.1)

The "Final Report to the Governor of the Citizen's Study Committee on Offender Rehabilitation," written by a task force of Wisconsin citizens, made a similar recommendation for Wisconsin's consensual sexual behavior statutes:

"We recommend that the following crimes against sexual morality be eliminated with respect to consenting adults.
944.15 Adultery
944.16 Fornication
944.17 Sexual Perversion
944.20 Lewd and Lascivious Behavior
...the Study Committee recognizes that sexual behavior between consenting adults in private is more properly regarded as a matter of private morals." (3.07 Sexual Morality)

SUGGESTED FUNCTIONS OF WISCONSIN'S STATUTES: WHY THE LAWS ARE HARD TO REPEAL

There are several specific reasons why laws of this sort which deal with norms of morality are rarely repealed. Even if all the evidence suggests that the criminal law cannot and perhaps should not deal with private, consensual sexual relations, in order for these laws to be removed the state legislature must act. As Thurman Arnold so nicely put it, these laws "Are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals." (Kadish 1967)
Representative Barbee has introduced a package of bills into the Wisconsin State Assembly every session since 1967. This package is an effort to reform the Wisconsin Criminal Code's treatment of sexual offenses of all types, that is all the topics covered by Chapter 944. (The two most recent bills which Representative Barbee introduced into the 1973 legislative session are included in the Appendix). These bills would repeal the laws we are dealing with here, as well as clarify the rape statutes and repeal the laws against prostitution.

Barbee estimates it will take another decade before a reform package like his is passed into law. There is tremendous resistance to social change in this area. On the one hand, he takes the position that individual legislators, facing the prospects of re-election, are afraid to support a package like this because they will appear to favor weakening the state's "moral fiber" and to not uphold the "highest standards of morality and decency." In addition, as witnessed by the public hearings held in April, 1973, on the proposed reform of Wisconsin's abortion statute, the forces who favor repeal of these laws are very poorly organized and are not communicating that desire to their congressmen.

These comments suggest the relevance of the interest group theories of developing law to the process of reform as well as to initial enactment. Barbee would presumably subscribe to an elitist, or political power, model of the reform process. In addition, his comments indicate that the legislator's failure to move is partially a result of experiencing role conflict. Charged with representing their constituents, they may in fact settle on the vocal ones as the majority without seeking out the other viewpoint. Or in the case of these specific laws it may be that when a reform is proposed the legislator who
rejects it does so out of a self-defined impression of what the constitutes want without really knowing. On the other side, they each must make the best record they can for reelection, so rather than bring these issues to the voters, they avoid them as too emotionally controversial.

Barbee finds the current criminal code to be very inadequate in these sexual offense areas and feels that the most beneficial time to have reformed the statutes was at the revision stage in 1955. As noted earlier, Professor Remington was on the Legislative Council. To Remington, reform at that time was not a fundamental aspect of the Council's task. Nor was reform politically possible because of the power being exercised by the Bar committee. Remington agreed with Barbee, however, that it will be a long time before these statutes are repealed. These men differ though in the danger which they perceive is involved in keeping them on the statute books. Remington argues that the misuse arguments of selective enforcement are basically make-weight arguments insofar as they relate to the consensual behaviors. He further feels that most legislators agree with that position, and since the laws represent no hazard they see no need to repeal them. Barbee, commenting on all the sexual offenses (rape and prostitution included) finds the selectivity of enforcement and the potentials for abuse to be a serious problem, and argues the need to repeal or reform the laws.

Another argument against removing certain laws from the criminal statutes that is also suggested by Barbee's comments, is that removal of legal proscription is equivalent to giving social approval to the behaviors. That is, if criminalization of a behavior marks it with social disapproval, to "decriminalize" fornication, for example, would be
tantamount to encouraging and condoning it. This is a faulty argument form several perspectives in this context.

First, it assumes a "one to one" correspondence between social norms and legal norms which is, at least, quite questionable. As the interest group theories argue and the data may be said to support, the enactment of social norms into legal norms in this area really results from conflict between groups in the society. Secondly, with laws such as these which are so deeply rooted in religious beliefs, is there reason to believe that those whose beliefs accord with the existing legal proscriptions would suddenly change their social norms if legal sanctions were removed?

In an attempt to test the accuracy of this "declaratory argument" against removal, Walker and Argyle did a study to discover how people's moral judgments are affected by their knowledge or belief of the state of the law (Walker and Argyle, 1964). The first example was the crime of attempted suicide, which was removed from the British criminal code in 1961. Comparing those who knew of the change with those who did not, they found no significant difference in their attitudes toward the "morality" of the act in question. Similar results were found using the behaviors of public drunkenness, prostitution, and use of obscene language in public, among others. There is little evidence here to support the "declaratory argument" when applied to laws regulating "morality" much like those with which we are dealing.

