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Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence

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Table of Contents

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> It seems to me that the sexual perversions have come under a very special ban, which insinuates itself into the theory, and interferes even with scientific judgment on the subject. It seems as if no one could forget, not merely that they are detestable, but that they are also something monstrous and terrifying; as if they had exerted a seductive influence; as if at bottom a secret envy of those who enjoy them had to be strangled.[1]

Once upon a time, sodomy, sometimes going under the alias "the abominable and detestable crime against nature," was a simple, if somewhat generously endowed, matter in almost every state in the United States.[2] Today, the proscriptions against sodomy have lost potency, direction, and simplicity. The purpose of the morality tale related in this Article is to better understand the realities of modern criminal sodomy. I will tell this tale through the eyes, so to speak, of a single jurisdiction to allow for a closer examination of the forces shaping modern criminal sodomy, as well as for the clarity of purpose and direction that concentration on one (representative) jurisdiction might bring to the study of this area. I have chosen to focus on Oklahoma because Oklahoma is rich with materials in this area of the law and because I believe it clearly evidences the direction that might well be taken by jurisdictions that still proscribe such conduct without regard to consent.[3] While this tale focuses on Oklahoma, it contains a moral for all

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1. SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHO-ANALYSIS 282 (Joan Riviere trans., 1963) (orig. pub. 1920).

2. Until 1961 every state proscribed sodomy in one form or another. Thirteen states regulated what they termed "sodomy": Alabama, Georgia, Hawaii, Indiana, Iowa, Maryland, Minnesota, Nebraska, New Mexico, North Dakota, Pennsylvania, Texas, and Washington. Nineteen states regulated the "crime against nature": Arizona, Colorado, Delaware, Florida, Idaho, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Virginia, and West Virginia. Another six states, whose legislators were apparently unable to make up their minds, used a combination of both terms: Alaska, California, New Jersey, New York, Oregon, and Wyoming. South Carolina regulated "buggery" while Kentucky and Arkansas regulated a combination of "sodomy" and "buggery". The remaining states—Connecticut, Massachusetts, Mississippi, New Hampshire, Ohio, Utah, Wisconsin and Vermont—preferred more individual designations for the deviant sexual activity each proscribed. Irv S. Goodman, *The Bedroom Should Not Be Within the Province of the Law*, 4 CAL. W. L. REV. 115, 116 (1968). In 1961, Illinois became the first state to decriminalize consensual sodomy. *See* Act of July 28, 1961, arts. 11-2 to -3, 1961 Ill. Laws 1983, 2006 (criminalizing sodomy only if performed or required under "force or threat of force"); *see also* MODEL PENAL CODE § 213.2 & cmt. at 373 (1980) (excluding criminal penalties for consensual sodomy). The history of sodomy is beyond the scope of this Article. For a fuller exposition of the history of sodomy, see, for example, Janet E. Halley, *Misreading Sodomy: A Critique of the Classification of "Homosexuals" in Federal Equal Protection Law*, *in* BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 351 (Julia Epstein & Kristina Straub eds., 1991), and Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1081-87 (1988).

3. Currently, twenty five states and the District of Columbia arguably continue to proscribe "sodomy" in one form or another. *See* ALA. CODE § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN. §§ 13-1411 to 13-1412 (1989); ARK. CODE ANN. § 5-14-122 (Michie 1987); D.C. CODE ANN. § 22-3502 (1989); FLA. STAT. ANN. § 800.02 (West 1992); GA. CODE ANN. § 16-6-2 (Michie 1992); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. §§ 510.070-.100 (Michie/Bobbs-Merrill 1990) (proscribing sodomy except, as applied to consensual homosexual activity, has been held to violate Kentucky Constitution's right to privacy by State v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992)); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. CODE ANN. art. 27, §§ 553-54 (1957); MASS. GEN. LAWS ANN. ch. 272, §§ 34-35 (West 1990) (criminalizing unnatural and lascivious acts except, as applied to private consensual adult behavior, has been held unconstitutional by Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass.

states that continue to incorporate within their criminal codes the ancient religious divisions between different types of sexual activity.

This tale focuses on the quiet transformation of consensual sodomy from a crime of moral deviance or mental disease to one of coercion, and on sodomy's merger into the traditional crime of rape. Sodomy's transformation has been accomplished in the manner of a seventeenth century English comedy of manners, full of disguises and double entendres. In that manner, and with much coquetry and protestations to the contrary, the Oklahoma Court of Criminal Appeals[4] and the Oklahoma Legislature have increasingly focused on coercive sexual activities, while insisting that morality is still a prominent component underlying the proscription of certain sexual acts, and that, to the extent morality has been displaced, the brazen federal courts and their immoral privacy jurisprudence have forced them to focus on the coercive elements of sodomy. Judge and lawmaker have cloaked the regulation of adult consensual sexual conduct with rules crafted for the control of coercive physical attacks by males (mostly) on females and children. It is the government's need to play this type of sexually charged parlor game that this Article will examine.

Part I briefly sets the stage by describing the notion of sodomy in the criminal law as a crime used as a catch-all proscription of violations of religious sexual conduct taboos. Part II begins the focus on Oklahoma and scrutinizes the Oklahoma judiciary's nearly century-long struggle to give content to classical sodomy as the "detestable and abominable crime against nature, committed with mankind or with a beast."[5] First tracing the genesis of the classical definition of sodomy, Part II then explores the manner in which the courts have transformed classical sodomy, perhaps out of

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1974)); MICH. COMP. LAWS ANN. §§ 750.158, 750.338-.338(b) (West 1991); MINN. STAT. ANN. § 609.293 (1992); MISS. CODE ANN. § 97-29-59 (1972); MO. REV. STAT. § 566.060 (Supp. 1992); MONT. CODE ANN. § 45-5-505 (1991); NEV. REV. STAT. § 201.190 (1991); N.C. GEN. STAT. § 14-177 (1992); OKLA. STAT. tit. 21, § 886 (Supp. 1992); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-13-510 (1991); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (West 1989) (criminalizing private sexual relations between consenting adults of the same sex except, when compelling government objective that justifies intrusion into homosexuals' private lives is absent, held unconstitutional by Morales v. State, 826 S.W.2d 201, 204 (Tex. Ct. App. 1992)); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (Michie 1988).

4. The Court of Criminal Appeals was established by the Oklahoma Constitution and has exclusive appellate jurisdiction in criminal cases. OKLA. CONST. art. VII, § 1; OKLA. STAT. tit. 20, § 40 (1991). Prior to 1959, the Court of Criminal Appeals was known as the Criminal Court of Appeals. In 1987, the state was divided into five Court of Criminal Appeals districts (prior to that time the state had been divided into three districts), with one judge of the Court of Criminal Appeals elected from each district. OKLA. STAT. tit. 20, § 33 (1991). Each judge serves a six year term. *Id.* § 35. Since 1968 the Governor has filled vacancies in the judiciary by appointment, choosing from a list of three candidates submitted by a Judicial Nominating Commission. OKLA. CONST. art. VII-B, § 4. Each judge of the Court of Criminal Appeals is required to seek reelection on a state-wide non-partisan retention ballot. OKLA. CONST. art. VII, § 3; OKLA. CONST. art. VII-B, § 5; OKLA. STAT. tit. 20, § 33 (1991); OKLA. STAT. tit. 26, §§ 11-101 to -108 (1991). If a judge is not reelected, the result is a vacancy, which is filled by the Governor. OKLA. CONST. art. VII, § 3; OKLA. CONST. art. VII-B, § 4; OKLA. STAT. tit. 20, § 33 (1991).

5. OKLA. STAT. tit. 21, § 886 (Supp. 1992).

existence, in the last quarter of the twentieth century. Part III analyzes the transformation of the underlying basis of sodomy jurisprudence over the last century. Implementing a perceived mandate first to preserve morals and thereafter to prevent the spread of mentally diseased conduct, the courts substantially enlarged the breadth of the types of sexual conduct that constituted classical sodomy during the period from Oklahoma's statehood through the third quarter of the twentieth century. Thereafter, both the Oklahoma courts and the Oklahoma Legislature increasingly concentrated on the coercive aspects of sexual conduct crimes, rejecting the blanket proscriptions of morality or the marginalizing language of mental disease as a basis for giving content to the crime of sodomy. Part IV applies the transformative notions underlying criminal sodomy to scrutinize the increasing emphasis on coercion that has begun to reshape sodomy into that quintessential crime of coercion—rape.[6] The melding of the crimes of sodomy and rape has been sped along by recent legislation and by the willingness of the courts to treat sodomy and rape as different forms of the same crime. Part V offers an appraisal of the effect of this century-long sexual game played between the state and its citizens: what it might portend as states quietly transform their notions of sodomy into a distinct subspecies of rape, and the moral that it might hold for jurisdictions still playing with sodomy. Part VI concludes this Article and discusses Oklahoma's proposed legislation in the area of sexual crimes.

I. Origins

For almost one hundred years, from before the time of the first codification of territorial law in Oklahoma in 1890 until 1981, the regulation of sodomy[7] in Oklahoma consisted of nothing more than this simple proscription: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years."[8] This proscription was meant to cover all illicit acts of sexual intercourse, that is to say, those acts that only fallen women and Godless men practice—acts other than heterosexual vaginal intercourse.[9]

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6. While rape is an important component of this Article, the primary focus of the discussion is sodomy; the many conceptual and practical problems of rape jurisprudence lie outside the scope of this Article. *See infra* text accompanying note 18.

7. For convenience (only), in this Article I will use the term "sodomy" interchangeably with the phrase "the abominable and detestable crime against nature" or with the term "buggery," or whatever other euphemism a state uses to regulate consensual human sexual behavior other than heterosexual vaginal intercourse. Oklahoma uses the terms interchangeably. *Compare* OKLA. STAT. tit. 21, § 886 (Supp. 1992) (proscribing "crime against nature") *with* OKLA. STAT. tit. 21, § 888 (Supp. 1992) (proscribing "forcible sodomy").

8. OKLA. STAT. tit. 21, § 886 (Supp. 1992).

9. *See* Roberts v. State, 47 P.2d 607, 607 (Okla. Crim. App. 1935)("The detestable and abominable

An ironic and significant result of the breadth of the statutory proscription against sodomy was that while most "right-thinking" folk tended to condemn the practice, they had no idea respecting exactly what practices they were condemning or why. Indeed, for the most part and until relatively recently, most people who condemned the practices of sodomy were possibly condemning not merely those deviants they sought to marginalize, but themselves as well. Why? Because laws forbidding sodomy recognized no difference between the male who inserted his tongue in his wife's vagina, the female who inserted her boyfriend's penis into her mouth (in order to preserve her virginity), or the male enjoying an evening of anal intercourse with a male friend. They were all deviants.

Simply stated, then, what was proscribed was illicit sexual activity—illicit because it was immoral according to the dictates of Christian religious law and teachings.[10] The proscription was so breathtakingly broad that it could encompass forms of sexual activity between people and animals as well as between humans.[11] And because the conduct was illicit, imperil-

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crime against nature . . . includes not only the offense of sodomy, but any other act as bestial or unnatural copulation.").

10. For a description of the development of Christian views of licit and illicit sexual activity, and the effect of such categorization in Christian theology and law, see JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987); ERIC FUCHS, SEXUAL DESIRE AND LOVE: ORIGINS AND HISTORY OF THE CHRISTIAN ETHIC OF SEXUALITY AND MARRIAGE (Marshe Daigl, trans., 1983); DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY (1988); JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS (1965); Robert Oaks, *Things Fearful to Name: Sodomy and Buggery in Seventeenth Century New England*, J. SOC. HIST. 268 (1978). For a discussion of the artificiality of the division between licit and illicit sexual conduct and the implications of this division respecting those who indulge in such activities, see MICHEL FOUCAULT, HISTORY OF SEXUALITY (Robert Hurley trans., Random House, Inc. 1978) (1976).

11. Bestiality generally refers to a human being's use of an animal for the purpose of sexual gratification. Such conduct has been proscribed by the sexual conduct codes of the majority of religions, as well as the criminal codes of Western Europe and the United States. Traditionally, bestiality was defined at law as the carnal copulation of man (or woman) with animals. Carnal copulation was usually understood to mean the penetration of the anus or vagina of an animal by a human penis, or the penetration of a human vagina or anus by an animal penis. Both the people of England and of the United States traditionally feared bestiality because they believed that inhuman creatures could be produced by successful copulation between humans and animals. Robert Oaks, *Perceptions of Homosexuality by Justices of the Peace in Colonial Virginia*, *in* 1 HOMOSEXUALITY AND THE LAW 35, 38 (Donald C. Knutson, ed. 1979-1980). Many jurisdictions have preserved the tradition of lumping bestiality with sodomy. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1990); MONT. CODE ANN. §§ 45-2-101(20), -5-505 (1992); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); VA. CODE ANN. § 18.2-361 (Michie 1988). This makes sense if one accepts the fundamental assumption that two distinct categories of sexual conduct, licit and illicit, exist. Since only heterosexual vaginal intercourse is licit, all other categories of sexual conduct are illicit. On this basis, there would be little difference between illicit sexual conduct involving humans and such conduct involving humans and animals; both amount to the same thing—an offense against God and man. Other states have separated the regulation of sexual conduct between humans and animals from regulation of the sexual conduct of humans *inter se*. *See, e.g.*, GA. CODE ANN. § 16-6-6 (Michie 1992); MINN. STAT. § 609.294 (1992); WIS. STAT. ANN. § 944.17(2)(c)-(d) (West Supp. 1993). Discussion of the "bestiality" portion of the statute, which proscribes the use of animals for purposes of human sexual gratification, is beyond the scope of this Article. Understand, however, that bestiality, especially in rural areas, remains a source of human sexual pleasure. *See, e.g.*, RICHARD POSNER, SEX AND REASON 126, 230-32 (1992); John Canup, *"The Cry of Sodom Enquired Into": Bestiality and the Wilderness*

ling the immortal souls of the practitioners of these lurid arts, consent was deemed irrelevant.[12] In this respect, sodomy, however defined, was a visible embodiment of social sexual control of non-marital, non-procreative sexual activity.

Rape was a wholly different matter. The object of rape law was the regulation of acts of sexual gratification other than illicit acts. Rape consisted of only one form of sexual gratification—heterosexual vaginal intercourse.[13] As such, this form of conduct was not proscribed *in toto*; rather only the unauthorized use of a vagina to which the accused had no claim was proscribed.[14] This is particularly apparent in Oklahoma where conviction for rape originally required penetration of the vagina by a penis.[15] This

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of Human Nature in Seventeenth Century New England (1988); Jonas Liliequist, *Peasants Against Nature: Crossing the Boundaries Between Man and Animal in Seventeenth- and Eighteenth-Century Sweden*, *in* FORBIDDEN HISTORY: THE STATE, SOCIETY AND THE REGULATION OF SEXUALITY IN MODERN EUROPE 57 (John C. Fout ed., 1992); Oaks, *supra* note 10, at 275-78.

12. *See infra* part II.B.4.

13. OKLA. STAT. art. 26, § 1 (1890) provided that "[r]ape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under [a number of circumstances]."

14. Of course, rape law was not the sole means of regulating heterosexual vaginal intercourse. Statutes proscribing prostitution, fornication, and adultery effectively proscribed all forms of heterosexual vaginal intercourse other than that engaged in between husband and wife. A discussion of these statutes and their effects upon sexual conduct is outside the scope of this Article. For a discussion of the purpose and effects of other sexual conduct proscriptions, from both a historical and modern perspective, see MODEL PENAL CODE § 213.1 & cmts. 1-9; ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 37-64, 90-123 (1984) (discussing traditional and feminist concepts of prostitution and the effects of misogynistic images on the legal theory of rape); Paul D. Carrington, *The Moral Quality of the Criminal Law*, 54 NW. U. L. REV. 575 (1959) (arguing that moral condemnation is an ineffective tool in discouraging criminal conduct); Martha A. Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991) (arguing for a reworking of existing legal concepts of privacy to better reflect current social norms in order to, among other things, shield single mothers from excessive state regulation of sexual activity); Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829 (1987) (arguing that a cultural consensus must exist before principled adjudication involving marriage can be made); Geoffrey May, *Experiments in the Legal Control of Sex Expression*, 39 YALE L.J. 219 (1929) (examining American proscriptions of sexual activities, which are substantially more extensive than England's proscriptions); Marvin M. Moore, *The Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219 (1962) (arguing that definition of adultery in state law is unjust, and the states' definitions of the crime are disharmonious); David A. J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979) (arguing that prostitution should be decriminalized and that our views of prostitution are clouded by our puritan past and sentimental view of marriage); Martin J. Siegel, *For Better or Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45 (1991-1992) (arguing that the right to be adulterous implicates a fundamental right to privacy that outweighs a state's interest in criminalizing the conduct); Stanton Wheeler, *Sex Offenses: A Sociological Critique*, 25 LAW & CONTEMP. PROBS. 258 (1960) (describing the current basis for the criminalization of sexual crimes and arguing for the limitation of criminal sanctions to socially dangerous acts); Douglass L. Custiss, Note, *Sex Laws in Ohio: A Need For Revision*, 35 U. CIN. L. REV. 211 (1966) (arguing that the Ohio sexual conduct laws no longer reflect societal practices and ought to be modified); Larry E. Joplin, Note, *Criminal Law: An Examination of the Oklahoma Laws Concerning Sexual Behavior*, 23 OKLA. L. REV. 459 (1970) (arguing for the elimination of the criminal regulation of consensual sexual activity). I note but do not discuss the patriarchal basis of both rape and the distinction between rape and sodomy, based in part on the notion of male ownership of vaginas (and the bodies attached thereto). *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (studying rape as an illustration of sexism in the criminal law and arguing for the criminalization of acts not traditionally recognized by the law of rape).