"One point that may well be unique to the problem of deviate consensual sexual relations is that by far the most powerful sanction is that of social stigma. There is little or no evidence to suggest that the criminal law exerts a deterrent influence that would not be present even if there were no criminal proscription."

(Packer, p. 302)
On the other hand, Granfield, writing about abortion, takes the position that merely by being codified, while not perfectly obeyed, laws do hold down the number of violations.

"Statistics from other countries indicate that when abortion laws are expanded, there is, as expected, a drastic increase in the number of legal abortions and, surprisingly enough, a proportionate increase in the number of illegal abortions. Even limited legal justification of abortion helps develop a climate of opinion favorable to its increase. So too a restriction on abortion, though not strictly enforced, does tend to limit the amount of proscribed behavior." (Granfield 1967, p. 376)

Again, this comparison creates the problem of inferring people's attitudes toward abortion from their behavior. Since Granfield's data were not available, it is difficult to counter his inferences. What these two contrasting conclusions may indicate is that those in Granfield's data who took advantage of the liberalized abortion laws by obtaining legal abortions were kept from doing so before because of the legal sanction but not because of a normative aversion to the behavior. Thus, we have a law which deters conduct, but that conduct is not seen as "bad" from the actor's standpoint. In that case, the law exists to codify a norm which is no longer adhered to in the social mores.

The declaratory argument makes relevant Granfield's discussion of the symbolic functions of law. The symbolic value of maintaining these behaviors as crimes asserts the dominance of those segments of society which do subscribe to them. The laws against consensual sexual relations are symbolic of the concepts of morality held by traditional Christian Americans; they are clearly a much smaller percentage of the population now than they were when these laws were enacted. As with the enactment of the 18th Amendment, the value derived from having "your norms" enacted into law can be quite significant:
"Issues of moral reform are analyzed as one way through which a cultural group acts to preserve, defend, or enhance the dominance and prestige of its own style of living within the total society. In the set of religious, ethnic, and cultural communities that have made up American society, drinking (and abstinence) has been one of the significant consumption habits distinguishing one subculture from another." (Gusfield 1963, p. 3)

Often this prestige factor is sufficient to divert attention from the actuality of enforcement of the laws. As we have seen, the sexual behavior laws are rarely enforced, but still they are maintained against repeated efforts for repeal. Their existence is a symbolic victory for their adherents because

"Even if the law is not enforced or enforceable, the symbolic import of its passage is important to the reformer. It settles the controversies between those who represent clashing cultures. The public support of one conception of morality at the expense of another enhances the prestige and self-esteem of the victors and degrades the culture of the losers." (Gusfield 1963, p. 5)

There is another aspect of this failure to enforce that is quite interesting. Clearly, many Christian Americans, while maintaining the image of believing in the immorality of these behaviors, are themselves violators. The lack of enforcement is extremely functional for them in that it allows them to break the law without getting caught, yet still derive the prestige value of being a member of the cultural group whose norms dictate others observed behavior.

In addition to the symbolic functions these laws have for the "moral entrepreneurs" who champion them, their dual effect of defining areas of deviance, and allowing deviant behavior to exist in a group, can serve other quite functional purposes (Cohen 1966, Dentler and Erikson 1959). By establishing deviance in the areas of morals, these laws clarify the normative boundaries of the society. This "boundary-maintaining mechanism" (Dentler and Erikson 1959, p. 101)
emphasizes a cohesion among conforming group members, which in contrast to the deviants, give members a sense of distinctiveness and unity. This is functional in promoting group identity and stability.

Another aspect of the sexual deviant's functional role is something of a vindicating function. By maintaining laws against certain sexual behavior, the group maintains a definable "out group" on which to blame such things as the declining morality of the society. Thus, when the public outcry goes up to "clean up the streets," these laws can be used to bring in a few examples and allow the group to feel pure again. LaFave (1965) documents this function in his discussion of police use of the laws against prostitution.

CONSEQUENCES OF THE STATUTES: WHY THEY SHOULD BE REPEALED

The most obvious "consequences" of these statutes can be seen from their implications for enforcement. Essentially victimless crimes, these behaviors demand proactive detection techniques from the police. The extremely low visibility of the behaviors creates a situation in which, if the police are to enforce these statutes, they are especially likely to resort to "illegal" methods of detection. The Constitutional right of privacy is fairly well defined in this area. We have seen that the police are left with few, if any, techniques by which they can detect violators without doing violence to their Constitutional rights.

If, despite Constitutional limitations on enforcement, they began to fully enforce these laws, we would have quite another problem. The data (Tables 2 and 4) indicate the relevance here of Davis' observation about enforcement of the laws against prostitution:

"Although the service (prostitution) is illegitimate, the citizen cannot ordinarily be held guilty, for it is inadvisable
to punish a large portion of the populace for a crime, particularly one that has no political significance. Each such citizen participates in the basic activities of the society, in business, government, the home, the church etc. To disrupt all of these by throwing him in jail for mere vice would cause more social disruption and inefficiency than correcting the alleged crime would be worth."
(Davis 1961, p. 356)

As the Madison data (Table 3) show, the result of this enforcement dilemma is often a decision not to enforce these laws. This decision represents an exercise of departmental discretion in the allocation of scarce enforcement resources. Selective enforcement of laws is only "inconsistent with principles of fairness" if the basis for the selectivity are discriminatory or unfair. While we have no data to suggest that the Madison police enforce these laws according to discriminatory criteria, as we have discussed, the type of law is particularly vulnerable to use as a tool for harassment. Arbitrary and erratic enforcement techniques reflect poorly on the police, and tend to breed disrespect for both the statutes and the law enforcement agency. The cost to the legitimacy of legal authority can be significant.

These laws impose unusual costs on offenders as well. Facker (1968) has proposed four conditions which must be inherent to a behavior before legal sanction should legitimately be avilable to enforce its prohibition. Of these four, his second criterion is of particular importance to potential offenders:

"The law and its administration can be applied equally, so that all are weighed with the same scales and so that the human costs of enforcement are spread among the largest feasible numbers of offenders." (Facker 1968, p. 66)

The problems in enforcing these statutes creates the situation that when they are used it is against an extremely small percentage of actual offenders. Far from being applied equally, these laws fall
heavily on a few and miss the rest entirely. The result is to impose
the social stigma of a "morals offense" on a very few individuals,
who, according to our data, are doing much the same thing their
neighbors are. The effect is to exaggerate the "unfairness" of their
treatment, as well as to underline the tenuous and arbitrary relationship
in this area between violating the law and being punished for it.
Uncertainty about the application and form of punishment tends to
undermine the deterrent force of the criminal law.

There is a final point to be made here. Even if these statutes
were never enforced and presented no potential danger, there is a
point at which one must decide whether the symbolic importance of
the law outweighs one's aesthetic sense of what the criminal code should
include. Cluttering up the criminal code with laws such as these which
cannot be enforced creates a picture of a heterogeneous society which
simply does not exist. Rather than enacting laws for their symbolic
value and then ignoring them, I prefer the alternate approach, a
criminal code which embodies

"...policies that accommodate society to the widest possible
diversity of behaviors and attitudes, rather than forcing
as many individuals as possible to 'adjust' to supposedly
common societal standards." (Schur 1973, p. 154)

Our argument against use of the criminal law to control sexual
behavior also emphasizes the interest group theories' point about the
lack of real correlation between social and legal norms. Devlin's
own definition, that "immorality then, for the purpose of the law,
is what every right minded person is presumed to consider to be immoral"
(Devlin 1965, p. 15) is a statement that rests its validity on the
consensus model, a theory that seems inappropriate to these laws.

Restricting use of criminal sanctions to the "harm to others"
standard, as Hill argues, rather than the harm to social mores approach
of Devlin, has, then the following benefits. First, it forces the law to specify precisely what secular harm is done, and what secular values are protected by codifying the proscription. This avoids the use of the law to perpetuate one group's notions of "sin" and "indecency" over another's, as well as getting the criminal code out of the business of "labelling" as deviant what is in fact statistically "normal" behavior. Secondly, it demystifies legal sanction by encouraging secular analysis along cost-benefit lines rather than the often obscure reaches of religious proscription. For along with the functions there are dysfunctions to this use of the criminal law as well. Rigid adherence to a definition of deviance which has become a statistically normal behavior is to ignore a "warning signal" that something is wrong with the value structure, that there is a serious disjuncture in values and behaviors. (Cohen 1966). One result of this is the fragmentation of the group. Another is the loss of authority for the normative standards of the elite and a consequent loss of cohesion and stability. It is necessary, alway, to sustain the legitimacy of the control mechanism in order to maintain and support social order. This enables a society to allocate its enforcement resources where they can be most efficient and effective, rather than diluting, diverting, and making nearly impossible attempts to regulate conduct.