15. OKLA. STAT. art. 26, § 1 (1890) (providing that "rape is an act of sexual intercourse, accomplished

limitation survived a constitutional challenge on Equal Protection grounds immediately before the statute, by legislative amendment, became gender neutral,[16] and even survived an initial attempt by the Legislature to broaden rape's definition to include anal intercourse.[17] Consequently, from earliest times, consent has been a central issue in rape jurisprudence.[18] While consent might be the subject of substantial legislative tinkering, the core notion of the statute—its grounding in and limitation to certain acts of heterosexual vaginal intercourse—remained undisturbed, at least until the late twentieth century.

In a very real sense, then, sodomy and rape each constituted a distinct planet in the solar system of criminal sexual conduct regulation in Oklahoma. Along with adultery, fornication, lewd molestation, prostitution, incest, and abortion, these crimes were the principal weapons of the state in its effort to keep males and females from indulging in any sexual practice other than heterosexual vaginal intercourse between men and their wives. All of this began to change in the 1980s, when the Court of Criminal Appeals began to resist adding new forms of sexual pleasure to the list of illicit (and therefore proscribed) forms of sexual pleasure. In 1986, for the first time the Court of Criminal Appeals injected consent into the jurisprudence of illicit sexual

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with a female not the wife of the perpetrator, under [a number of circumstances]); Miller v. State, 82 P.2d 317, 322 (Okla. Crim. App. 1938) (reversing conviction of rape because evidence of vaginal penetration insufficient); Thompson v. State, 187 P. 819, 820 (Okla. Crim. App. 1920) (holding that one of the essential elements of an indictment or information charging rape or assault with intent to rape is an allegation that the person alleged to have been raped or assaulted was a female). The only exception to this scheme was lewd molestation of children, conviction of which did not require penetration of vagina or anus. *See* OKLA. STAT. tit. 21, § 1123(A) (Supp. 1992); Price v. State, 782 P.2d 143, 149 (Okla. Crim. App. 1989) (affirming adult male's conviction for lewd molestation of 17-month-old female on basis of evidence of touching of the child's vaginal area).

16. *Cf.* Eberhart v. State, 727 P.2d 1374, 1376-77 (Okla. Crim. App. 1986) (rejecting argument that the statute was unconstitutional because only males could be charged with rape).

17. *See infra* part IV.A.

18. Consent has been an element of rape from earliest times in Oklahoma. *See* OKLA. STAT. art. 26, § 1 (1890) (listing seven circumstances under which the victim was presumed to have withheld, to have fraudulently given, or to have been incapable of giving informed consent). Statutory definition of the grounds on which consent can be based have survived universally to our own day. *See* OKLA. STAT. tit. 21, §§ 1117-1122 (1991).

The *Model Penal Code* also provides a definition of consent within the framework of the statute. *See* MODEL PENAL CODE § 213.1 & cmt. 4. The notion of consent has become problematical in recent years. In particular, the question whether it is more proper to emphasize the overreaching of the perpetrator rather than the lack of consent of the victim has arisen. This question has jurisprudential significance, especially for feminist writers. *See* Estrich, *supra* note 14; Robert Garcia, *Rape, Lies and Videotape*, 25 LOY. L.A. L. REV. 711 (1992) (examining whether the male character rapes the female character in the last scene of *Last Tango in Paris* from the perspectives of the actors in the U.S. adversarial system, in the social context in which rape issues arise, and under traditional and radical feminist notions of rape); Maria L. Payne, Note, *Constitutionality of Statutory Rape:* Michael v. Superior Court of Sonoma County, 17 TULSA L.J. 350 (1981) (arguing that statutory rape should be gender neutral and should avoid legitimizing undesirable sex-role stereotypes); Charles J. Scharnberg, Note, *Constitutional Law: Oklahoma's Statutory Rape Legislation and the Equal Protection Clause*, 32 OKLA. L. REV. 159 (1979) (arguing that gender-based classifications are not substantially related to a compelling governmental interest, and thus the unequal treatment of males and females is constitutionally suspect).

activity by holding application of the "crime against nature" law to voluntary adult heterosexual sexual activity unconstitutional.[19]

The Legislature has followed suit, focusing increasingly on consent in connection with sexual conduct crimes. In 1981, the Legislature created the crime of forcible sodomy, the effect of which was essentially to enhance the sentence of persons convicted of forcing others to engage in the crime against nature.[20] In 1992, and for the first time since 1887, the Oklahoma Legislature amended the crime against nature provision, increasing the maximum jail time for people who are convicted of engaging in such activities with minors and others who are incapable of giving consent, under certain circumstances.[21] After 1981, the Oklahoma Legislature broadened the rape statute to include within its definition proof of penetration of the victim's anus as well as her vagina, either by a penis[22] or by some other

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19. Post v. State, 715 P.2d 1105 (Okla. Crim. App.), *reh'g denied*, 717 P.2d 1151 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986).

20. OKLA. STAT. tit. 21, § 888 (Supp. 1992). When enacted, the statute provided: "Any person who forces another person to engage in the detestable and abominable crime against nature, pursuant to Section 886 of Title 21 of the Oklahoma Statutes, if convicted, is guilty of a felony punishable by imprisonment in the penitentiary for a period of not more than ten (10) years. This crime may be known as forcible sodomy." *Id.*

21. Title 21, section 886 of the Oklahoma Statutes now provides as follows:

> Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years. Any person convicted of a second violation of this statute, where the victim of the second offense is a person under sixteen (16) years of age, shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of this section, where the victim of the third or subsequent offense is a person under sixteen (16) years of age, shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fail or refuse to fix punishment then the same shall be pronounced by the court.

OKLA. STAT. tit. 21, § 886 (Supp. 1992). The forcible sodomy statute was also amended in similar respects and now provides:

> A. Any person who forces another person to engage in the detestable and abominable crime against nature, pursuant to Section 886 of Title 21 of the Oklahoma Statutes, if convicted, is guilty of a felony punishable by imprisonment in the penitentiary for a period of not more than twenty (20) years. Any person convicted of a second violation of this statute, where the victim of the second offense is a person under sixteen (16) years of age, shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of this section, where the victim of the third or subsequent offense is a person under sixteen (16) years of age, shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fail or refuse to fix punishment then the same shall be pronounced by the court.
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> B. The crime of forcible sodomy shall include:
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> 1. Sodomy committed by a person over eighteen (18) years of age upon a person under sixteen (16) years of age; or
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> 2. Sodomy committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent; regardless of the age of the person committing the crime; or
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> 3. Sodomy accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the victim or the person committing the crime."

OKLA. STAT. tit. 21, § 888 (Supp. 1992).

22. OKLA. STAT. tit. 21, §§ 1111, 1113 (1991). Like the sodomy statute, Oklahoma's rape statute was

body part (finger, tongue, and the like), or an inanimate object.[23] The Legislature strengthened these provisions in 1990 to make clear that rape includes the penetration of the anus of one male by another male.[24] Additionally, the Legislature increased its regulation of sexual activity by creating the crime of sexual battery[25] and broadening the definition of lewd molestation of children.[26]

The result of these legislative actions is that Oklahoma's once fairly simple and, for its kind, run of the mill regulation of a (large) class of sexual conduct—sodomy—has now become convoluted, contradictory, and arbitrary. Sodomy has become enmeshed in the problems of controlling non-consensual heterosexual vaginal intercourse in a world where it is no longer uncommon to precede, interrupt, or conclude such activity (whether or not consensual) with forms of sexual conduct (fellatio, cunnilingus, anilingus) that were once commonly thought of as the province of the solitary Godless and depraved person. Sodomy has also become entangled in the growing numbers of criminal prosecutions of persons who sexually victimize children. My sense is that sodomy today is as much the handmaid of rape as it is the state's principal modern instrument of social sexual control.

Even as Oklahoma lurches towards a sodomy jurisprudence grounded in consent (protesting all the while it is really doing no such thing), it remains tied to the past in an increasingly odd way. The oddity arises because, while some types of *consensual* acts of sexual gratification other than heterosexual vaginal intercourse are proscribed as crimes against nature, exceptions have

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taken verbatim from the laws of the Dakota Territories. *See* COMP. LAWS DAK. § 6521 (1887) (first codified at OKLA. STAT. art. 26, § 1 (1890)). When Oklahoma first enacted the rape statute, it defined rape as "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator," under one of seven enumerated circumstances. Act of Dec. 24, 1890, ch. 25, 1890 Okla. Sess. Laws 457, 457. The statute has been amended several times. The 1981 amendment provided that "[r]ape is an act of sexual intercourse accomplished with a male or female, not the spouse of the perpetrator" under a number of enumerated circumstances. Act of June 30, 1981, ch. 325, 1981 Okla. Sess. Laws 1139, 1139. In 1990, the statute was further amended to provide, in its present form, that "[r]ape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator" under a number of enumerated circumstances. OKLA. STAT. tit. 21, § 1111 (1991). "Any sexual penetration, however slight," constitutes the crime. *Id.* § 1113.

23. In 1981, the Oklahoma Legislature codified the created the new crime of "rape by instrumentation." Limited at first to acts of "carnal knowledge" involving penetration by an "inanimate object," the crime was broadened in 1987 to include the insertion of "any part of the human body" as an element of the offense. Act of July 5, 1987, ch. 224, 1987 Okla. Sess. Laws 1431, 1437. For a discussion of the early and not entirely successful legislative attempts to expand the definition of rape to encompass the elements of traditional sodomy, see Robert E. Richardson, *An Analysis of Oklahoma's New Rape Statutes*, 52 OKLA. B.J. 2482 (1981).

24. OKLA. STAT. tit. 21, § 1111 (Supp. 1992).

25. OKLA. STAT. tit. 21, § 1123(B) (Supp. 1992). Sexual battery is defined as the "intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner and without the consent of that person." *Id.* Indeed, in a sense, sexual battery represents an attempt to regulate coercive acts of masturbation. It is a counterpart to the proscription of consensual masturbation for compensation. *See infra* text accompanying notes 83-91.

26. OKLA. STAT. tit. 21, § 1123(A)(5) (Supp. 1992) proscribes the ejaculation, urination, or defecation by a person on or in the presence of a child under sixteen years of age, regardless of the consent of the child.

been made on the basis of the marital status of the people, or of the sex of all participants in the activity. Thus, male-female acts of sodomy are permitted, unless the partners are married to others, but not male-male or female-female sexual acts. That this odd state of things might also appear somewhat senseless or arbitrary[27] has been noted by a number of the highest

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27. A discussion of the power or desirability of using the criminal law to control the extent of permissible sexual conduct is beyond the scope of this Article. That debate has been raging almost without abatement in Western society at least since the middle of the nineteenth century. *See, e.g.*, JOHN S. MILL, ON LIBERTY (Gertrude Himmelfarb ed., 1975) (arguing that criminal regulation should, as a general matter, be limited to harmful (injurious) conduct); JAMES F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1873) (arguing that the state has a legitimate interest in the regulation of sexual conduct); *cf.* WENDY DONNER, THE LIBERAL SELF: JOHN STUART MILL'S MORAL AND POLITICAL PHILOSOPHY (1991) (interpreting and defending Mill's enlarged concept of "utility" and exploring his interpretation of the "good" in any individualism context).

In the twentieth century this debate has grown more heated and wide-ranging. The classic parameters of this debate were set by Patrick Devlin and H.L.A. Hart in connection with the recommendations of the Wolfenden Commission to remove most proscriptions on consensual adult homosexual conduct. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965) (maintaining that the state has the obligation to regulate sexual morality); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963) (arguing that the state has no business regulating adult consensual sexual activity); H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967) (disputing the notion that a common morality is essential to society's existence); REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSE AND PROSTITUTION (Auth. Am. ed. 1963) [hereinafter THE WOLFENDEN REPORT] (taking the position that consensual sexual conduct between adults ought not be proscribed by the criminal law).

In the United States, this debate commenced in earnest during the 1950s in the course of the drafting of the *Model Penal Code*. *See* AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 207.5 & apps. A-E (Tentative Draft No. 4, 1955); *cf.* Morris Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROBS. 217, 220 (1960) (noting controversial nature of the position taken in the *Model Penal Code*).

A tremendous amount of ink has been spilled attacking or defending the proposition that no adult consensual sexual activity ought to be proscribed, and that the preferences of either the individual or the community ought to be respected, to a greater or lesser degree. *See, e.g.*, JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988) (representing the modern classical liberal derivation of a justification for limiting the reach of the criminal law); POSNER, *supra* note 11, at 309-14 (describing much of the writing in the field and examining the issue from the perspective of economics); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 779-83 (1988) (describing three conceptions of sexual conduct—traditional, liberal, and egalitarian—and arguing that the egalitarian approach has the most promise from the modern feminist perspective); Custiss, *supra* note 14 (arguing that the trend to liberalize the sexual conduct laws ought to be further expanded); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) (arguing that democracy fosters a notion of individualism that minimizes valuable societal interests and suggesting a paradigm for prioritizing individual and societal interests when they conflict); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963) (arguing that the regulation of obscenity is based on notions of sin and that criminal proscriptions of sin might well violate the federal constitutional establishment clause); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (arguing that there ought to be a protected right of intimate relationship between consenting adults); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989) (asserting the fallacy of bracketing moral judgements for purposes of law and arguing that the better means of determining the justice of sexual conduct prohibitions is by assessing the moral worth of the conduct prohibited or protected); Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445 (1987) (examining communitarian morality critically in light of its three major themes: morality and selfhood, character and civic virtue, and the community of reason); Siegel, *supra* note 14 (arguing that the states have no legitimate interest in criminalizing adultery and that means exist that are better suited to maintaining decent moral atmosphere); Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561 (1989) (arguing that

courts of several states that have considered the issue,[28] though not by all state high courts,[29] nor by the United States Supreme Court.[30]

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standards based on community values are not currently feasible, and even if they were, they should not be permitted to interfere with individual rights); Wheeler, *supra* note 14, at 258 (discussing sociological bases for the regulation and deregulation of various types of sexual conduct).

28. *See* Harris v. State, 457 P.2d 638 (Alaska 1969) (holding crime against nature void for vagueness); Franklin v. State, 257 So. 2d 21 (Fla. 1971) (overturning sodomy provisions); State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (overturning sodomy statutes on federal constitutional grounds); State v. Wasson, 842 S.W.2d 487 (Ky. 1992) (overturning sodomy statute on state constitutional grounds); Schochet v. State, 580 A.2d 176 (Md. 1990) (holding fellatio statute not applicable to non-commercial private consensual heterosexual activity); Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974) (covering statutory proscription of unnatural and lascivious acts performed in private by consenting adults, but not sodomy); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (overturning sodomy statute on federal constitutional grounds); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (holding voluntary deviated sexual intercourse statute unconstitutional).

29. *See, e.g.*, State v. Bateman, 547 P.2d 6 (Ariz.) (holding that state legislature may regulate moral welfare of its people by specifically prohibiting sodomy and other specified lewd acts), *cert. denied*, 429 U.S. 864 (1976); Gordon v. State, 360 S.E.2d 253 (Ga. 1987) (holding that sodomy statute does not violate privacy interests of people engaging in same sex sexual activity, even if the statute is inapplicable to the same conduct performed by people of the opposite sex); Dixon v. State, 268 N.E.2d 84 (Ind. 1971) (finding no constitutionally protected privacy right to engage in heterosexual sodomy); State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (holding classification based on sexual preference constitutionally permissible); State v. Poe, 252 S.E.2d 843 (N.C. Ct. App.) (holding that defendant's constitutional right to privacy was not violated by prosecution under a statute that prohibited fellatio between unmarried persons without forbidding fellatio between married persons), *petition denied and appeal dismissed*, 259 S.E.2d 304 (N.C. 1979), *appeal dismissed*, 445 U.S. 947 (1980); State v. Santos, 413 A.2d 58 (R.I. 1980) (holding that right of privacy does not extend to private unnatural copulation between unmarried adults); Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1970) (allowing state to constitutionally regulate deviant sexual conduct).

30. The closest the Supreme Court has come to considering the notion that such distinctions might violate the Fourteenth Amendment of the Constitution was in Bowers v. Hardwick, 478 U.S. 186 (1986), in which the Court rejected a Fourteenth Amendment Due Process challenge to the Georgia sodomy statute. Earlier, the Supreme Court had rejected challenges to sodomy statutes brought on vagueness grounds. *See* Rose v. Locke, 423 U.S. 48 (1975) (holding Tennessee statute not unconstitutionally vague); Wainwright v. Stone, 414 U.S. 21 (1973) (holding Florida statute not unconstitutionally vague).