"We know that mechanisms of social control are required in all societies. The problem remains of determining whether or when a particular type of control mechanism we choose to call "legal" is necessary." (Schur 1968, p. 72)

This is the ultimate question that must be answered in regards to control of morality, and particularly for our purposes, these sexual behaviors. We have seen that jurisprudential thought differs as to the appropriate domain of law. Sociological perspectives differ as
well, as is evident from the contrasting positions of the consensus theorists and the interest group theorists. To the extent our data allows, we have tried to point out throughout this discussion the applicability of either a consensus (functional) model of law or an interest group theory. The laws regulating consensual sexual behavior are a result of select groups' religious and economic interests in protecting and preserving the family and regulating access to sexual relations. It seems true today that they are representative of the behavior of a minority of citizens, and perhaps their attitudes as well. They serve a symbolic purpose for some, but at the same time encourage hypocrisy in individual's personal relationships with the law. The difficulties of detecting the behaviors -- legal restrictions, lack of a victim, low visibility -- as well as the discretion exercised in resource allocation decisions, leaves these laws essentially unenforced and unenforceable.

Before assuming that legal control is necessary, we must first consider whether or not other control mechanisms cannot perform the appropriate function. Sexual morality is, to a large extent, a peculiarly individual thing. Yet it has important consequences for society and so is a social issue as well. It is within a society's "rights" to express disapproval of conduct with affects it. However, the form that disapproval takes is a separate question.

The patterned evasion of these legal norms indicates that individuals are defining their own moral standards despite the existence of these laws. Knowledge that violation is high belies the image of a "moral society" which some feel these laws provide. Socialization and education are two methods of non-legislative control that may be appropriate in this area. They have the advantage of allowing the
real heterogeneity of opinion on these issues to exist in this society on a visible level. Since legal controls are not actually used, it falls now to informal social controls to regulate sexual behavior.

It is the author's position that reform is much needed in this area. The values to be protected need to be reevaluated; the means chosen to protect them are arguable not the proper ones. But most important is the culture's definition of the proper scope of its criminal law. Clearly it is not necessary nor always useful to lend legal sanction to everything that is normatively proscribed. The efficiency and utility of the criminal process will be promoted by a selective codification of norms into punishable violations. In the words of the Wolfenden Report, in its recommendation that homosexuality between consenting adults be removed from the British criminal code:

"Unless a deliberate attempt is to be made by society, acting through the agency of law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." (p. 9-10)
1. The Wisconsin Constitution and Statutes were chosen for a very practical reason -- I live in Wisconsin and am currently completing a law degree at the University of Wisconsin. Consequently, these are the laws I know best and for which I have the best access to information.

2. The element of "knowledge" is extremely important to the criminality of behavior. Unlike areas such as consumer law in which it is possible to violate a regulation without being aware of it under the doctrine of strict liability, intent is still a requirement for most criminal penalties.

Two legal definitions of intent are worth noting. 1) Scienter is defined as "knowingly violating the regulation" Boyce Motor Lines vs. US 342 US 337 (1952). Thus it is necessary for the accused to have 1) intended to do the act, and 2) known that it was illegal.

2) Mens rea means criminal intent or "dirty mind." It includes the mental states of "purpose, knowledge, belief, recklessness, or negligence" (Moline Penal Code, Proposed Official Draft, Sec. 2.04, 1962). Under this doctrine, ignorance of an mistake as to law does not negate the necessary intent, (State vs. Woods, 107 Vt. 354, 1925); but ignorance or mistake as to fact may act as a defense if it functions to negate the element of intent to violate. (People vs. Weiss, 276 NY 384, 1938). Thus the knowledge that the act is illegal may be inferred from the fact of having committed it. Consequently, the source of the mistake (fact or law) makes a difference in the existence of intent under the doctrine of mens rea. Except for this refinement, the two terms have the same definition and are used interchangeably.

3. Wisconsin has a separate statute, 944.15, to deal with fornication. By tracing this statute back through its first codification in 1849, we see that for many years there was a companion statute which forbade the crime of "seduction." This law was an effort to punish a single man who induced a woman to have intercourse with him by promising to marry her, or to punish a married or single man who had intercourse with a single woman of "previous chaste character," presumably to protect female virginity. The first phrase, which decried the deception of the female, was maintained as a misdemeanor until 1955 when it was made part of 944.02 in the statutes in the revision. The second section of the statute had several additions through the years, proscribing abduction of children, carnal knowledge of a female idiot, detention in a house of ill fame, etc. The core offense became our current statute 944.02, statutory rape (sexual intercourse with one who is incapable of consenting through stupor, mental deficiency and the like); other of the behaviors covered are now under 944.11 (indecent liberties with a child), 944.12 (enticing a child for immoral purposes), and 944.30-944.35 (prostitution).
Burns Ind. Stat. Ch. 169, Sec. 10-4221:

"Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution, shall be deemed guilty of sodomy, and conviction shall be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1000) to which may be added imprisonment in the state prison not less than two (2) years nor more than fourteen (14) years."

It is important to note that when a policeman suspects a crime may be occurring or has occurred in an automobile, they have the authority to stop and search the vehicle if there is reason to believe that a delay in order to get a warrant would mean a loss of the opportunity. Young people often "park" and sexual intercourse often takes place in cars. The policeman who "happens upon" such a situation may or may not decide to arrest, but the enforcement approach here is proactive, yet extremely uncostly both financially and in terms of legality of techniques.

These three functions were taken from the training manual used by the Madison Police Department in 1969, as reported by Police Inspector Herman Thomas.

The sale of contraceptive devices to unmarried couples is still illegal in Wisconsin:

450:11 Advertising or display of indecent articles, sale in certain cases prohibited

1) As used in this chapter, the term "indecent articles" means any drug, medicine, mixture, preparation, instrument, article or device of whatsoever nature used or intende or represented to be used to procure a miscarriage or prevent pregnancy.

2) No person, firm or corporation shall publish, distribute or circulate any circular, card, advertisement or notice of any kind offering or advertising any indecent article for sale, nor shall exhibit or display any indecent article to the public.

3) No person, firm or corporation shall manufacture, purchase, or rent, or have in his or its possession or under his or its control, any slot machine, or other mechanism or means so designed and constructed as to contain and hold indecent articles and to release the same upon the deposit therein of a coin or other thing of value.

4) No person, firm or corporation shall sell or dispose of or attempt or offer to sell or dispose of any indecent articles to or for any unmarried person; and no sale in any case of any indecent articles shall be made except by a pharmacist registered under the provisions of ch. 151 or a physician or surgeon duly licensed under the laws of this state.

5) Any person, firm or corporation violating any provision of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $500 or by imprisonment in the county jail for not to exceed 6 months, or by both such fine and imprisonment.
"Sexual Crimes Between Adults With Consent"

944.15 Fornication

1971 "Whoever has sexual intercourse with a person not his spouse may be fined not more than $200 or imprisoned not more than 6 months or both.

Revised Statute
1849 Ch. 139 of Offenses Against Chastity, Morality and Decency
Sec. 5 If any man shall commit fornication with any single woman, each of them shall be punished by imprisonment in the jail, not more than thirty days, or by fine not exceeding thirty dollars.

Sec. 6 Any unmarried man, who, under promise of marriage, or any married man, who shall seduce and have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in a state prison, not exceeding five years, or by imprisonment in a county jail not exceeding one year; but no conviction shall be had under the provisions of this section on the testimony of the female seduced, unsupported by other evidence, nor unless indictment shall be found within two years after the commission of the offense: Provided, that the subsequent intermarriage of the partner may be plea in bar of a conviction.

R.S.1858 drop sec. 5 from 1849 from ch. 170; put in ch. 183 "Of Offenses Cognizable by Justice of the Peace"

Sec. 6 of 1849 preserved verbatim as sec. 5 of 1858.
R.S.1878 Sec. 4580 Any man who commits fornication with a single
woman, each of them shall be punished by imprisonment in
the county jail not more than six months, or by fine not
exceeding one hundred dollars.

Sec. 4581 ...shall be punished by imprisonment in the
state prison not more than five years, nor less than
one year, or by imprisonment in the county jail not more
than one year;...nor unless the indictment or information
for the same shall be found or presented within two years
after the commission of the offense, provided...

Annotated Sec. 4580 Sentence from 1878 same; but add to it:
In case any man shall commit fornication with a female
of previous chaste character under the age of fifteen years,
he shall, upon conviction there of, be punished by imprison-
ment in the state prison not more than four years, or by a
find not exceeding five hundred dollars, or both, in the
discretion of the court.