A tremendous amount of ink has been spilled arguing the merits of the *Bowers* decision and its implications, and arguing for and against the merits of a federal constitutional challenge to such statutes. *See, e.g.*, Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1986-1987) (arguing that *Bowers* is fundamentally inconsistent with the Supreme Court's earlier privacy decisions and portending the unraveling of the Court's privacy doctrine in general); Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15 (1990-1991) (reviewing liberal notion of privacy as a "negative" right to be let alone and suggesting means by which privacy can be viewed as a positive right, rooted in the concept of equality); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution*, 58 NOTRE DAME L. REV. 445 (1983) (arguing that the Supreme Court has enacted a philosophy of personal autonomy that underlies a belief of what the Constitution protects); Fineman, *supra* note 14; Goldstein, *supra* note 2, at 1081-87 (examining the *Bowers* decision in the context of the Court's (deliberate) misreading of history); Hafen, *supra*, note 27 (arguing that the interests of the community as well as of the individual ought to be considered in making constitutional determinations of privacy and other rights); Halley, *supra* note 2 (arguing that after *Bowers*, equal protection arguments that classify homosexuals based on "immutable characteristics" should be reexamined); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (fleshing out the utility of equal protection in the context of the attainment of equal rights for gay men and lesbians); Allan Ides, Bowers v. Hardwick: *The Enigmatic Fifth Vote and the Reasonableness of Moral Certitude*, 49 WASH. & LEE L. REV. 93 (1992) (arguing that Justice Powell could have developed a middle ground in *Bowers* that would have focused on reasonableness in the context of due process); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (arguing that the disapprobation of homosexual behavior reflects a societal reaction to perceived violations of

Oklahoma provides an apocryphal example of the perversions that have become characteristic of modern sodomy practice,[31] which refocus sexual

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community imposed gender norms); Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 FORDHAM L. REV. 485 (1991) (arguing that 14th Amendment Equal Protection jurisprudence has consistently accommodated the interests of the dominant culture and has proven to be an ineffective vehicle for the vindication of the rights of minorities); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (providing civic-republican critique of *Bowers* as the failure of the courts to protect privacy and facilitate participation in republican dialogue); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (applying a Foucauldian analysis of privacy to argue that the courts should prohibit exercises of state power that have the effect of compelling particular conduct); Sandel, supra note 27 (arguing that the justice or injustice of laws against homosexual sodomy may be based on the morality of the act); Kevin W. Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases*, 33 ARIZ. L. REV. 811 (1991) (arguing that constitutionalism, democracy, and privacy are independent values and that the courts are best equipped to determine the manner in which these values should be accommodated on a case by case basis); Stephen J. Schnably, *Beyond* Griswold: *Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991) (arguing that the judicial process is a poor model for republican dialogue and that true jurisgenerative politics is a political struggle over which the courts can contribute little); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (exploring the relationship between privacy rights and violence against women); Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987) (arguing that *Bowers* represents a flagrant example of the worst kind of jurisprudence in which established rules are ignored in an effort to reach a personally desirable result); Robert A. Ermanski, Note, *A Right to Privacy for Gay People Under International Human Rights Law*, XV B.C. INT'L & COMP. L. REV. 141 (1992) (arguing that the right to privacy in international law ought to be expanded to include the rights of people based on sexual orientation); Hank Pearson, Note, *Reconsidering Suspect Status for Homosexuals* (High Tech Gays v. Defense Industrial Security Clearance Office, *895 F.2d 563 (9th Cir. 1990)*), 23 ARIZ. ST. L.J. 871 (1991) (arguing that the rights of homosexuals can best be protected under the rational basis test of the 14th Amendment's Equal Protection Clause); Developments in the Law, *Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (exploring the implications of the aftermath of *Bowers* and demonstrating that absent significant judicial and legislative action, homosexuals will continue to be subject to significant discrimination).

31. Of the states that continue to criminalize illicit sexual activities, as such, eight arguably regulate sodomy whether it is practiced by people of the same or of the opposite sex. *See* ALA. CODE § 13A-6-65(a)(3) (1991) (proscribing deviate sexual intercourse); ARK. CODE ANN. § 5-14-122 (Michie 1991) (proscribing sodomy); D.C. CODE ANN. § 22-3502 (1989) (proscribing sodomy); FLA. STAT. ANN. § 800.02 (West 1992) (proscribing unnatural lewd and lascivious conduct); GA. CODE ANN. § 16-6-2 (Michie 1992) (proscribing sodomy); MD. ANN. CODE art. 27, §§ 553-554 (1992) (proscribing unnatural or perverted sexual practices); MINN. STAT. § 609.293 (1992) (proscribing sodomy); UTAH CODE ANN. § 76-5-403 (1990) (proscribing sodomy).

Six jurisdictions have attempted to streamline their statutes by proscribing sodomy only when the acts are engaged in with someone of the same sex. *See* KAN. STAT. ANN. § 21-3505 (1988) (proscribing sodomy); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1992) (proscribing sodomy except, as applied to consensual homosexual activity, has been held to violate Kentucky Constitution by State v. Wasson, 840 S.W.2d 487, 491-92 (Ky. 1992)); MO. REV. STAT. § 566.060 (Supp. 1972) (proscribing sexual misconduct and criminalizing deviate sexual intercourse involving minors); MONT. CODE ANN. §§ 45-2-101, 45-5-505 (1991) (proscribing deviate sexual conduct); TENN. CODE ANN. § 39-13-510 (1991) (proscribing homosexual conduct); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (West 1989) (criminalizing private sexual relations between consenting adults of the same sex except, absent a compelling government objective that justifies intrusion into homosexuals' private lives, has been held unconstitutional by Morales v. State, 826 S.W.2d 201, 204 (Tex. Ct. App. 1992)).

Twelve other jurisdictions proscribe the crime against nature. *See* ARIZ. REV. STAT. ANN. §§ 13-1411 to 13-1412 (1991); IDAHO CODE § 18-6605 (1993); LA. REV. STAT. ANN. § 14:89 (West 1993); MASS. GEN. L. ANN. ch. 272, §§ 34, 35 (West 1993) (criminalizing unnatural and lascivious acts except, as applied to private consensual adult behavior, held unconstitutional by *Balthazar*, 318 N.E.2d at 481); MICH. COMP. LAWS ANN. §§ 750.158, 750.338, 750.338(b) (West 1991); MISS. CODE ANN. § 97-29-59 (1972); NEV. REV. STAT. § 201.190 (1991); N.C. GEN. STAT. § 14-177 (1992); OKLA. STAT. tit. 21, § 886 (Supp. 1992); R.I. GEN. LAWS § 11-10-1 (1992); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); VA. CODE ANN. §

conduct (and primarily sodomy) jurisprudence away from per se proscriptions of particular practices to proscriptions based on the injury or humiliation caused by individual conduct. The lessons of Oklahoma sodomy jurisprudence clearly outline the manner in which the law of sodomy will continue to change. Rather than accept the United States Supreme Court's invitation to retain or expand traditional forms of sodomy regulation, and despite the decision in *Bowers v. Hardwick*, states like Oklahoma have quietly and slowly continued to transform the conceptualization of sodomy in a manner that may in time make the *Bowers* decision wholly irrelevant.

II. Judicial Definition of Sodomy

Defining sodomy has presented a long-term problem for Oklahoma courts. Defining actionable sodomy, as opposed to sodomy-in-fact, has proven to be an even longer-term problem, the discussion of which will be saved for later in this Article.[32] This Article will first trace the genesis of the classical definition of sodomy and then trace the transformation of classical sodomy, which has perhaps faded out of existence, in the last quarter of the twentieth century.

A. Classical Sodomy

The original statutory provision proscribing sodomy was taken from the laws of the Dakota Territory and first adopted in the Oklahoma Territory in 1887.[33] The statute neither defined the crime nor specified in any detail the acts that might give rise to liability; it did, however, specify that the crime was "detestable and abominable" and that it somehow offended nature when it was "committed with mankind or with a beast."[34] It was said in the early Oklahoma cases that using such a description continued the tradition of English law that professed, as a matter of law, no need to name the offense or its elements among Christians because both are so well known.[35] As

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18.2-361 (Michie 1988).

For a discussion of the application of the sodomy laws in other jurisdictions (many of them now out of date), see W. Christopher Barrier, *Render Unto Caesar: An Essay on Private Morals and Public Law*, 4 U. ARK. LITTLE ROCK L.J. 511, 532-34 (1981); Robert G. Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?*, 30 MD. L. REV. 91 (1970); Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643 (1966) (describing the nature and effects of the enforcement of the sodomy laws in Los Angeles, California through empirical study, and taking the position that the statutory provision had little relation to what society generally deemed acceptable or at least tolerable conduct); Custiss, *supra* note 14; Joplin, *supra* note 14.

32. *See infra* part II.B.3.

33. *See supra* note 21; OKLA. STAT. ANN. tit. 21, § 886 hist. notes (West Supp. 1993).

34. OKLA. STAT. ANN. tit. 21, § 886 hist. notes (West Supp. 1993).

35. Thus, for instance, sodomy as defined by Coke was said to be "a detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator,

such, there appeared no need to specify the offense among the residents of Oklahoma, whether or not the residents were Christians and recipients of suitable religious instruction.

Despite the reticence respecting the crime and its elements, there was general agreement respecting the broad outline of what specific acts were meant to be covered by the statute. At a minimum, anal intercourse between men or between a man and a woman was proscribed, as was any sort of intercourse between a man and an animal, all of which required the penetration by a penis into the anus of another person or in an animal.[36] Of course, the statute specified none of these acts. The initial question that Oklahoma courts confronted was whether the crime encompassed other sexual acts—specifically fellatio. Though the lower territorial courts doubtlessly applied the proscription against sodomy to fellatio on a number of occasions after the statute's enactment,[37] the Criminal Court of Appeals first spoke to the issue in *Ex parte De Ford*,[38] decided in 1917, ten years after Oklahoma became a state. The court, in an expansive reading of the statute, held that the Oklahoma sodomy statute did indeed proscribe fellatio engaged in by persons of the same sex.[39]

The Criminal Court of Appeals arrived at this determination by two distinct routes. First, it distinguished the English case of *Rex v. Jacobs*,[40]

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and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast." SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 58 (London 1644). Sometimes, even veiled references were thought to be too offensive and resort was made to the ancient language of law. Thus, sodomy was defined as *"Peccatum illud horrible inter christianos non nominandum."* 1 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 976 (7th Eng. ed. 1876) (referring to "that horrible sin not to be named among Christians"). *See* Glover v. State, 101 N.E. 629, 630 (Ind. 1913); Goldstein, *supra* note 2, at 1082 n.62 (1988) (discussing the use of the term "buggery" in lieu of specific acts of sodomy).

36. Apparently, jurists in the early part of the twentieth century could glean at least this much from the old English cases definitions of sodomy. *See* Herring v. State, 46 S.E. 876, 881-82 (Ga. 1904); *Glover*, 101 N.E. at 631; State v. Vicknair, 28 S. 273, 274 (La. 1900); State v. Start, 132 P. 512, 512-13 (Or. 1913); State v. Whitmarsh, 128 N.W. 580, 581-82 (S.D. 1910). Note the similarity, in this respect, between this definition of sodomy and the definition of rape: To be actionable, rape required vaginal penetration by a penis, no matter how slight the penetration. OKLA. STAT. art. 29, § 1834 (1921); COMP. LAWS DAK. § 6528 (1887); Miller v. State, 82 P.2d 317, 322 (Okla. Crim. App. 1938) (interpreting § 1834 as requiring that the state must prove the insertion of a penis in the vagina of the prosecutrix in order to convict on the charge of rape); *see also infra* part III.A.

37. Clearly, the defendant's desire to secure a favorable disposition or, in lieu thereof, to minimize notoriety should result in relatively few jury trials, and even fewer appeals. Unfortunately, few empirical studies exist, either current or historical, on the enforcement and administration of the sex laws in most jurisdictions. One of the best empirical studies, now almost 30 years old, was conducted in Los Angeles, California. Project, *supra* note 31, at 763-92.

38. 168 P. 58, 59-60 (Okla. Crim. App. 1917). The defendant in *De Ford* was charged with having fellated another man. The ages of the respective parties were not reported.

39. *Id.* at 60.

40. 168 Eng. Rep. 830 (1817). In *Jacobs*, a man was convicted of sodomy on the basis of evidence tending to prove that he was fellated by a seven-year-old boy. *Id.* at 830. The judges determined that a pardon must be granted because this did not constitute the offense of sodomy. *Id.* On the basis of this case, the view arose, acknowledged but not accepted in the cases cited in *De Ford*, that to constitute actionable sodomy, "the act must be in that part where sodomy is usually committed." *De Ford*, 168 P. at 60; *see also*

the only case that had squarely considered the issue and that had held that fellatio was not encompassed under the common-law definition of sodomy. It did so on two grounds. As an initial matter, and in agreement with the high courts of South Dakota and Georgia,[41] the *De Ford* court explained away *Rex v. Jacobs* on the basis that fellatio was not well known at law at the time of that decision.[42] According to the Georgia court, *Rex v. Jacobs* could have gone the other way had the judges of England been more sexually sophisticated at the time of the decision.[43] Recent scholarship has demonstrated that English society, as well as its courts, were well aware of the existence of fellatio, but that such conduct, like sexual activity between women, was morally condemned but not regulated by the criminal law.[44] Next, the Criminal Court of Appeals concluded that *Rex v. Jacobs* had been wrongly decided. It was clear to the Criminal Court of Appeals that common-law sodomy must have included within its proscriptions fellatio, if only because oral-genital contact was considered by the late nineteenth-century American courts to be the baser form of sodomy, even more depraved than anal intercourse, despite English authority to the contrary.[45]

MATTHEW BACON, 9 A NEW ABRIDGEMENT OF THE LAW 159-60 (Heny Gwyllim et al. eds., 1846); 1 W. RUSSELL, *supra* note 35, at 698.

41. Herring v. State, 46 S.E. 876, 881-82 (Ga. 1904); State v. Whitmarsh, 128 N.W. 580, 582-83 (S.D. 1910).

42. *De Ford*, 168 P. at 60.

43. *Herring*, 46 S.E. at 876.

44. *See, e.g.*, JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 93 n.2 (1980) (noting that the meaning of sodomy has varied widely over the ages and has included at times everything from heterosexual intercourse in atypical positions to oral sexual contact with animals); THE WOLFENDEN REPORT, *supra* note 27, at 55-69 (explaining the distinctions between buggery or sodomy in English law, sexual intercourse *per anum*, and the crime of "gross indecency," which included oral-genital contact between persons of the same sex); J.E. Hall-Williams, *Sex Offenses: The British Experience*, 25 LAW & CONTEMP. PROBS. 334, 353-59 (1960) (discussing the arguments of *The Wolfenden Report* concerning homosexual offenses); Randolph Trumbach, *Sex, Gender, and Sexual Identity in Modern Culture: Male Sodomy and Female Prostitution in Enlightenment London*, *in* FORBIDDEN HISTORY, *supra* note 11, at 94 (describing cases of sodomitical assault brought by boys or their parents in the 18th century); *cf.* Polly Morris, *Sodomy and Male Honor: The Case of Somerset, 1740-1850*, 16 J. HOMOSEXUALITY 387 (1988) (noting that the popular definitions of buggery differed sufficiently from the legal ones to allow considerable latitude in male sexual practice).

45. *De Ford*, 168 P. at 59 (Okla. Crim. App. 1917). The *De Ford* court quoted with approval the following passage from the Georgia decision in *Herring*, 46 S.E. at 881-82:

> After much reflection, we are satisfied that, if the baser form of the abominable and disgusting crime against nature—i.e., by the mouth—had prevailed in the days of the early common law, the courts of England could well have held that that form of the offense was included in the current definition of the crime of sodomy. And no satisfactory reason occurs to us why the lesser form of this crime against nature should be covered by our statute, and the greater excluded, when both are committed in a like unnatural manner, and when either might well be spoken of and understood as being "the abominable crime not fit to be named among Christians."

See also Honselman v. People, 48 N.E. 304, 305 (Ill. 1897) ("The method employed in this case [fellatio] is as much against nature . . . as sodomy or any bestial or unnatural copulation that can be conceived."); Means v. State, 104 N.W. 815 (Wis. 1905); *infra* note 49. In this respect, American courts took a very different jurisprudential course from their English cousins.

Second, the *De Ford* court held that the Oklahoma sodomy statue proscribed fellatio by reasoning that even if the *Rex v. Jacobs* court had interpreted the law of sodomy correctly, the Oklahoma Legislature had proscribed the "crime against nature," and not merely "sodomy." This, to the court, indicated a legislative intent to adopt a significantly broader definition of proscribed conduct than that contemplated by the English common-law definition of sodomy. Any kind of sexual conduct that did not involve the penetration of the vagina by the penis was unnatural, and therefore subject to the criminal proscription of the statute.[46] Existence of this broader definition was said to be gleaned from learned English commentaries, though the gleanings in this respect appear to modern eyes to be somewhat forced.[47]

The English tended to view anal intercourse as the baser form of the possible sexual activities between people of the same sex:

> [T]here is in the minds of many people a stronger instinctive revulsion from this particular form of behavior than from any other; that it is particularly objectionable because it involves coition and thus simulates more nearly than any other homosexual act the normal act of heterosexual intercourse; that it may sometimes approximate in the homosexual field to rape in the heterosexual. . . .

THE WOLFENDEN REPORT, *supra* note 27, at 60. Fellatio, mutual masturbation, and the like were criminalized in England only after 1885, and then such offenses were criminalized as "gross indecency" rather than "buggery" or "sodomy" and were subject to lesser punishment than homosexual anal intercourse. *Id.* at 55, 67-69. This rule was followed by a number of states. *E.g.*, People v. Boyle, 48 P. 800, 800 (Cal. 1897); Commonwealth v. Poindexter, 118 S.W. 943, 944 (Ky. 1909); Kinnan v. State, 125 N.W. 594, 594 (Neb. 1910); Prindle v. State, 21 S.W. 360, 361 (Tex. Crim. App. 1893).

46. "Unnatural," in this context, refers to both biology and morality. By establishing such a definition of "unnatural," the courts merely reflected, without much thought or contradiction, the long tradition of Western culture that generally condemned as illicit, on religious grounds, all sexual acts other than heterosexual vaginal intercourse engaged in primarily for purposes of reproduction. According to one author:

> The concept of *nature* has three meanings for the Fathers at the end of the second century: a) a disposition is natural when inscribed in a process which is not contaminated by sin or by human error (for example, the sexual process is "natural" to the extent that it is analogous to the sowing of seed in a field); b) whatever animals do is "natural": here again is the conviction that the universal models that are useful to man can be found where man's sin is absent, i.e. in the animal kingdom; c) finally, nature is a structure belonging to the realm of the human body: we could say that the most evident function of a particular bodily organ is "natural" (the eye is made to see).