Sec. 4581 verbatim from 1878 seduction under promise
of marriage
Sec. 4581a abduction of female child for purpose of
prostitution, seduction, etc.
Sec. 4581b enticing, abducting, etc. a chaste woman for
unlawful purposes 5-15 years
Sec. 4581c same, as to other women 1-5 years
Sec. 4581d detention of woman in house of ill-fame
Sec. 4581e carnal knowledge of female idiot
Statutes Sec. 4580  Fornication
1898
G. 186
$ 4580
$ 4581

Any man who commits fornication with a sane single female
over the age of fourteen years, each of them shall be
punished by imprisonment in the county jail not more than
six months or by fine not exceeding one hundred dollars.
Any man who commits fornication with a sane female of
previous chaste character under the age of fourteen years
shall be punished by imprisonment in the state prison not
more than four years or by fine not exceeding five hundred
dollars, or by both fine and imprisonment. Any man who
commits fornication with any female who is idiotic, insane,
or imbecile shall be punished by imprisonment in the state
prison not more than fifteen years nor less than five years.

Sec. 4581  Seduction: same as 1878

L. 1899  Sec. 4580  second sentence becomes "under the age of 18
years."

Supplement Sec. 4580  same as amended in 1899
1906
C. 186
$ 4580

L. 1907  Sec. 4580  add at end of 1st sentence -- "or by both such
C. 653  fine and imprisonment."

St. 1925  Sec. 351.05  Sane single females; intercourse; ruin:
C. 351
$ 351.05
$ 351.07

Any man who commits fornication with a sane single female
over the age of 16 years, each of them shall be punished
by imprisonment in the county jail not more than six months
or by fine not exceeding one hundred dollars, or by both
such fine and imprisonment. Any man who commits fornication
with a sane female of previous chaste character under the
age of 21 years shall be punished by imprisonment in the
state prison not more than four years or by fine not exceeding
two hundred dollars, or both fine and imprisonment.
Sec. 351.07 Seduction: same as sec. 4581 from 1878
St. 1955 944.15 same as 1971

944.16 Adultery

1971 Either of the following may be fined not more than $1000
or imprisonment not more than 3 years or both:
(1) A married person who has sexual intercourse with a
person not his spouse; or
(2) A person who has sexual intercourse with a person
who is married to another.
R.S.1849 Sec. 1 Every person who shall commit the crime of adultery
§ 1 shall be punished by imprisonment in the state prison not
more than two years, nor less than six months, or by fine
not exceeding three hundred dollars, nor less than seventy
dollars, and when the crime is committed between a married
woman and a man who is unmarried the man shall be deemed
guilty of adultery, and be liable to the same punishment.
R.S.1858 Sec. 1 verbatim as 1849 Sec. 1
C. 170
§ 1

R.S.1878 Sec. 4576 ...in the state prison, not more than three
C. 186
§ 4576 years, nor less than one year, or by fine not exceeding
one thousand dollars, nor less than two hundred dollars...
both shall be deemed guilty of adultery, and each shall
be punished therefor.
St.1898 Sec. 4576 Adultery, same as 1878
C.186
§ 4576
St.1925 351.01 Adultery same as 1878
C. 351

St.1955 944.16 Adultery same as 1971

944.17 Sexual Perversion

1971 Whoever does either of the following may be fined not
more than $500 or imprisoned not more than 5 years or both:
(1) Commits abnormal act of sexual gratification involving
the sex organ of one person and the mouth or anus
of another; or
(2) Commits an act of sexual gratification involving
his sex organ and the sex organ, mouth or anus of
an animal.

R.S.1847 Sec. 15 Every person who shall commit sodomy, or the
C. 139
§ 15 crime against nature, either with mankind or any beast,
shall be punished by imprisonment in the state prison, not
more than five years no less than one year.

R.S.1858 Sec. 15 verbatim from 1849, except work "any" preceding
C.170
§ 15 "beast" is omitted

R.S.1878 Sec. 4591 verbatim except work "either" is omitted
C.186
§ 4591

St.1898 Sec. 4591 Sodomy: first sentence same as 1878; add to
C. 186
§ 4591 it: said crime may be committed by the penetration of the
mouth of any human being by the organ of any male person
as well as by the penetration of the rectum, proof of
emission shall not be required.

St.1925 351.40 Sodomy -- same as 1898

St.1955 944.17 Sexual Perversion same as 1971
Lewd and Lascivious Behavior

1971 Whoever does any of the following may be fined not more than $500 or imprisoned not more than one year in county jail or both:

(1) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes a sex organ; or

(3) Openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse.

R.S.1849 Sec 4 If a man and woman, not being married to each other shall lewdly and lasciviously cohabit and associate together or if any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behavior, every such person shall be punished by fine, not exceeding three hundred dollars, nor less than seventy dollars.

R.S.1858 Sec. 4 verbatim from 1849 Sec. 4
C. 170 § 4

L.1859 lewd and indecent exposure $5-50 fine, 1-6 weeks imprisonment
C. 136 § 1

R.S.1878 Sec. 4579 Any man and woman...every such person shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding five hundred dollars, nor less than one hundred dollars.