FUCHS, *supra* note 10, at 91. *See* BOSWELL, *supra* note 44, at 11-15, 49-50, 110-12, 145-56 (exploring concept of sexual "naturalness"); BRUNDAGE, *supra* note 10, at 212-214, 420-430 (examining "sins against nature").

For Protestant theologians, natural law is a function of biblical models. As a gift from God, the natural order of things can be known only through Scripture. FUCHS, *supra* note 10, at 159. *See also id.* at 142 n.32. ("If we abhor immorality, it is because of the principle that our bodies are temples of the Holy Spirit.") (quoting John Calvin, *Fourth Sermon on the Epistle to the Corinthians* (10:8-9), *in* XLIX OPERA CALVINI 624 (1558)). For a social constructionist view of the Christian paradigm of the regulation of sexual activity, see FOUCAULT, *supra* note 10.

47. For instance, the courts justified the inclusion of fellatio within the definition of proscribed conduct on the basis of explanations such as: "All unnatural carnal copulation whether with man or beast seem to come under the notion of sodomy." State v. Start, 132 P. 512, 512 (Or. 1913) (quoting 1 HAWKINS, PLEAS OF THE CROWN 357). Further support was found in the statutory prohibition of sodomy, which proscribed as a capital offense the "detestable and abominable vice of buggery committed with mankind or beast." 25 Hen. 8, ch. 6 (1533), repealed by 1 Phil. & M., ch. 1 (1553), and revived by 5 Eliz., ch. 17 (1562). However, current research indicates that the criminal proscriptions were quite precise in that the only conduct proscribed was homosexual anal intercourse. Oral copulation and sex between women were effectively

More to the point, it was perfectly clear to the court that if, indeed, it was unnatural to use one end of the alimentary canal for purposes of sexual gratification, it could be no less unnatural to use the other end for the same purpose.[48] Lastly, the court derived a substantial amount of comfort from the fact that, at least as to this decision, it was merely following what it perceived to be the emerging majority rule.[49]

Was the Oklahoma Criminal Court of Appeals' decision in *Ex parte De Ford* correct? Certainly from a historical perspective, its decision is questionable.[50] What is clear, however, is that after *De Ford*, the crime against nature proscribed both anal intercourse and fellatio when performed

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excluded from the ambit of the statute. MODEL PENAL CODE § 213.2 cmt. at 358-59 (1980). All other conduct was morally condemned, but left to the tender mercies of the Church. For a description of early British law on sodomy, see Ellen M. Barrett, *Legal Homophobia and the Christian Church*, 30 HASTINGS L.J. 1019, 1023-25 (1979); Goldstein, *supra* note 2, at 1082-86; Goodman, *supra* note 2, at 115-16.

From a historical perspective, the court might perhaps have confused (deliberately) the millennia old moral and religious condemnation of certain sexual practices, such as fellatio between males or between males and females, with the precise proscriptions of the criminal statute. Because the religious taboo was especially strong against homosexual fellatio, it was relatively easy for the court to say in one breath both that "penal statutes are to reach no further in meaning than the fair and plain import of their words, and that acts within the mischief and reason, but not within the letter, are to be excluded" and that this limitation had little application in the case of unnatural sexual conduct because this crime (at least among good Christians) "has always been deemed a very pariah of crimes." Glover v. State, 101 N.E. 629, 631 (Ind. 1913). As evidenced by the label "a crime too horrible to be named among Christians," it was merely assumed that every law abiding person would understand the full extent of the conduct proscribed. *Id.* Understanding, of course, came from the receipt of proper religious instruction at an early age.

48. Thus, the *Start* court explained:

> In the order of nature the nourishment of the human body is accomplished by the operation of the alimentary canal, beginning with the mouth and ending with the rectum. In this process, food enters the first opening, the mouth, and residuum and waste are discharged through the nether opening of the rectum. The natural functions of the organs for the reproduction of the species are entirely different from those of the nutritive system. It is self evident that the use of either opening of the alimentary canal for the purpose of sexual copulation is against the natural design of the human body. In other words, it is an offense against nature.

Start, 132 P. at 513, *quoted with approval in Ex parte* De Ford, 168 P. 58, 59 (Okla. Crim. App. 1917).

Modern scholarship has tended to debunk the mythology of the natural uses of the various bodily organs. WAINWRIGHT CHURCHILL, HOMOSEXUAL BEHAVIOR AMONG MALES: A CROSS CULTURAL AND CROSS SPECIES INVESTIGATION 61 (1967); LINDA MARIE FEDIGAN, PRIMATE PARADIGMS: SEX ROLES AND SOCIAL BONDS 142-43 (1982); R.H. Denniston, *Ambisexuality in Animals*, *in* HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 25, 34-35 (Judd Marmor ed., 1980) (giving examples of common homosexual activity of animals); *cf.* Bonnie B. Spanier, *"Lessons" From "Nature": Gender Ideology and Sexual Ambiguity in Biology*, *in* BODY GUARDS, *supra* note 2, at 329.

Indeed, as every person knows, some of the residuum and waste created by the male body is discharged, in the form of urine, through the penis, which is intimately associated with even the most conservative definition of the sexual functioning of humans. The ludicrous possibilities of calling on "nature" in support of conduct proscriptions are endless. Should we, for example be permitted to criminalize the use of fingers for picking noses because it is unnatural, detestable, and abominable to use fingers to pick noses?

49. *De Ford*, 168 P. at 60.

50. *See* Goldstein, *supra* note 2, at 1081-87 (arguing that the Supreme Court misread the historical evolution of criminal sodomy in *Bowers* and that this misreading has a long history); Nan Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 532-33 (1992) (arguing that the term sodomy is a cultural chameleon whose meaning has shifted from its original delineations based primarily on non-procreative sex to a contemporary view that reflects social anxiety over sexual orientation).

between males. Although the full extent of the proscription was still a matter of speculation, the *De Ford* court's expansive reading of the parameters of the crime against nature set the tone for Oklahoma's sodomy jurisprudence through the 1970s.[51] Beginning in 1935, the Criminal Court of Appeals made clear that the crime against nature was not meant to apply strictly to homosexual oral-genital activity. In *Roberts v. State*,[52] the crime against nature statute was applied to convict a sixty-nine-year-old blind man of engaging in cunnilingus with a nine-year-old girl.[53] Even though that conviction was ultimately overturned for lack of credible evidence,[54] the principle enunciated in that case endured. To the extent that *Roberts* was not clear to bench and bar, the court corrected this oversight in *Lefavour v. State*,[55] another child sex case, explaining in dicta that the sex of the prosecuting witness (the victim in this case) was not an element of the crime.[56]

In 1946, the Oklahoma Criminal Court of Appeals, again in dicta, began to flesh out the parameters of the sexual conduct proscribed by the crime against nature statute. Quoting with approval Dean Burdick's treatise on criminal law,[57] the court in *Cole v. State*,[58] another child sex case, explained that if both parties to the act are adults, then both are liable under the statute, but if one is a child, the child will incur no liability under the statute.[59] The status of the parties to the activity conferred no immunity on the parties.[60] Thus, a woman who voluntarily fellated her willing husband violated the statute proscribing crimes against nature as much as the male who voluntarily fellated another willing male; the result would be the same if cunnilingus or anal intercourse were substituted for fellatio.[61] After *Cole*,

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51. This broad reading of the crime against nature statute was not unique to Oklahoma. In addition to the cases cited in *De Ford*, see, for example, Rose v. Locke, 423 U.S. 48, 50-52 (1975); State v. Larsen, 337 P.2d 1, 4-5 (Idaho), *cert. denied*, 361 U.S. 882 (1959); State v. Milne, 187 A.2d 136, 140 (R.I. 1962), *appeal dismissed*, 373 U.S. 542 (1963). It was also common to cases contemporary to *De Ford*. *See, e.g.*, State v. Maida, 96 A. 207 (Del. 1915); Ephraim v. State, 89 So. 344 (Fla. 1921); State v. Vicknair, 28 So. 273 (La. 1900); State v. Cyr, 198 A. 743 (Me. 1938); Commonwealth v. Dill, 36 N.E. 472 (Mass. 1894); *In re* Benites, 140 P. 436 (Nev. 1914); Means v. State, 104 N.W. 815 (Wis. 1905).

52. 47 P.2d 607, 610 (Okla. Crim. App. 1935).

53. *Id.* at 608.

54. *Id.* at 612.

55. 142 P.2d 132 (Okla. Crim. App. 1943).

56. The court stated: "It has been held that the word 'mankind' as used in our statute includes a female and that it is not necessary to allege in the indictment or information the sex of the person on whom the offense was committed, this being immaterial." *Id.* at 135. This rule was generally applied by other states as well. *See* Daniels v. State, 205 A.2d 295, 296 (Md. 1964) (finding that sodomy can be committed upon a female); People v. Askar, 153 N.W.2d 888, 890 (Mich. 1967) (stating statute equally applicable to acts of sodomy between a man and a woman); Adams v. State, 86 S.W. 334 (Tex. Crim. App. 1905) (declaring sodomy statute applicable to heterosexual deviant couplings); Lewis v. State, 35 S.W. 372 (Tex. Crim. App. 1896) (affirming conviction of male for engaging in anal intercourse with adult female).

57. 3 BURDICK, LAW OF CRIME § 879 (1942).

58. 175 P.2d 376 (Okla. Crim. App. 1946).

59. *Id.* at 379.

60. *Id.*

61. *Id.* This was the rule in other jurisdictions as well. *See* State v. Nelson, 271 N.W. 114, 118 (Minn.

about the only place into which an Oklahoma man could lawfully insert his penis was the vagina of his wife, and about the only things a woman could insert in her mouth were food, medicine, and cigarettes; only a proctologist (or perhaps the family doctor) was permitted entry into an anus, whether male or female.[62]

This expansive view of the breadth of the crime against nature was confirmed in *Berryman v. State*,[63] a case involving a fifteen-year-old male prosecuting witness. Rejecting a challenge to *Ex parte De Ford*'s expansive reading of the sodomy statute, the Criminal Court of Appeals held that the sodomy proscription in Oklahoma was more comprehensive than common-law sodomy, and included any kind of oral-genital contact within the conduct proscribed.[64]

While the *Berryman* court's pronouncements respecting the parameters of the crime against nature statute appeared to leave few questions unanswered, the broad sweep of its pronouncements amounted to little more than dicta.[65] As a consequence, the Court of Criminal Appeals devoted nearly thirty years after *Berryman* to actually fleshing out the limits of the crime against nature. This fleshing out process by the Court of Criminal Appeals, after *Berryman*, resulted in the confirmation of the validity of an expansive reading of the crime against nature statute. Although the interpretations of the statute were ostensibly applicable to all, the development of sodomy

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1937) ("Thus the husband and wife, if violating this statute, would undoubtedly be punished, whereas the normal sexual act would not only be legal but perhaps entirely proper."); Pruett v. State, 463 S.W.2d 191, 193 (Tex. Crim. App. 1970) (stating that it is conceivable that the sodomy statute could be applied to acts of married people).

62. This conclusion is based not only on interpretation of title 21, section 886 of the Oklahoma Statutes, but also on a number of the other provisions criminalizing certain forms of sexual conduct in Oklahoma. For example, the man or woman who attempted to commit otherwise licit forms of sexual acts (heterosexual vaginal intercourse) with someone other than his or her spouse was subject to criminal liability under the adultery provisions, if one party were married, under OKLA. STAT. title 21, section 871. If both parties to acts of heterosexual vaginal intercourse are unmarried, either might then be incarcerated pursuant to the incest provisions of Oklahoma criminal law, title 21, section 885, if the parties are within the prohibited degrees of consanguinity, or under the laws prohibiting prostitution pursuant to title 21, section 1030, which defined, in 1991, prostitution as including "the giving or receiving of the body for indiscriminate sexual intercourse without hire." The later provision was modified in 1992, expanding the catalog of sexual activities subject to the statute to include those proscribed for indiscriminate but uncompensated conduct. OKLA. STAT. tit. 21, § 1030 (Supp. 1992) (prohibiting, in addition to sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lewdness for hire).

63. 283 P.2d 558 (Okla. Crim. App. 1955).

64. *Id.* at 563. As the Court of Criminal Appeals explained many years later, the crime against nature statute "ha[s] been applied only to cases in which the defendant performed fellatio on the victim, *see Golden v. State*, 695 P.2d 6 [(Okla. Crim. App. 1985)]; where the defendant forced the victim to perform fellatio on him, *see Phillips v. State*, 756 P.2d 604 [(Okla. Crim. App. 1988)]; where the defendant performed cunnilingus on the victim, *see Casady v. State*, 721 P.2d 1342 [(Okla. Crim. App. 1986)]; where the defendant forced the victim to perform cunnilingus on her, *see Salyers v. State*, 755 P.2d 97 [(Okla. Crim. App. 1988)]; and where the defendant inserted his penis into the victim's rectum, *see Miller v. State*, 751 P.2d 733 [(Okla. Crim. App. 1988)]." Virgin v. State, 792 P.2d 1186, 1187 (Okla. Crim. App. 1990) (dismissing adult male's conviction for forcible anal sodomy because the crime against nature did not include the act of inserting a finger in the anus of another).

65. *Berryman*, 238 P.2d at 562 (quoting cases that discuss the "natural" use of the alimentary canal).

jurisprudence occurred almost exclusively in the context of non-consensual sexual activity, usually involving underage children, especially children abused by parents or step-parents.[66] As important, after *Berryman*, the dicta of *Cole* became reality as the Court of Criminal Appeals began to enforce the sodomy statute against females as well as males. Indeed, it is in connection with the regulation of female sexual conduct that the courts were most active after 1955.

Prior to the Second World War, Oklahoma courts were given little opportunity to consider the perversions of females. Perhaps this indifference was a function of the assumption that the only women practicing acts of perversion proscribed by the sodomy statute were prostitutes and "fallen women," to whom the state applied a somewhat more elastic set of proscriptions.[67] This notion may be gleaned from the off-hand remarks of the Criminal Court of Appeals in *Tuggle v. State*.[68] In commenting on the chronicle of the sexually loose lifestyle of the accused prior to his arrest, the Criminal Court of Appeals explained that such a lifestyle was "just evidence of a looseness of morals that has been encouraged and cultivated by living with prostitutes, whoremongers and pimps in houses of ill-fame."[69] Arguably, in a society in which men enjoyed more sexual freedom than women, and where the regulation of the sexual conduct of women was entrusted in the first instance to fathers, brothers, and husbands, it was difficult to conceive of women making sexual choices other than to marry and to practice such (procreative) sexual acts as were taught to them by their husbands.[70] Consequently, society tended to conceive of the unconventional sexual activity of women only in terms of compulsion.[71] Indeed, though the

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66. For a discussion of the evolution of this underlying motivating force in sodomy jurisprudence, *see infra* part III.

67. *See* OKLA. STAT. tit. 21, §§ 1030, 1031 (1991). Section 1030 defined prostitution traditionally as the giving or receiving of the body for sexual intercourse for hire. This provision was modified in 1992 to explicitly include acts of fellatio, masturbation, cunnilingus, anal intercourse, and "lewdness." OKLA. STAT. tit. 21, § 1030 (Supp. 1992). Unlike the crime against nature, which is punished by up to 10 years in the penitentiary (OKLA. STAT. tit. 21, § 886 (Supp. 1992)), prostitution is a misdemeanor, punishable by imprisonment in the county jail for no less than 30 days and no more than one year. OKLA. STAT. tit. 21, § 1031(A) (1991). For an interesting argument about the origins of the modern view of prostitution, see Trumbach, *supra* note 44, 89-106 For an argument in favor of the decriminalization of prostitution on moral grounds, see Richards, *supra* note 14. For a discussion of prostitutes as the archetypical "bad-girls" who exist to meet men's need for sexual objects, and of woman as lying temptress, see TONG, *supra* note 14, at 38-39, 98-100. Prostitution and the many problems it raises lies outside the scope of this Article. Note that the Minnesota courts declined to extend constitutional privacy rights to prostitutes. *See* State v. Gray, 413 N.W.2d 107, 113-14 (Minn. 1987).

68. 119 P.2d 857, 863 (Okla. Crim. App. 1941)(affirming a sentence of death for murder committed in an effort to prevent discovery of defendant's engaging in sexual activity with his half-sister). In explanation of the murders, the defendant provided a detailed narrative to the trial court of a lifetime spent engaging in a number of what, for the time, were extremely deviant sexual activities. *Id.* at 860-61.

69. *Id.* at 863.

70. *See* Richards, *supra* note 14, at 1251 ("[F]emale unchastity . . . [has been seen] as a disgusting failure to exercise self-control over appetites in the way required to perform one's mandated social role as wife and mother.").

71. Richards argues that in a society in which "conceptions of rigid virginity prevail," women are

Court of Criminal Appeals has yet to consider the applicability of the prohibition of crime against nature to the activities of a prostitute, there is no reason to suppose that the acceptance of direct compensation for sexual favors would alter the criminal nature of the act proscribed.[72] It is no surprise, then, that the extension of the crime against nature to the acts of females occurred in the context of coercive acts—acts for the most part overseen or directed by men.

In 1971 and for the first time, the Court of Criminal Appeals held in *Warner v. State*[73] that "copulation *per os* between two females is a violation of 21 O.S. § 886."[74] *Warner* involved non-consensual sexual activity—the sexual abuse of an eighteen-year-old female by a married couple.[75] The implication of the testimony was that the defendant's husband had compelled the defendant's activities.[76] This implication was made explicit in *Salyers v. State*,[77] where the accused testified "that her husband forced her to participate in sexual acts with her minor daughters."[78]

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presumed incapable of living a life that is not "defined by procreation and child-rearing in the home." *Id.* He adds that "[i]n Victorian America, female chastity remained the ideal, but the ancient idea of female hypersexuality was radically denied and replaced by that of female asexuality." *Id.* at 1252. He also cites studies of medical community "conclusions" that prostitutes must be mentally deficient. *Id.* at 1267-69. Thus, by the end of the eighteenth century, "there was a strong body of opinion which actually denied the existence of the sexual drive in the majority of women, and regarded the minority who experienced it to any marked degree as morally, mentally or physically diseased." LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800 676 (1977).

Victorian notions persist into the present. *See* GEORGE GILDER, MEN AND MARRIAGE 8-9, 14 (Pelican Publishing Co. 1986) (1973) (arguing that men can control their sexual urges only by submitting to the control offered by marriage, because women naturally exercise more sexual control and discretion since they can derive sexual pleasure associated with all facets of procreation); Ruth Perry, *Colonizing the Breast: Sexuality and Maternity in Eighteenth-Century England*, *in* FORBIDDEN HISTORY, *supra* note 11, at 137 (describing the desexualization of women during the eighteenth century by redefining women as maternal rather than sexual beings). *But see* ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW 83-84 (1988) (taking particular issue with concentration on procreation represented by traditionalist writers such as George Gilder); *cf.* ZILLAH R. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY (1984) (discussing expectations of females in context of "revisionist" feminist philosophy). For general discussions of the evolution of the gender role expectations of females in American and English society, see Trumbach, *supra* note 44, at 89, and Perry, *supra*, at 107.

72. However, the acceptance of a fee for sexual favors would subject the party accepting the funds to a charge of prostitution in addition to a charge of sodomy. After Post v. State, 715 P.2d 1105 (Okla. Crim. App.) (holding crime against nature statute inapplicable to consensual heterosexual sexual activity), *reh'g denied*, 717 P.2d 1151 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986), the fact that a person accepts money for the commission of the act might appear only to affect the issue of consent. *See infra* part II.B.4. In the only reported sodomy case involving a prostitute considered by the Court of Criminal Appeals, the prostitute was the victim; a customer committed sodomy when he forced a prostitute to engage in fellatio against her will—the prostitute appears not to have been charged with the crime against nature. Horton v. State, 724 P.2d 773, 775 (Okla. Crim. App. 1986).

73. 489 P.2d 526 (Okla. Crim. App. 1971).

74. *Id.* at 527.

75. *Id.*; *see also* Freeman v. State, 721 P.2d 1331, 1332 (Okla. Crim. App. 1986) (adult female convicted of aiding her husband in the course of the commission of rape, sodomy, and battery on 16-year-old female foster child).

76. *Warner*, 489 P.2d at 526-27.

77. 755 P.2d 97 (Okla. Crim. App. 1988).

78. *Id.* at 99-100.

It followed that if female-female sexual activity was proscribed as a form of the abominable and detestable crime against nature, then cunnilingus performed by a man would also fall within the proscription of the sodomy statute. Indeed, heterosexual cunnilingus was explicitly held to be proscribed by the statute in 1984.[79] Additionally, though there are as yet no reported cases, under the *Berryman* standard it is likely that anilingus is also contemplated by the statute.[80] Of course, the penetration requirement of sodomy would make anilingus actionable only if there is proof of penetration of the anus by the tongue.[81] Thus, in *Salyers*, the accused's sodomy conviction was reversed for failure to prove that the accused's tongue had penetrated the vagina of her daughter.[82] The same principle would apply in the context of anilingus.

The parameters of the classical definition of crimes against nature were thus quite broad, but not boundless. Besides acts that in other jurisdictions constituted the separate crime of bestiality, the crime against nature included all acts involving the penetration of the anus of either a man or a woman by the penis of another man, fellatio involving two men or a man and a woman, cunnilingus involving two women or a man and a woman, and probably anilingus, irrespective of the sexes of the parties involved.

While the crime against nature encompasses a large variety of sexual activity, it does not cover all activity. It is, therefore, worthwhile to consider for a moment those types of sexual activities that are not crimes against nature, even under the classical definition of sodomy. Foremost among the category of sexual activities not proscribed as a crime against nature is masturbation, whether or not solitary.[83] Masturbation is still a criminal

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79. Clayton v. State, 695 P.2d 3, 6 (Okla. Crim. App. 1984) (affirming conviction of adult male for attempting to engage in cunnilingus with an adult female during the course of a burglary); *accord* Williams v. State, 733 P.2d 22, 24-25 (Okla. Crim. App. 1987).

80. Anilingus is defined as the oral stimulation of the anus of another for purposes of sexual stimulation.

81. Since the crime against nature is a crime of penetration (OKLA. STAT. tit. 21, § 887 (1991)), the penetration of the anus by the tongue likely constitutes sufficient penetration under the statute for liability.

82. *Salyers*, 755 P.2d at 100. Conviction of the crime against nature required "completion": "Any sexual penetration, however slight, is sufficient to complete the crime against nature." OKLA. STAT. tit. 21, § 887 (1991). *See infra* text accompanying notes 330-334. The problems of proof that this element has raised has touched other jurisdictions. Consider State v. Hill, 176 So. 719, 720 (Miss. 1937), where the dismissal of an indictment for heterosexual cunnilingus was affirmed where the indictment charged the accused with "sucking her private sexual organs with his mouth" since such an indictment did not on its face indicate that the required penetration occurred.

Penetration is not a universal requirement under state sodomy laws. *See* Roundtree v. United States, 581 A.2d 315, 330 (D.C. 1990) (holding penetration not required for proof of cunnilingus in violation of statute); Wimpey v. State, 349 S.E.2d 773, 774 (Ga. 1986) ("Proof of penetration is not essential to a conviction of sodomy. . . ."); Carter v. State, 176 S.E.2d 238, 240 (Ga. 1970) (holding that all that is required for conviction is "some contact"). *But see* State v. Whittemore, 122 S.E.2d 396 (N.C. 1961) (holding penetration required for conviction); Lawson v. Commonwealth, 409 S.E.2d 466, 468 (Va. Ct. App. 1991) (holding proof of penetration required but may be proven by circumstantial evidence and evidence need be only slight).

83. Earlier in this century, however, even masturbation was proscribed in some jurisdictions. *See* Act of Mar. 10, 1905, 1905 Ind. Acts 584, 694 ("[w]hoever entices, allures, instigates or aids any person under

activity in Oklahoma if engaged in indiscriminately or for compensation,[84] performed before an audience of people who might be offended or annoyed thereby,[85] conducted in a manner that openly outrages public decency and is injurious to public morals,[86] or when engaged in with other people without consent.[87]

Urination, defecation, or ejaculation upon or in the presence of others and consensual voyeurism are not crimes against nature. Since 1989, however, some of these acts might well constitute sexual battery if performed with a non-willing partner.[88] Additionally, these acts, if performed with a child under sixteen years of age,[89] or performed before an audience of people who might be offended or annoyed thereby,[90] constitute felonies in Oklahoma. Note that even as the Oklahoma Legislature criminalized additional forms of sexual gratification, it did nothing to add such newly criminalized forms of sexual gratification to the list of conduct proscribed by the sodomy statute. For instance, the insertion of an animate or inanimate object into the anus of another is not contemplated within the meaning of the

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the age of twenty-one years to commit masturbation or self-pollution, shall be deemed guilty of sodomy. . . ."). Masturbation has long been a problematical form of sexual expression for society's censors because, among other reasons, it has long been used as a means of birth control for married and unmarried heterosexual couples. *See, e.g.*, NOONAN, *supra* note 10, at 367. Masturbation, of course, is not limited to the autoerotic. Even the Oklahoma Legislature recognized that masturbation can have application in the sexual conduct of couples. OKLA. STAT. tit. 21, § 1030 (Supp. 1993) (proscribing masturbation with any person not his or her spouse for hire). For a discussion of the legal and cultural manifestations of Western cultural paranoia regarding masturbation, see Lesley A. Hall, *Forbidden by God, Despised by Men: Masturbation, Medical Warnings, Moral Panic, and Manhood in Great Britain 1850-1950, in* FORBIDDEN HISTORY, *supra* note 11 at 293 (describing the nature of the hysteria surrounding masturbation during the period 1850-1950 and the obsessive, cruel nature of the cures and punishments prescribed); STONE, *supra* note 71, at 677 ("Inspired by fears of physical debilitation and even of insanity, some surgeons . . . were performing clitoridectomy on masturbating girls and deliberately painful circumcision on boys, while agitated parents were attaching toothed rings to the penis and locking adolescents into chastity belts or even in strait jackets for the night.").

84. OKLA. STAT. tit. 21, § 1030(1)(a) (Supp. 1992) defines prostitution as the "giving or receiving of the body for . . . masturbation." For purposes of the prostitution statute, masturbation is defined as the "stimulation of the genital organs by manual or other bodily contact exclusive of sexual intercourse." OKLA. STAT. tit. 21, § 1030(6) (Supp. 1992). Indiscriminate mutual masturbation, among other acts, is punishable as lewdness. OKLA. STAT. tit. 21, §§ 1029(a), 1030(5)(b) (Supp. 1992).

85. Indecent exposure is defined in Oklahoma as the wilful lewd exposure of a person's body or genitals in any public place or in any place where there are present other persons to be offended or annoyed thereby. OKLA. STAT. tit. 21, § 1021 (1991). The statute has been applied to acts of public masturbation. Vanscoy v. State, 734 P.2d 825, 830 (Okla. Crim. App. 1987); Hamboy v. State, 720 P.2d 345, 347 (Okla. Crim. App. 1986); Martin v. State, 674 P.2d 37, 42 (Okla. Crim. App. 1983), *cert. denied*, 465 U.S. 1081 (1984).

86. OKLA. STAT. tit. 21, § 22 (1991). This provision is especially useful where sexual activity is performed in a public place—perhaps the inside of a parked automobile. *See, e.g.*, Canfield v. State, 506 P.2d 987, 989 (Okla. Crim. App. 1973) (affirming the conviction of an adult consensually fellating another adult male), *appeal dismissed*, 414 U.S. 991 (1973).

87. Mutual masturbation without consent is likely actionable as sexual battery, a new crime in Oklahoma. OKLA. STAT. tit. 21, § 1123(B) (Supp. 1992). Until amendment in 1981, § 1123 provided only for the criminalization of the lewd molestation of children under 16 years of age.

88. OKLA. STAT. tit. 21, § 1123(B) (Supp. 1992).

89. *Id.* § 1123(A)(5).

90. *See supra* note 86 and accompanying text.

crime against nature.[91] Such activities, however, if performed without consent, might amount to rape by instrumentation.[92] And the courts, so eager in the early part of the century to interpret the statute broadly, have refrained from expanding the statute to include such conduct.

B. *The Crafting of Modern Sodomy*

I have demonstrated that classical criminal sodomy proscribes a broad range of different sexual conduct that can be performed by humans. The proscription applies irrespective of the marital status of the participants, their sex, or the consensual nature of the activity. Although early statutory and constitutional attacks on these statutes were largely unsuccessful, elaborations of the constitutional right to privacy[93] altered the criminal law of sodomy. I speak first to the statutory challenges and then discuss the constitutional attacks on the statute. I conclude by describing the manner in which the reach of the crime against nature statute has been narrowed as a result of the partial success of these attacks.

1. Statutory Challenges.—Early on, Oklahoma courts considered and rejected common-law attacks on the enforceability of the crime against nature statute. Opponents of the statute argued that the common law required strict construction of penal statutes. According to an early version of this argument, the Oklahoma sodomy provision, since it otherwise failed to specify with any kind of detail the precise conduct proscribed, could have no greater reach than common-law sodomy. In *Ex parte De Ford*,[94] the first case in Oklahoma to present this issue, the court found no reason to consider the argument since it determined that under its reading of common-law sodomy, fellatio, the conduct at issue in that case, was encompassed in the common-law definition.[95]

Later versions of this argument took the position that the crime against nature statute was indefinite and therefore unenforceable because it insufficiently informed those who are subject to it as to what conduct on their part would render them liable to its penalty.[96] The courts, in one breath, agreed that penal statutes should be sufficiently explicit so that one may know what acts are prohibited, but nonetheless concluded that this rule did not apply to

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91. *See* Virgin v. State, 792 P.2d 1186 (Okla. Crim. App. 1990) (holding that penetration of rectum of the prosecuting witness by the finger of the accused was not an act chargeable as a crime against nature).

92. OKLA. STAT. tit. 21, § 1111.1 (1991); *see* discussion *infra* part IV.A.

93. *See, e.g.*, Carey v. Population Services, 431 U.S. 678 (1977) (holding that state may not regulate the sale and distribution of contraceptives if it serves no compelling state interest); Eisenstadt v. Baird, 405 U.S. 438 (1972) (recognizing the right of a woman to use contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing the right of married couples to use contraception).

94. 168 P. 58 (Okla. Crim. App. 1917).

95. *Id.* at 59-60.

96. This was the argument raised, for instance, in Berryman v. State, 283 P.2d 558, 561, 563 (Okla. Crim. App. 1955).

the crime against nature statute because the crime against nature was characterized as a pariah of crimes—a legal outcast. Pariah crimes are so indelicate that they need not be subject to the specificity rule; neither a legislature nor a state need be burdened with the obligation, applicable to other crimes, no matter how despicable, to specify the acts prohibited.[97] Why? Because the sexual behavior covered should not be described among Christians, and besides, both the Bible and learned commentaries on criminal law provided sufficient notice of the particulars of the crime.[98] In this respect at least, Oklahoma courts have treated the crime against nature as a special crime to which the limitations of the penal law do not apply in the same way as perhaps they may apply to, say, murder. It seems, however, that if crimes against nature are not subject to the limitations applicable to other criminal provisions, the basis for this exception should perhaps be more weighty than a concern about the sensibilities of certain Christians to a recitation of the particulars of certain religious sexual conduct taboos.

In early vagueness challenges to the statute proscribing crimes against nature, the Oklahoma courts also considered, and rejected, challenges to the indictment or information on vagueness grounds. In prosecutions under the crime against nature statute, the courts have held that an indictment or information charging the commission of the crime against nature in the language of the statute was sufficient, even if the specific acts committed are not there set forth.[99] This, according to the courts, was the preferred course of conduct for prosecutors given the indelicate nature of the crime committed.[100] The courts relied in part on tradition, noting that the English courts had handled indictments for common-law sodomy in this manner since the time of Blackstone.[101] Certainly, there is a perverse logic to the notion that if the Legislature could enact a law prohibiting a crime that is unspecified in its particulars (because the particulars could be determined after proper

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97. *Id.* at 563. *See also* People v. Green, 165 N.W.2d 270, 271 (Mich. 1968) ("Since the crime is of an indelicate nature, it cannot be said that the failure to graphically outline the acts encompassed by the crime of sodomy causes the statute to be unconstitutionally vague. Similarly, the defendant's arguments that the indictment did not adequately inform them of the crime charged is insubstantial.").

98. *Berryman*, 283 P.2d at 563.

99. *Id.*; *see also* Lefavour v. State, 142 P.2d 132, 135 (Okla. Crim. App. 1943) (affirming conviction of 16-year-old boy for fellating an 8-year-old boy); Roberts v. State, 47 P.2d 607, 610 (Okla. Crim. App. 1935) (holding an information charging 69-year-old blind man accused of committing sodomy with a 9-year-old girl to be sufficient); Borden v. State, 252 P. 446, 447 (Okla. Crim. App. 1927) (holding an information charging 18-year-old defendant with crime against nature for non-consensually fellating a 13-year-old boy to be sufficient).

This view was not unique to Oklahoma. *See, e.g.*, Honselman v. People, 48 N.E. 304, 305 (Ill. 1897); Glover v. State, 101 N.E. 629, 631 (Ind. 1913); Jaquith v. Commonwealth, 120 N.E.2d 189, 192 (Mass. 1954); State v. Mays, 329 So. 2d 65, 66 (Miss. 1976); *In re* Benites, 140 P. 436 (Nev. 1914); State v. Stokes, 163 S.E.2d 770, 773 (N.C. 1968).

100. *Berryman*, 283 P.2d at 563 ("Many courts hold that a description of the offense in terms of the statute without stating further the particulars of the offense is sufficient because the very alleged sexual behavior is such as should not be described among Christians.").

101. *LeFavour*, 142 P.2d at 135; *Borden*, 252 P.2d at 446-47.

Christian instruction about sinful sexual conduct),[102] then prosecutors could charge a particular offense without specifying the particulars of the offense charged.

As such, due regard to the sentiments of decent humanity was apparently enough to except sodomy prosecutions from the Oklahoma law of criminal procedure, in effect since 1887, that an indictment or information set forth a "statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended."[103] The defendant was not required to have particular knowledge of the statutory proscription, or of the particulars of the offense. Why? Perhaps because the Oklahoma Legislature believed that decent citizens who received proper religious instruction in the sexual taboos of American society would have no need for the details, and the others deserved what they had coming to them. This sanctimonious position, which forms the core of state court sodomy jurisprudence, is hard to justify, considering that heterosexual married couples who, by mutual consent, engaged in acts of fellatio, cunnilingus, and anal intercourse, could be prosecuted for committing the crime against nature as surely as the archetypal gay man fellating his lover.