Sec. 4588 Any person who shall publicly expose his or her person in an obscene or indecent manner, shall be punished by fine not exceeding one hundred dollars.
American Law Institute
Model Penal Code
Tentative Draft (1955)

Article 207  Sexual Offenses

207.1  Illicit Cohabitation or Intercourse

A person who cohabits or has sexual intercourse with a person of the opposite sex other his spouse commits a misdemeanor if:

(a) the behavior is open and notorious; or

(b) the couple are adoptive parent and child or are related by affinity in a degree that would make the relationship incestuous under 207.3 if they were blood relatives.

Cohabitation means to live together under the representation or appearance of being married.

Advisory Committee approved this section; the Council of the Institute voted to delete it, removing adultery and fornication from the criminal code entirely.

207.5  Sodomy and Related Offenses

(1) Deviate sexual intercourse by force or its equivalent.

A person who causes another to carry out or submit to an act of deviate sexual intercourse commits a felony of the second degree if:
a) the victim is compelled to participate by force or violence, or out of fear that death or serious physical injury or extreme pain is about to be inflicted on him or a member of his family, or be a threat to commit any felony in the first degree; or

b) for the purpose of preventing the victim from resisting, the actor administers or employs without the victim's knowledge or consent, drugs, intoxicants, or other substance or force resulting in a major deficiency of or in any power to make judgments or control behavior; or

c) the victim is unconscious or physically powerless to resist; or

d) the victim is less than 10 years old (whether or not the actor is aware of that)

2) Gross Imposition. A person who causes another to carry out or submit to an act of deviate sexual intercourse in situations not covered by subsection (1) commits a felony of the 3rd degree if:

a) the victim is compelled to participate by any intimidation (which would prevent resistance by a person of ordinary resolution) (reasonably calculated to prevent resistance); or

b) the actor knows that the victim's submission is due to substantially complete incapacity to appraise or control his own behavior, but this paragraph shall not apply where a victim over 18 years of age loses that capacity as a result of voluntary use of drugs (or intoxicants) in the company of the actor; or
c) the victim submits because he is unaware that a sexual act is being committed upon him; or
d) the victim is less than 18 years old, and the actor is at least 5 years older than the victim, but it shall be a defense under this paragraph if the actor proves the victim had previously engaged promiscuously in deviate sexual intercourse.

3) Minor Wards and Persons in Custody

4) Consensual Sodomy; Public Solicitation. A person who engages in an act of deviate sexual intercourse or who in any public place solicits another with whom he had no previous acquaintance to engage in deviate sexual intercourse commits a misdemeanor.

5) Deviate Sexual Intercourse means penetration by the male sex organ into any opening of the body of a human being or animal, other than carnal knowledge within Sec. 207.4 (Rape), and any sexual penetration of the vulva or anus of a female by another female or by an animal.

Sec. 1.05 (2) felony -- over one year
(3) misdemeanor -- over 3 months but less than one year
1973 ASSEMBLY BILL 208

January 23 — Introduced by Representative BARBEE. Referred to Committee on Judiciary.

AN ACT to repeal 944.15 to 944.17 and 944.30 to 944.35; and to amend 165.60, 343.06 (11) and 343.30 (2d) of the statutes, relating to repealing of criminal penalties for prostitution and other consensual sex acts.

Analysis by the Legislative Reference Bureau

This bill repeals the criminal penalties for prostitution, keeping a house of prostitution, and for other consensual sex acts.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 165.60 of the statutes is amended to read:

165.60 LAW ENFORCEMENT. The division of criminal investigation is authorized to enforce s. 66.054 and chs. 139 and 176, ss. 944.30, 944.31, 944.33, 944.34, 945.02 (2), 945.03 and 945.04 and shall be invested with the powers conferred by law upon sheriffs and municipal police officers in the performance of such duties. Nothing herein shall deprive or relieve sheriffs, constables and other local police officers of the power and duty to enforce said sections, and such officers shall likewise enforce said sections.
SECTION 2. 343.06 (11) of the statutes is amended to read:

343.06 (11) To any person who has been convicted of any offense specified under ss. 944.01, 944.02, 944.10 (2) and (3), 944.11 and 944.12 and 944.17 or adjudged delinquent under ch. 48 for a like or similar offense, when the sentencing court makes a finding that issuance of a license will be inimical to the public safety and welfare. Such prohibition against issuance of a license to said offenders shall apply forthwith upon receipt of a record of such conviction and such court finding by the administrator, for a period of one year or until discharge from any jail or prison sentence or any period of probation or parole with respect to the offenses specified, whichever date is the later. Receipt by such offender of a certificate of discharge from the department of health and social services or other responsible supervising agency shall, after one year has elapsed since said prohibition began, entitle the holder thereof to apply for an operator's license. Such applicant may be required to present his certificate of discharge to the administrator if the latter deems it necessary.