Another argument, which was posed and rejected early in this century, sought to void indictments that tracked the wording of the statute on the grounds that the very language of the statute was inherently inflammatory and prejudicial.[104] The defendant in *Johnson v. State*[105] contended that the indictment itself served to inflame the passions and prejudices of the jury by describing the acts charged as "detestable and abominable," even though such language tracked the statute.[106] The Court of Criminal Appeals somewhat simplistically reasoned that since it had previously held that an indictment under the statute was sufficient if it tracked the statutory language,[107] and

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102. *See Roberts*, 47 P.2d at 610 ("Our Penal Code . . . gives no definition of the crime which the law with due regard to the sentiments of decent humanity has always treated as one not fit to be named."). Recall that one of the definitions noted with approval by the court in *De Ford* was "Peccatum illud horrible inter christianos non nominandum." *Ex parte* De Ford, 168 P. 58, 59 (Okla. Crim. App. 1917) ("[T]he sin so horrible that among christians it is not named.") (quoting RUSSELL, *supra* note 35, at 697. The crime is one of sin, and a sin so great that as among Christians it is too indelicate to describe. However, as among all citizens of the state, commission of this sin, too horrible to be named among the religious, might cost those who put less stock in the sexual conduct teachings of orthodox Christianity up to 10 years of their liberty for unchristian sexual conduct.

103. OKLA. STAT. tit. 22, § 401(2) (1992) (*adopting* COMP. LAWS DAK. § 7241); *see also* OKLA. STAT. tit. 22, § 402(3) (1992) (*adopting* COMP. LAWS DAK. § 7242) (requiring the state to set forth the particular circumstances of the offense charged, when they are necessary to constitute the complete offense).

104. A basic principle of criminal procedure proscribes all activity that might have the effect of inflaming the passions or prejudices of the jury. *See, e.g.*, Cole v. State, 175 P.2d 376, 379-80 (Okla. Crim. App. 1946).

105. 380 P.2d 284 (Okla. Crim. App. 1963) (affirming conviction of a male defendant accused of engaging in anal intercourse with a number of 7- to 12-year-old boys).

106. *Id.* at 291-92.

107. *Id.* (quoting Roberts v. State, 47 P.2d 607 (Okla. Crim. App. 1935)).

since the statute as drafted contained the offending language, adding such language to the indictment could not serve to unduly inflame and prejudice the jury.[108]

The solution offered by the *Johnson* court avoided the real issue of the case—whether the language of the statute itself was impermissibly inflammatory. This issue was resolved by the Court of Criminal Appeals in *Moore v. State,*[109] where the defendant contended that the words "detestable and abominable" in the statute constituted an impermissible legislative attempt to comment on the evidence. The Court of Criminal Appeals, relying on its earlier decision in *Johnson v. State,* rejected the argument without stopping long enough to consider it.[110] This line of attack was renewed in *Soap v. State,*[111] where the defendant contended that the trial court's use of the statute's language constituted reversible error because the words "detestable" and "abominable" impermissibly embellished the sordidness of the act to the prejudice of the defendant.[112] The Court of Criminal Appeals again gave this argument short shrift, concluding, without analysis, that the charge fairly and accurately stated the applicable law. However, the argument has some logical merit.[113]

2. Constitutional Challenges: Vagueness.—Constitutional challenges to the sodomy statute have taken two routes. Prior to the U.S. Supreme Court's decision in *Wainwright v. Stone,*[114] the traditional approach was to chal-

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108. *Johnson*, 380 P.2d at 291-92.

109. 501 P.2d 529 (Okla. Crim. App. 1972) (affirming adult male conviction for having anal intercourse with 11-year-old stepson), *cert. denied*, 410 U.S. 987 (1973).

110. *Id.* at 552-53.

111. 562 P.2d 889 (Okla. Crim. App. 1977).

112. *Id.* at 895.

113. Thus, for instance, the *Soap* court relied for its conclusion on Turman v. State, 522 P.2d 247 (Okla. Crim. App. 1974), to support its conclusion that such instruction was not prejudicial. However, *Turman* involved a conviction for larceny of domestic animals (cattle), and the defendant's contention in that case that "remarks about the custody of the 'stolen' animal were prejudicial" was not considered because the defendant "neither argued the alleged error in his Motion for New Trial, or referred to this remark in his Petition in Error." *Turman*, 522 P.2d at 249. Consider also that the *Soap* court may well not have wanted to expend much time with this argument because the state's case was substantial, and the crime charged particularly unsavory, involving a charge of anal intercourse with a seven year old girl. It is hard to see, however, how the description of the crime that the defendant is accused of committing, an *abominable* and *detestable* crime against nature, would be no less inflammatory and prejudicial than the comments of the prosecutor in Cole v. State, 175 P.2d 376, 380 (Okla. Crim. App. 1946) (reversing conviction), who, in closing argument in a case charging a young minister of the gospel with homosexual anal intercourse, stated: "This defendant has turned the words of The Master around, when He said, 'Come unto me, ye little children and be saved.' This defendant says, 'Come unto me you little boys and I will corn hole every one of you.'"

114. 414 U.S. 21 (1973). In *Wainwright*, the Supreme Court held:

> The judgement of federal courts as to the vagueness or not of a state statute must be made in light of prior state constructions of the statute. For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitively as if it had been so amended by the legisla-

lenge the crime against nature statute on constitutional vagueness grounds.[115] This argument was made interchangeably with the common-law statutory construction argument pressed before the courts. The Court of Criminal Appeals has generally given constitutional vagueness challenges short shrift. For example, in *Warner v. State*,[116] the court rejected the argument that the crime against nature statute was invalidly vague and overbroad because it could unconstitutionally proscribe consensual marital acts. Citing with approval a then recent Nevada case,[117] the Court of Criminal Appeals reasoned that the language of the statute "is definite in that men or women of common knowledge can reasonably understand the conduct prohibited by said statute."[118] This constitutional vagueness theory,

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> ture,' claims of impermissible vagueness must be judged in that light. This has been the normal view of this court.

Id. at 22-23 (citations omitted).

115. This is essentially a Due Process challenge. The argument, as developed in federal constitutional jurisprudence, provides that a statute that is so vague as to be incomprehensible or that otherwise does not provide the person with fair notice of the conduct regulated deprives the person of due process, and is, for that reason, void. *See, e.g.*, Canfield v. State, 506 P.2d 987, 988 (Okla. Crim. App.) (holding statute prohibiting "the detestable and abominable crime against nature" is not unconstitutional as being too broad and indefinite), *appeal dismissed*, 414 U.S. 991 (1973); Warner v. State, 489 P.2d 526, 528 (Okla. Crim. App. 1971) (holding statute prohibiting crime against nature is not unconstitutionally vague and that men or women of common knowledge can reasonably understand he conduct prohibited by the statute).

Of the states presented with this challenge, only two, Alaska and Florida, struck down their statutes on the basis of vagueness. Harris v. State, 457 P.2d 638, 640-641 (Alaska 1969); Franklin v. State, 257 So. 2d 21, 22-23 (Fla. 1971); *cf.* Jones v. State, 200 N.W.2d 587, 590 (Wis. 1972) (assuming that former version of statute proscribing the crime against nature was unconstitutionally vague).

Other states have either sidestepped the issue when presented with it or have upheld the statute against a constitutional vagueness attack. *See, e.g.*, State v. Bateman, 547 P.2d 6, 9 (Ariz.), *cert. denied* 429 U.S. 864 (1976); Carter v. State, 500 S.W.2d 368, 372-73 (Ark. 1973) (upholding 21 year sentences upheld for consensual acts), *cert. denied*, 416 U.S. 905 (1974); People v. Boljat, 98 P.2d 513,514 (Cal. 1940); Gilmore v. State, 467 P.2d 828, 829 (Colo. 1970); Wanzer v. State, 207 S.E.2d 466, 471 (Ga. 1974); State v. Goodrick, 641 P.2d 998, 999 (Idaho 1982) (avoiding direct consideration of constitutional challenge); Blake v. State, 124 A.2d 273, 274 (Md. 1956); People v. Coulter, 288 N.W.2d 448, 450 (Mich. 1980); State v. Mays, 329 So.2d 65, 66 (Miss. 1976); State v. Crawford, 478 S.W.2d 314 (Mo. 1972); Hogan v. State, 441 P.2d 620, 622 (Nev. 1968); State v. Trejo, 494 P.2d 173, 175 (N.M. Ct. App. 1972) (Sutin, J., dissenting); State v. Poe, 252 S.E.2d 843, 845 (N.C. Ct. App.), *petition denied and appeal dismissed*, 259 S.E.2d 304 (N.C. 1979), *appeal dismissed*, 445 U.S. 947 (1980); Warner v. State, 489 P.2d 526, 528 (Okla. Crim. App. 1971); State v. Milne, 187 A.2d 136, 140-41 (R.I. 1962), *appeal dismissed*, 373 U.S. 542 (1963); Stephens v. State, 489 S.W. 2d 542, 543 (Tenn. Crim. App. 1972); State v. Rhinehart, 424 P.2d 906, 910 (Wash. 1967).

The Supreme Court has twice rejected vagueness challenges to state crime against nature statutes. *See* Rose v. Locke, 423 U.S. 48 (1975) (upholding Tennessee statute as applied to acts of cunnilingus); *Wainwright*, 414 U.S. at 23 (upholding Florida statute, which has since been replaced).

116. 489 P.2d 526 (Okla. Crim. App. 1971) (upholding conviction of adult female for orally sodomizing an 18-year-old female).

117. Hogan v. State, 441 P.2d 620 (Nev. 1968).

118. *Warner*, 489 P.2d at 528. The court, citing *Hogan*, explained that the term "crime against nature" was as much a "term of art," disclosing its meaning through interpretation, usage and application, as "robbery," "larceny," or even "murder": "All are 'words of art' disclosing their full meaning through interpretation, usage and application." *Warner*, 489 P.2d at 528 (quoting *Hogan*, 441 P.2d at 621-22).

The Court of Criminal Appeals could also take comfort in the fact that this explanation was well established in prior and contemporaneous judicial pronouncements in other states. *See Ex parte* Rankin, 183 P. 686 (Cal. 1919) (stating that every person of ordinary intelligence understands what the crime against

reasserted in *Moore v. State*,[119] *Carson v. State*,[120] and later cases,[121] was rejected without analysis, simply by citing *Warner v. State* or its progeny. Note that the Court of Criminal Appeals has not always been so cavalier with other constitutional challenges. Indeed, in a related area of the law, where ordinary heterosexual nude dancing was the object of proscription of conduct "outraging public decency,"[122] the Court of Criminal Appeals applied federal constitutional due process restrictions as early as 1977 to void application of the statute on vagueness grounds.[123]

Why might the Court of Criminal Appeals have been so disinterested in

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nature with a human being is); State v. Milne, 187 A.2d 136, 141 (R.I. 1962) ("It would not be reasonable to require a legislature to anticipate and describe in other than comprehensive terms all of the bizarre means for perverting the sexual function that are conceived by depraved minds."); *see also* Jaquith v. Commonwealth, 120 N.E. 2d 189, 191 (Mass. 1954) (holding "unnatural and lascivious conduct" are words of common usage and are well defined); *Poe*, 252 S.E.2d at 845 (quoting 16 AM. JUR. 2d, *Constitutional Law*, § 552, at 951-52).

As applied to modern commonly practiced sexual activities, this is a bit farfetched, considering, for example, that many women who have fellated their gentlemen friends in order to preserve their virtue (or for that matter, men who have practiced cunnilingus in order to, among other things, preserve the virginity of their female companions) would have been astounded to learn that they were engaging in an activity that might land them in the penitentiary for up to 10 years. *See, e.g.*, MILTON DIAMOND & ARNO KARLEN, SEXUAL DECISIONS 198-200 (1980) (summarizing characteristics of sexual behavior in Western society); John H. Gagnon & William Simon, *The Sexual Scripting of Oral Genital Contacts*, 16 ARCHIVES SEX. BEHAV. 1 (1987) (analyzing the prevalence of oral sex in the U.S. over the past 50 years); Sandra L. Hofferth, et al., *Premarital Sexual Activity Among U.S. Teenage Women Over the Past Three Decades*, 19 FAM. PLANNING PERSP. 46 (1987) (analyzing levels of nonmarital and premarital sexual activity among teenage girls).

119. 501 P.2d 529, 532 (Okla. Crim. App. 1972) (affirming conviction of stepfather for anal intercourse with 11-year-old stepson), *cert. denied*, 410 U.S. 987 (1973).

120. 529 P.2d 499, 508 (Okla. Crim. App. 1974) (affirming conviction of adult male for, among other things, the rape and sodomizing of a female child and an adult female).

121. *See* McBrain v. State, 763 P.2d 121, 123 (Okla. Crim. App. 1988) (affirming conviction of adult male for kidnapping, rape, and sodomy of 14-year-old female); Plotner v. State, 762 P.2d 936, 944 (Okla. Crim. App. 1988) (remanding in part the conviction of adult male for attempted rape and forcible cunnilingus and disposing vagueness challenge by reference to Casey v. State, 732 P.2d 885, 887 (Okla. Crim. App. 1987), *Hicks*, 713 P.2d at 19, and *Golden*, 695 P.2d at 7); Harris v. State, 713 P.2d 601, 602 (Okla. Crim. App. 1986) (upholding judgment against adult male convicted of crime against nature during the course of a burglary where sex of victim not reported); Hicks v. State, 713 P.2d 18, 19-20 (Okla. Crim. App. 1986) (overturning conviction of an adult male for forcible cunnilingus against an adult female in the course of a burglary for failure to prove penetration); Glass v. State, 701 P.2d 765, 770 (Okla. Crim. App. 1985) (upholding conviction of adult male for rape, crime against nature, and robbery against two females and disposing of vagueness challenge by reference to *Carson*, 529 P.2d at 508 and *Golden*, 695 P.2d at 7); Golden v. State, 695 P.2d 6, 7 (Okla. Crim. App. 1985) (upholding trial court's finding that adult male coercively fellated a 13-year-old boy); Clayton v. State, 695 P.2d 3,6 (Okla. Crim. App. 1984) (affirming conviction of adult male found guilty of attempting to engage in cunnilingus with an adult female during the course of a burglary); Canfield v. State, 506 P.2d 987, 988 (Okla. Crim. App. 1973) (upholding conviction of consensual fellatio), *appeal dismissed*, 414 U.S. 991, *rehearing denied*, 414 U.S. 1138 (1974).

122. OKLA. STAT. tit. 21, § 22 (1991) provides that: "Every person who willfully and wrongly commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, although no punishment is expressly prescribed therefor by this chapter, is guilty of a misdemeanor."

123. State v. Walker, 568 P.2d 286, 287 (Okla. Crim. App. 1977) (holding that since OKLA. STAT. tit. 21, § 22 (1991), which proscribes conduct outraging public decency, neither mentions sexual conduct nor specifically defines such conduct within the constitutional bounds set forth in Miller v. California, 413 U.S. 15 (1973), it was constitutionally impermissible to charge nude dancer with violation of the statute), *overruling* Ridgeway v. State, 553 P.2d 511 (Okla. Crim. App. 1976)).

giving serious consideration to the constitutional vagueness challenges raised by the sodomy cases? In large part, perhaps, the old morality and scientific, psychiatric versions of the reality of the deviations proscribed by the statute[124] played a part in delaying a considered examination of the constitutional arguments raised. Thus, the *Warner* court could reason, without embarrassment, that the crime constituted an offense against the laws of nature, as well as against the laws of humankind. Since all humans (at least all Oklahomans) were presumed to have a working knowledge of the laws of nature and the punishments for the violations thereof, the prohibitions of the statute would, by definition, be common knowledge even if unstated.[125] As such, there could not possibly be any confusion respecting the conduct prohibited. Perhaps also the facts of the cases in which the issue was raised did not lend themselves to careful consideration of issues that might require the reversal of a particularly gratifying conviction. A court that is cautious doctrinally is probably least likely to consider highly sophisticated and newly applied constitutional thinking (or the *extension* of new doctrine) where the convictions involve brutal coercive conduct such as anal intercourse with a young stepson,[126] abduction for the purpose of lesbian cunnilingus,[127] or rape.[128]

Indeed, the one member of the Court of Criminal Appeals who has even been willing to consider the merits of the constitutional vagueness challenges first did so only in a case that presented far more sympathetic facts (conviction for consensual adult homosexual sexual activity) than other cases raising the issue.[129] Thus, starting with his partial dissent in *Canfield*,[130]

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124. For a discussion of the driving force of moral vision and thereafter, the scientific reasoning of psychiatry, see discussion *infra* part III.

125. Recall the lessons of the laws of nature set forth by the Oregon Supreme Court in State v. Start and quoted with approval by the Oklahoma Court of Criminal Appeals in *Ex Parte* De Ford, 168 P. 58 (Okla. Crim. App. 1917). *See supra* note 48.

126. Moore v. State, 501 P.2d 529, 530-31 (Okla. Crim. App. 1972), *cert. denied*, 410 U.S. 987 (1973). Indeed, the Court of Criminal Appeals in *Moore*, in finding the constitutional argument meritless, expressed its sense of the untoward presumption of the *Moore* defendant in even bringing the issue to the attention of the court. The Court of Criminal Appeals derisively described the constitutional balancing for which the *Moore* defendant was arguing as consisting of the state's right to regulate the conduct of promiscuous non-married persons against an adult male's right to bond with a male child through coercive sexual acts. *Id.* at 532. The rejection of such a proposition was evident in its stating.

127. Warner v. State, 489 P.2d 526, 526-27 (Okla. Crim. App. 1971).

128. Carson v. State, 529 P.2d 499, 508 (Okla. Crim. App. 1974).

129. Canfield v. State, 506 P.2d 987, 989-90 (Okla. Crim. App. 1973) (Brett, J., concurring in part and dissenting in part), *appeal dismissed*, 414 U.S. 991, *reh'g denied*, 414 U.S. 1138 (1974). Indeed, it was only when the court was finally presented with a more conventionally sympathetic fact pattern (a highly contested trial involving heterosexual anal intercourse and fellatio) that a majority of the court, if somewhat reluctantly, accepted in a limited way the implications of federal constitutional "privacy rights" jurisprudence. *See* Post v. State, 715 P.2d 1105, 1107 (Okla. Crim. App.) (reversing conviction of adult male for rape, anal intercourse, and fellatio), *reh'g denied*, 717 P.2d 1151 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986).

On the jurisprudence of "privacy rights" an almost uncountable number of articles and books have been produced. For arguments in favor of a constitutional right to some significant protection from state interference in private consensual sexual activity, see, for example, Chamallas, *supra* note 27, at 779-782

Judge Brett began to take the position that the crime against nature statute was unconstitutionally vague "as its meaning is not ascertainable from the language of the statute."[131] Judge Brett's analysis was never accepted by a majority of the court—more, I suspect, for reasons of historical inertia than for any more sophisticated or principled reasons. In the end, this line of constitutional attack proved to be much ado about nothing.

The Court of Criminal Appeals attempted to slam the doors on further attacks based on constitutional vagueness challenges in *Clayton v. State*.[132] Speaking through Judge Brett, the Court of Criminal Appeals rejected a constitutional vagueness challenge on the grounds that the Federal Supreme Court's decision in *Wainwright v. Stone*[133] foreclosed any consideration of the issue in Oklahoma, given the prior construction of the statute by the Court of Criminal Appeals.[134] However, constitutional vagueness attacks

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(arguing that contemporary law has increasingly accepted a more egalitarian view of appropriate sexual conduct, as evidenced in the law's understanding of "consent"); Henkin, *supra* note 27 (arguing that obscenity regulation is aimed at regulating morals and that obscenity laws should be reexamined in that light); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974) (examining the Supreme Court's newly-created "right to privacy" and attempting to discover its characteristics); Karst, *supra* note 27 (arguing for a protected right of intimate relationship between consenting adults); Schnably, *supra* note 30 (considering *Roe*, *Griswold*, and *Bowers* and arguing that gay rights issues have implications for every person's privacy rights). *But see* MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (arguing that the discourse of rights and the primacy of individual rights needs substantial limiting in light of the rights of the community); Hafen, *supra* note 27 (arguing that there should not automatically be accorded a constitutional right for individuals to engage in every sort of consensual sexual activity); Arthur E. Brooks, Note, *Doe and Dronenburg: Sodomy Statutes Are Constitutional*, 26 WM. & MARY L. REV. 645 (1985) (discussing whether a court constitutionally can invalidate a state sodomy law).

130. 506 P.2d at 989 (Brett, J., concurring in part and dissenting in part). Judge Brett argued that despite numerous court opinions to the contrary, the "prohibited conduct is not clearly expressed so that the ordinary person of common intelligence can determine exactly what he may, or may not do." *Id.* He argued that while the phrase "crime against nature" was a term of 'art' he did "not agree that it is as understandable as are the words 'robbery,' 'larceny,' 'burglary,' and even 'murder.' At least those words can be found in any ordinary dictionary, but the phrase 'abominable and detestable crime against nature' is not defined in any dictionary this writer has consulted. . . . [T]he fact that courts have interpreted the statute for a hundred years does not satisfy the constitutional requirement." *Id.* at 989-90. Indeed, about the only requirement the statute appeared to satisfy is the extreme state of legal prudery in fashion at the time the statute was enacted: "[J]ust because the persons of 1890 and 1910, when the statute was formulated, may have been offended at the word 'sodomy,' that puritan belief is no justification for perpetuating an unconstitutionally vague statute." *Id.* at 990. In light of this, Judge Brett argued, if the state is to proscribe "sodomy," it should say so. Indeed, as Judge Brett noted, the Legislature was even then considering a revision to the statute that would have defined sodomy and aggravated sodomy, which unfortunately was not enacted, and would have defined "the offense without words of antiquity, so the ordinary person of common intelligence can understand what is prohibited." *Id.* (referring to S.B. 22, 34th Okla. Leg., 1st Sess. (1973)).

131. *Id.* at 989.

132. 695 P.2d 3, 6 (Okla. Crim. App. 1984) (affirming conviction of adult male for attempted coercive cunnilingus on an adult female).

133. 414 U.S. 21 (1973).

134. Judge Brett, noting that prior to *Wainwright* he had been of the opinion that OKLA. STAT. tit. 21, § 886 (1971) was unconstitutionally vague, reasoned that "it is clear that if prior State opinions include certain conduct within the definition of 'detestable and abominable crimes against nature,' the statute is no longer vague and indefinite." *Clayton*, 695 P.2d at 6. Note, however, that Judge Brett may have misread the breadth of the Supreme Court's holding in *Wainwright*. *Wainwright* need not foreclose a determination of vagueness even where a statute has been construed in the past. Judge Brett appeared to realize this after

on the crime against nature statute have continued even after *Clayton*, and rightly so.[135] To the extent that *Clayton* holds that *Wainwright* forecloses the determination that the crime against nature statute is impermissibly vague, it is wrong.[136]

Wainwright has appeared to be a questionable source of support even to Judge Brett. Judge Brett recognized this after *Clayton*, and continued to entertain doubts about the force of *Wainwright*, and, more importantly, the validity of the older cases that might have "cleared up" the vagueness problems of the statute. Thus, two years after *Clayton*, Judge Brett indicated that he had again changed his mind respecting the constitutionality of the crime against nature statute. Writing for the majority in *Hicks v. State*,[137] Judge Brett stated that his belief that the crime against nature statute was unconstitutionally vague "has not changed. However, I have been unable to persuade a majority of my colleagues to adopt my view. Despite my strong personal discomfort regarding the constitutionality of this statute, I believe my personal view must take a back seat to principles of *stare decisis* . . . ."[138]

3. Constitutional Challenges: Privacy.—In the 1970s, defendants began

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the *Clayton* decision was rendered. *See infra* text accompanying note 136.

135. *See* Casey v. State, 732 P.2d 885, 887 (Okla. Crim. App. 1987) (affirming conviction of an adult male for rape and forcible sodomy (fellatio) of an adult woman); Casady v. State, 721 P.2d 1342, 1344-45 (Okla. Crim. App. 1986) (affirming conviction of an adult male for kidnapping, rape, one count of forcible sodomy, and two counts of sodomy against an adult female); Peninger v. State, 721 P.2d 1339, 1341 (Okla. Crim. App. 1986) (affirming conviction of an adult male for kidnapping, rape, anal intercourse, and fellatio committed on an adult female); Glass v. State, 701 P.2d 765, 770 (Okla. Crim. App. 1985) (affirming conviction of adult male for rape, crime against nature, and robbery committed against two females); Golden v. State, 695 P.2d 6, 7 (Okla. Crim. App. 1985) (affirming conviction of adult male for coercively fellating a 13-year-old boy).

136. The United States Supreme Court in *Wainwright* merely reiterated the traditional rule of construction that claims of vagueness must be judged in light of the interpretation of the statute by the state's highest courts. *Wainwright*, 414 U.S. at 22-23. However, *Wainwright* does not hold that the state is required to adhere to past construction of its statutes, even constructions as to the vagueness of the statute in question. Thus, in Florida, the decision cited by the Supreme Court as giving substantial content to the state crime against nature statute, Delaney v. State, 190 So. 2d 578 (Fla. 1966), was itself overturned by the Supreme Court of Florida in 1971, on the basis that the Supreme Court of Florida would not give content to the statute, and, absent a clear description of the acts proscribed on the face of the statute, the statute would be declared void for vagueness and uncertainty. *Wainwright*, 414 U.S. at 23-24 (citing *Franklin v. State*, 257 So.2d 21 (Fla. 1971)). Consequently, all *Wainwright* may do is confirm the power of a state court to interpret its statute; it does not require state courts to make a determination of vagueness on the basis of ancient constructions of a statute that, to modern eyes, might well appear vague, and therefore, void. That, perhaps, is the reason cases such as *Wainwright* might not have prevented Judge Brett from taking the position that the Oklahoma sodomy statute was impermissibly vague. In Rose v. Locke, 423 U.S. 48 (1975), the Supreme Court rejected an attempt by a *federal* appellate court to void Tennessee's sodomy statute for vagueness when such a conclusion rested on the federal court's construction of the statute (the Tennessee Supreme Court had not then spoken on the issue before the court). *Rose* did nothing to impair the power of a state court to interpret or invalidate its own sodomy statutes for vagueness.

137. 713 P.2d 18, 19-20 (Okla. Crim. App. 1986) (reversing conviction for forcible cunnilingus in the course of a burglary for want of proof of penetration).

138. *Id.* at 19 (citing as binding precedent Judge Brett's earlier opinion in *Clayton*, 695 P.2d at 6).

to press a new line of constitutional attack after the United States Supreme Court handed down decisions creating a so-called right of privacy.[139] The first attack on Oklahoma's sodomy statute, on privacy grounds, was deflected by the *Warner v. State* court in 1971 on the grounds that the contention was inappositely raised.[140] The defendant in *Moore v. State* also challenged the statute for unconstitutional overbreadth, arguing that the statute impermissibly proscribed certain private consensual marital relations.[141] The Court of Criminal Appeals, noting that the defendant had not been married to his eleven-year-old stepson at the time the anal intercourse occurred, declined the invitation to rule on this contention.[142] Later challenges in the early 1980s were also rejected on similar grounds.[143]

Ironically, in the same year that the United States Supreme Court decided *Bowers v. Hardwick*,[144] the Oklahoma Court of Criminal Appeals

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139. The three seminal cases respecting this right "to be let alone" are generally identified as Carey v. Population Services, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). To this trilogy should probably be added Bowers v. Hardwick, 478 U.S. 186 (1986). For a discussion about the nature of the possible ambiguities of privacy jurisprudence, see Schnably, *supra* note 30.

140. Warner v. State, 489 P.2d 526, 528 (Okla. Crim. App. 1971). Since the indictment related to the activities of a married couple with a woman not the wife of either defendant, the court declined to reach the issue of the effect of *Griswold*, concluding that *Griswold* "does not prohibit the state's regulation of sexual promiscuity or misconduct between non-married persons." *Id.*

Constitutional privacy attacks were given short shrift in other jurisdictions as well. *See, e.g.*, State v. Bateman, 547 P.2d 6, 8-9 (Ariz.) (en banc), *cert. denied*, 429 U.S. 864 (1976); People v. Roberts, 64 Cal. Rptr. 70, 74 (Cal. Ct. App. 1967); State v. Poe, 252 S.E.2d 843, 845 (N.C. Ct. App.), *petition denied and appeal dismissed*, 259 S.E.2d 304 (N.C. 1979).

141. Moore v. State, 501 P.2d 529, 532 (Okla. Crim. App. 1972).

142. Taking its cue from the *Warner* opinion, the *Moore* court explained: "We are of the opinion that the right of the state of Oklahoma to regulate sexual promiscuity and sexual misconduct between non-married persons to be far superior to defendant's right to express sexual unity by performing an unnatural sex act with a young male child. We, therefore, find this proposition to be without merit." *Id.*

The *Moore* court's analysis is strikingly similar to then contemporary cases reported from other jurisdictions. *See, e.g.*, People v. Hurd, 85 Cal. Rptr. 718, 725-726 (Cal. Ct. App. 1970) ("Defendant does not and could not cite any authority that the right to privacy constitutionally protected under the 'penumbra doctrine' extends to a father's sexual contact with his minor daughter.") People v. Coulter, 288 N.W.2d 448, 451 (Mich. 1980) ("Finally, we find it unnecessary to determine whether the sodomy statute infringes on the right of privacy of all adults. We need only decide whether its application to adult prison inmates violates the constitutional guarantee of privacy.") *See also* Carter v. State, 500 S.W.2d 368 (Ark. 1973) (recognizing no federal or state constitutional protection for consensual sexual activity), *cert denied*, 416 U.S. 905 (1974); State v. Santos, 413 A.2d 58, 66-68 (R.I. 1980) (recognizing no right of privacy for unmarried heterosexuals). *But see* State v. Bateman, 547 P.2d 6, 9-10 (Ariz.) (stating in dicta that the state sodomy statute might be inapplicable to the private sexual activities of married couples), *cert denied*, 429 U.S. 864 (1976); State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976) (holding sodomy statute unconstitutional as applied to private heterosexual conduct); People v. Onofre, 415 N.E.2d 936, 943 (N.Y. 1980) (overturning sodomy statute on federal constitutional grounds); Jones v. State, 200 N.W.2d 587, 591 (Wis. 1972) (implying without deciding that former sodomy statute could not be applied to the private sexual activity of married couples).

143. *See* Canfield v. State, 506 P.2d 987, 988 (Okla. Crim. App. 1973) (rejecting the argument that the statute unconstitutionally interfered with the right of consenting adults to engage in sexual activity), *appeal dismissed*, 414 U.S. 991, *reh'g denied*, 414 U.S. 1138 (1974).

144. 478 U.S. 186, 196 (1986) (upholding Georgia sodomy statute against constitutional attack as applied to proscribed sexual activity of homosexuals).

abandoned *Warner* and substantially voided prosecution under the crime against nature statute where the illicit conduct consisted of alleged consensual unmarried heterosexual sexual activity.[145] In *Post*, the Court of Criminal Appeals held that its prior decision in *Warner* had been erroneous and that "the right to privacy, as formulated by the Supreme Court, includes the right to select consensual adult sex partners."[146] This holding was based on the Oklahoma court's reading of the Supreme Court's "privacy" decisions.[147] Exercise of this right cannot be proscribed by the state in the absence of compelling justification.[148] Moral indignation or repugnance does not create a sufficiently compelling state interest to justify regulation.[149] Additionally, the state failed to demonstrate, to the satisfaction of the court, that the sexual actions of consenting adults would significantly harm society.[150] The *Post* court, however, did not open the door fully to all sorts of consensual sexual conduct. The *Post* court was careful to note that its holding did not affect the applicability of the statute to bestiality, coercive sexual activity, and public or commercial sexual acts.[151] More importantly,

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145. Post v. State, 715 P.2d 1105 (Okla. Crim. App.) *reh'g denied*, 717 P.2d 1151 (Okla. Crim. App.), *cert denied*, 479 U.S. 890 (1986). The defendant in *Post* had been charged by information with rape and two counts of the crime against nature, one for fellatio and the other for anal intercourse. The defendant was charged with maiming because, during the course of the sexual activity, the defendant and the prosecuting victim became involved in an altercation and, as a result, the prosecuting victim eventually lost an eye. The jury acquitted the defendant of rape, but convicted the defendant of the other charges. On appeal, the defendant argued that the convictions on the crime against nature charges must be overturned because the statute was unconstitutionally vague, and also because the statute, as applied to non-violent consensual activity between adults in private, violates his right to privacy under the United States Constitution. The Court of Criminal Appeals ignored the constitutional vagueness claim and rested its decision squarely on its analysis of defendant's privacy claims. *Id.* at 1107, 1109-10.

146. *Id.* at 1109.

147. Thus, in *Post* the Court of Criminal Appeals concluded that its earlier reading of Griswold v. Connecticut, 381 U.S. 479, 486 (1965), limiting *Griswold's* reach to the marriage bed, was too narrow. *Post*, 713 P.2d at 1107-08. The court further concluded that the right to privacy required a more expansive reading: "We are informed that 'the outer limits' of the right to privacy 'have not been marked by the Court.'" *Id.* at 1108 (quoting Carey v. Population Servs., 431 U.S. 678, 684 (1977)). This expansive reading required extension of the right to privacy to consensual adult activity. The Oklahoma court stated: "Indeed, Eisenstadt v. Baird, 405 U.S. 438 (1972) indicates to us that the constitutional right to privacy, which at first appeared to be family based, affords protection to the decisions and actions of individuals outside the marriage union." *Post*, 713 P.2d at 1108. The court continued: "Stanley v. Georgia, 394 U.S. 557 (1969), obviously did not deal with procreative choice within or without marriage, but instead extended the right to privacy to matters of sexual gratification." *Post*, 713 P.2d at 1109. On the basis of this reading of federal privacy jurisprudence, the Court of Criminal Appeals arguably felt compelled to reach its decision in *Post*. *Accord*, State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976) (overturning sodomy statute on constitutional grounds); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (overturning sodomy statute on constitutional grounds).

148. *Post*, 715 P.2d at 1109.

149. *Id.*

150. *Id.* It is interesting to note in this regard that the court justified this conclusion by pointing out that 22 states had, by 1986, decriminalized private consensual sexual activity without significant adverse societal effect.