SECTION 3. 343.30 (2d) of the statutes is amended to read:

343.30 (2d) A court may suspend or revoke a person's operating privilege upon conviction of any offense specified under ss. 944.01, 944.02, 944.10 (2) and (3), 944.11 and 944.12 and 944.17, when the court finds that it is inimical to the public safety and welfare for the offender to have operating privileges. The suspension or revocation shall be for one year or until discharge from prison or jail sentence or probation or parole with respect to the
1. offenses specified, whichever date is later. Receipt of a certificate of discharge from the department of health and social services or other responsible supervising agency shall, after one year has elapsed since such suspension or revocation, entitle the holder thereof to reinstatement of his operating privileges. He may be required to present such certificate to the administrator if the latter deems necessary.

SECTION 4. 944.15 to 944.17 of the statutes are repealed.

SECTION 5. 944.30 to 944.35 of the statutes are repealed.

(End)
AN ACT to repeal 944.10 (1), 944.15, 944.16, 944.20 (3), 944.30, 944.31, 944.34 and 944.35; to renumber 944.10 (2) and (3) and 944.17; to amend 165.60; 944.10 (1), as renumbered; 944.11 (1), (2) and (3), 944.12; and 944.13 (intro.), as renumbered; and to create 944.005 of the statutes, relating to reducing the age of consent to 14 and abolishing criminal sanctions against certain consensual sexual acts.

Analysis by the Legislative Reference Bureau

This bill eliminates all criminal sanctions against sexual acts between consenting adults, and lowers the age of consent to 14 years of age. The age of consent in Wisconsin is presently 18.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 165.60 of the statutes is amended to read:

165.60 LAW ENFORCEMENT. The division of criminal investigation is authorized to enforce s. 66.054 and chs. 139 and 176, ss. 944.30, 944.31, 944.33, 944.34, 945.02 (2), 945.03 and 945.04 and shall be invested with the powers conferred by law upon sheriffs and municipal police officers in the performance of such duties.
Nothing herein shall deprive or relieve sheriffs, constables and
other local police officers of the power and duty to enforce said
sections, and such officers shall likewise enforce said sections.

SECTION 2. 944.005 of the statutes is created to read:

944.005 PRIVACY OF SEXUAL ACTS. All sexual acts between
consenting parties are private and are not subject to the criminal
laws of this state. However, no person under the age of 14 years
shall be deemed to consent to any sexual act.

SECTION 3. 944.10 (1) of the statutes is repealed.

SECTION 4. 944.10 (2) and (3) of the statutes are renumbered
944.10 (1) and (2), respectively, and 944.10 (1), as renumbered, is
amended to read:

944.10 (1) If the female is under the age of 16 14, and the
male is 18 years of age or over, imprisoned not more than 15 years;
or

SECTION 5. 944.11 (1), (2) and (3) and 944.12 of the statutes
are amended to read:

944.11 (1) Any male who takes indecent liberties with a female
under the age of 16 14; or

(2) Whoever takes indecent liberties with the privates of any
person under the age of 16 14; or

(3) Whoever consents to the indecent use of his own privates
by any person under the age of 16 14.

944.12 Any person 18 years of age or over, who, with intent
to commit a crime against sexual morality, persuades or entices any
child under 18 14 years of age into any vehicle, building, room or
1 secluded place may be imprisoned not more than 10 years.

2 SECTION 6. 944.15 and 944.16 of the statutes are repealed.

3 SECTION 7. 944.17 of the statutes is renumbered 944.13 and

4 944.13 (intro.), as renumbered, is amended to read:

5 944.13 SEXUAL PERVISION. (intro.) Whoever does either of

6 the following with a person under the age of 14 may be fined not

7 more than $500 or imprisoned not more than 5 years or both:

8 SECTION 8. 944.20 (3) of the statutes is repealed.

9 SECTION 9. 944.30 and 944.31 of the statutes are repealed.

10 SECTION 10. 944.34 and 944.35 of the statutes are repealed.

11 SECTION 11. CROSS REFERENCES. In the sections listed in

12 column A below, the cross references to the sections in column B are

13 changed to the cross references shown in column C:

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