151. *Id.* at 1109. *Accord* Newsom v. State, 763 P.2d 135, 139 (Okla. Crim. App. 1988) (affirming conviction of an adult male convicted of burglary, rape, and crime against nature forcefully committed against an adult female). Another court that has considered the issue has rejected constitutional privacy protection

perhaps, it sought to limit its holding only to consensual adult *heterosexual* activity.[152]

The *Post* decision was rendered shortly before the U.S. Supreme Court rendered its decision in *Bowers v. Hardwick*.[153] In *Hinkle v. State*,[154] the Court of Criminal Appeals had the opportunity to reconsider its earlier decision in light of *Bowers*. By a narrow margin, however, the Court of Criminal Appeals reaffirmed its holding in *Post*. In doing so it also reaffirmed the strict limitation of that decision to acts of consensual, heterosexual, adult sexual conduct. It distinguished *Bowers* on the grounds that the *Bowers* court considered only the constitutional right of homosexuals to engage in acts proscribed as sodomy in Georgia; *Bowers* had not considered the issue specifically addressed in *Post* respecting the constitutional rights of heterosexuals to engage in deviant activities.[155]

Since *Post*, the Court of Criminal Appeals has refused to expand the meaning of the crime against nature, or at least the acts proscribed thereby. For example, the Court of Criminal Appeals has refused the invitation to extend the definition of the abominable and detestable crime to include the insertion of a finger into the rectum of another.[156] Despite legislative recognition of "new" forms of proscribable sexual conduct—urination, defecation, and ejaculation for the purpose of sexual gratification[157] and masturbation for hire[158]—the Court of Criminal Appeals has considered no case that it might have used as a vehicle for including these acts within the definition of the crime against nature. The boundaries set in the early cases,

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for commercial sexual activity, even if between heterosexuals. *See* State v. Gray, 413 N.W.2d 107, 114 (Minn. 1987) (holding that there is no fundamental right under state constitution to engage in sodomous acts for compensation).

152. *Post*, 715 P.2d at 1109 ("We do not reach the question of homosexuality since the application of the statute to such conduct is not an issue in this case."). *Accord*, State v. Pilcher, 242 N.W.2d 348, 360 (Iowa 1976) (holding the sodomy statute unconstitutional as applied to private heterosexual conduct); *cf. Hinkle*, 771 P.2d at 233 (reversing conviction for oral sodomy by adult male on a 76-year-old female due to erroneous jury instruction that consent was not a defense and citing *Post* in support); *Newsom*, 763 P.2d at 139 (distinguishing *Post* when heterosexual sodomy is not consensual); McBrain v. State, 763 P.2d 121, 123 (Okla. Crim. App. 1988) (distinguishing *Post* as inapplicable to heterosexual activity of the underaged when appellant attacked constitutionality of sodomy statute); Salyers v. State, 755 P.2d 97, 100 (Okla. Crim. App. 1988) (distinguishing *Post* on the grounds that same-sex victim was a minor). *But cf.* State v. Poe, 252 S.E. 2d 843, 844-845 (N.C. Ct. App.) (upholding constitutionality of state statute prohibiting fellatio between males and females without forbidding the same acts between married couples), *petition denied*, 259 S.E.2d 304 (N.C. 1979), *appeal dismissed*, 445 U.S. 947 (1980).

153. 478 U.S. 186 (1986).

154. 771 P.2d 232 (Okla. Crim. App. 1989).

155. *Id.* at 233 n.1.

156. Virgin v. State, 792 P.2d 1186 (Okla. Crim. App. 1990).

157. OKLA. STAT. tit. 21, § 1123(A) (5) (Supp. 1992) (proscribing such activities if performed upon or in the presence of a child under sixteen years of age); *see also* OKLA. STAT. tit. 21, § 1123(B) (Supp. 1992) (prohibiting the intentional touching, mauling, or feeling of the body or "private parts" of a person sixteen years of age or older in a lewd and lascivious manner without consent).

158. OKLA. STAT. tit. 21, §§ 1030(1)(a), 1030(6) (Supp. 1992) (defining prostitution as including masturbation for hire and defining masturbation as the "stimulation of the genital organs by manual or other bodily contact exclusive of sexual intercourse").

and taken for granted in cases like *Berryman*, which then seemed so expansive, now appear constricting in light of the (belated) discovery of the full range of human activity undertaken for purposes of sexual gratification.[159]

4. The Repercussions of Privacy: Consent and Collateral Issues.—The *Post* decision has required the Court of Criminal Appeals to turn its attention to issues of consent.[160] Traditionally, consent was not an element of the crime against nature. As such, the willing partner of a person accused of the crime against nature was deemed to be an accomplice (usually not prosecuted), and the rules respecting accomplice testimony applied.[161] This rule, requiring the state to corroborate the testimony of an accomplice, has two significant consequences. First, since the state would be required to put on additional evidence if the prosecuting witness consented to the acts charged, it was not uncommon for the defense to raise the issue of consent.[162] Second, where the issue of consent was raised, there was little guidance respecting proof of corroboration required of the state in order to comply with the accomplice testimony rules. What was clear, however, was that the corroborating testimony need not be "complete, independent proof of the crime, but if an accomplice's testimony is corroborated in part, the jury is then justified in believing the accomplice's entire story to be true."[163]

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159. Thus, because the court in earlier cases had applied the crime against nature statute only to acts involving the genitalia—fellatio, cunnilingus and anal intercourse—the court concluded that expansion of the crime to include non-oral-genital forms of sexual gratification was now beyond its power. *Virgin*, 792 P.2d at 1188. In light of the court's fearlessness in expanding the reach of the statute even as late as the 1970s to lesbian acts of cunnilingus in Warner v. State, 489 P.2d 526 (Okla. Crim. App. 1971), this new reticence is inexplicable except in light of the transformed view of the sodomy statute after *Post*.

160. Indeed, Judge Lumpkin, speaking in dissent in *Hinkle*, acknowledged that consent had become a significant issue with respect to illicit heterosexual activity. Hinkle v. State, 771 P.2d 232, 235 (Okla. Crim. App. 1989) (Lumpkin, J., concurring in part and dissenting in part).

161. OKLA. STAT. tit. 22, § 742 (1991) provides that a "conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." *See* Cole v. State, 175 P.2d 376, 378-79 (Okla. Crim. App. 1946); Cole v. State, 179 P.2d 176, 177-78 (Okla. Crim. App. 1947) (holding that since prosecuting witness did not consent to anal intercourse, his uncorroborated testimony was sufficient to support conviction); Woody v. State, 238 P.2d 367, 372 (Okla. Crim. App. 1951) (affirming conviction of adult male for fellating a 15-year-old male where the act was committed without threat of force, and therefore corroborating testimony required).

162. In *Cole*, 175 P.2d at 378 (reversing the conviction of young minister of the gospel for engaging in anal intercourse with 14-year-old male congregant), the court noted that even children are capable of giving consent because, unlike the statutes in other jurisdictions, the crime against nature statute did not provide that children under a certain age were legally incapable of giving consent. *See also* Horton v. State, 724 P.2d 773, 775 (Okla. Crim. App. 1986) (affirming the conviction of an adult male for coercive sodomy against a prostitute and holding that the question of the prostitute's consent to the act was one for the jury where, in this case, the prostitute engaged in fellatio at knife point); Slaughterback v. State, 594 P.2d 780, 781 (Okla. Crim. App. 1979) (affirming the conviction of a 55-year-old man for sexual activity with a 16-year-old developmentally-impaired boy).

163. *Woody*, 238 P.2d at 373 (citations omitted).

Clearly, the corroborating testimony rule need not pose much of an obstacle for the determined prosecuting attorney. Such has been the history of its application in Oklahoma.[164]

As a result of the decriminalization of private, consensual, adult heterosexual acts of sexual gratification, the Court of Criminal Appeals also has been required to confront the issue of consent in the heterosexual context of the enforcement of the statute. The traditional role of consent remains intact in cases in which the prosecuting witnesses consented to the acts charged. The question of consent is still a question for the jury, even in what might be characterized as unusual circumstances.[165] However, consent has now increased in significance. Where the parties involved are of opposite sexes, proof of consent does not lead merely to the requirement of corroboration, but must result in the dismissal of the action.

Two questions have arisen as a result of this change: since consent is now more important, especially in heterosexual acts of sodomy, does *Post* require the imposition of new consent requirements in prosecutions for the crime against nature; and, if consent is now implicitly a determinant of liability, ought not the state be required to prove lack of consent in at least heterosexual prosecutions under the statute? In the wake of *Post,* the Court of Criminal Appeals resolved the first issue by looking to the law of statutory rape[166] to hold that in sodomy prosecutions, minors "are too young to make an informed choice about participating in the sexual activity proscribed by this statute."[167] But traditionally consent was never an element of the crime

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164. In *Woody*, sufficient corroboration was provided by the testimony of the janitor who testified that, though he did not witness the act, he did see the defendant running past him wiping his mouth and that the prosecuting witness was attempting to buckle his pants as the janitor came into the room. *Id.* at 369. *See also* Penninger v. State, 721 P.2d 1338, 1340 (Okla. Crim. App. 1986) (holding that there was sufficient corroboration provided by defendant, who testified that the defendant and the female victim had consensually rolled around together on a bed naked, to convict the defendant of kidnapping, rape, anal intercourse, and fellatio).

165. *Horton*, 724 P.2d at 775 (sustaining the jury's finding that the prostitute victim was not a willing accomplice since she resisted the act of fellatio at knife point).

166. *See* OKLA. STAT. tit. 21, § 1111(1) (1991) (defining one form of rape as anal or vaginal intercourse "where the victim is under 16 years of age"). By the terms of the statute, the state has created a presumption that a person under 16 years of age is incapable of giving consent. OKLA. STAT. tit. 21, § 1112 (1991) also provides that "[n]o person can be convicted of rape or rape by instrumentation on account of an act of sexual intercourse with anyone over the age of fourteen (14) years, with his or her consent, unless such person was over the age of eighteen (18) years, at the time of such act." For discussion of statutory rape in Oklahoma, see generally Richardson, *supra* note 23, at 2482 (discussing deletions in the Oklahoma rape statute, made during the 1981 legislative session, which changed the scope of the statute); Payne, *supra* note 18 (discussing the historical origins of gender-based classifications in statutory rape legislation); Scharnberg, *supra* note 18 (discussing gender-based classifications in the Oklahoma rape statutes).

167. Little v. State, 725 P.2d 606, 608 (Okla. Crim. App. 1986). In *Little*, an adult male was convicted of raping and sodomizing his 15-year-old stepdaughter. The defendant raised the argument that the sodomy statute was unconstitutional on its face because it violated the right of privacy in the home. In connection with this argument, the court determined that as applied to the defendant, the sodomy statute was constitutional, because the child was incapable of informed consent, and that the State had a compelling interest in protecting the physical and mental health of minors who the State could determine were incapable of consenting to certain kinds of sexual activity. *Id. Accord* Salyers v. State, 755 P.2d 97, 100 (Okla. Crim.

against nature, irrespective of the age of the victim. The act itself was the crime, the state of mind of the participants thereto making up no part of the crime; consent figured in sodomy cases only as an evidentiary sufficiency issue. This was explained by the Criminal Court of Appeals in *Cole v. State*.[168] Judicial memories are sometimes short, however, especially when the underlying nature of the crime appears to change, and the Court of Criminal Appeals appeared to modify the consent-corroboration rule of *Cole sub silentio* in *Martin v. State*,[169] a case that, interestingly enough, like *Cole*, involved homosexual sexual activity with a child. In *Martin*, the Court determined that a "child of tender years cannot, as a matter of law, consent to sexual acts performed with an adult."[170] The decision in *Martin* was affirmed in *Kimbro v. State*,[171] over the vigorous partial dissent of Judge Parks, who argued that force, not lack of consent, was an essential element of the state's case in a forcible sodomy prosecution, regardless of the victim's

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App. 1988) (explaining that the decision in *Post* did not apply where the victims were minors); Martin v. State, 747 P.2d 316, 317 (Okla. Crim. App. 1987) (upholding the sodomy and lewd molestation of a child conviction of an adult male who lured a seven-year-old boy to fellate him).

168. 175 P.2d 376, 378-79 (Okla. Crim. App. 1946). The two *Cole* cases provide an excellent example of the purpose of consent in traditional sodomy litigation. In the first *Cole* case, the sodomy conviction of the accused minister was reversed because the only testimony respecting the acts was provided by the prosecuting witness, and it was unclear whether he had consented to the acts, and thus his testimony needed corroboration. *Cole*, 175 P.2d at 379. In the second *Cole* case, the same minister's conviction for anal intercourse with another person, obtained substantially on the basis of the testimony of the prosecuting witness, was affirmed where the evidence indicated that the witness had not consented to the act. Cole v. State, 179 P.2d 176, 177-78 (Okla. Crim. App. 1947). In Slaughterback v. State, 594 P.2d 780, 781-82 (Okla. Crim. App. 1979), the Court of Criminal Appeals confirmed that consent was not an element of the crime against nature, and that the issue of consent, for the purpose of determining whether corroboration of the testimony of the prosecuting witness was required, was a question for the jury irrespective of the age of the prosecuting witness except in exceptional circumstances. *Id.* at 781.

169. 747 P.2d 316 (Okla. Crim. App. 1987).

170. *Id.* at 318. In support of this proposition, the court cited Fannin v. State, 88 P.2d 671, 676 (Okla. Crim. App. 1939), a case involving the attempted rape of a female under the statutory age of consent. Logically enough, the Criminal Court of Appeals had concluded that since the statute had incorporated a legislative presumption that a person under a certain age is incapable of informed consent, the State need not prove the element of consent in such cases; the State merely has to prove that the child is under the age specified. *Fannin*, 88 P.2d at 676. The *Martin* court inexplicably failed to cite its 1946 decision in *Cole*, where the court overturned a conviction because the testimony of the prosecuting witness, who might have consented to the acts charged, required corroboration. The *Cole* court specifically explained that the crime against nature statute "does not fix an age of consent." *Cole*, 175 P.2d at 378. In the absence of statutory language providing that children under a certain age are legally incapable of consenting to the act of sodomy, any person who consents to the acts charged is an accomplice. *Id.* at 378-79; *accord Slaughterback*, 594 P.2d at 781-82 ("There is no chronological age limitation for consent."). This seems to be the very proposition rejected, *sub silentio*, in *Martin*. The *Cole* court had noted that several states provided that children under a certain age are not capable of consenting to sodomy, and so a conviction could be based on their uncorroborated testimony. *Cole*, 175 P.2d at 378. However, the court appeared to reject this position holding that the question of consent, if disputed, is a question for the jury, without reference to the age of the parties. *Id.* at 379. *Martin* had the effect of taking this very question from the jury by determining that such activity could never be consensual if the party was a young child.

171. 857 P.2d 798, 799 (Okla. Crim. App. 1990) (Parks, J., concurring in part and dissenting in part) ("Thus, by instructing the jury that a child under the age of sixteen (16) cannot consent to sodomy, the trial court effectively relieved the state from its burden of proof beyond a reasonable doubt that force was employed."), which also expressly overruled *Slaughterback*, 594 P.2d at 781-82.

age. As Judge Parks so clearly saw, the Court of Criminal Appeals was importing the consent provision of the rape statute into the forcible sodomy statute and was making a decision that was better left to the Legislature.[172] In the context of traditional, consentless notions of sodomy, Judge Park's dissent makes sense; however, the majority view in *Kimbro*, that sodomy is more a crime of coercion, and *Martin* are supportable only in light of the transformation of the jurisprudence of sodomy related in Part III.

Having determined that the consentless crime of sodomy now imposed (at least in grey-letter law) consent requirements, it seemed likely that the Court of Criminal Appeals would also draw on the analogy to rape to import into the crime against nature statute the element of consent. That certainly would logically follow from the holding of *Post*, since consensual heterosexual acts of sodomy did not come within the meaning of the crime anymore. The implications of *Martin*, however, appear to cut the other way. Thus, in *Newsom v. State*,[173] the Court of Criminal Appeals refused to read the element of consent into the crime against nature provision in all prosecutions under the sodomy provisions thereby sparing the state the need to prove lack of consent in order to convict. Consent, however, could be pleaded as an affirmative defense to the crime against nature, at least with respect to heterosexual sexual activity.[174]

The Court of Criminal Appeals based its decision in *Newsom* on its reluctance to legislate in this area, arguing that only the Legislature had the power to add an element to a crime.[175] This is a somewhat startling basis for decision considering the Court of Criminal Appeals' long history of legislation in this area in general, and its very recent "legislation" of a presumption against consent in *Kimbro* and *Martin*. After *Martin* and *Newsom*, the defendant was permitted to raise the affirmative defense of consent when the parties were of opposite sexes, but the defense was not available when the prosecuting witness was a child, incapable, as a matter of law, of giving consent.[176] When the parties were of the same sex, the defense did not have available the defense of consent; however, it could still raise consent as a matter going to the proof required to be put on by the State, unless the prosecuting witness was a child, in which case the laws of

172. *Kimbro*, 857 P.2d at 801 (Parks, J., concurring in part and dissenting in part) ("The Oklahoma Legislature has never included a chronological age limitation for consent in any of the sodomy statutes and one should not be added by this Court.").

173. 763 P.2d 135, 139 (Okla. Crim. App. 1988) (affirming adult male's conviction for rape and crime against nature against an adult female and rejecting argument that constitution required the state to prove lack of consent in order to convict on crime against nature charge).

174. *Id.*; *see also* Hinkle v. State, 771 P.2d 232, 233 (Okla. Crim. App. 1989) (reversing conviction of oral sodomy by adult male perpetrated on a 76-year-old female on grounds of improper instruction that jury could not consider consent defense).

175. Newsom, 763 P.2d at 139.

176. Martin, 747 P.2d at 318.

statutory rape and not sodomy appeared to apply.[177] In such cases, the inability to give consent was presumed.[178] In this way at least, despite the protestations of the Court of Criminal Appeals to the contrary, the *Post* decision had a material affect on the prosecution of (homosexual) acts of sodomy.

Modern sodomy, then, is a very different crime from the crime against nature of earlier in the century. The court in *Post v. State*[179] substantially limited the power of the State to proscribe any sort of "deviant" sexual activity, at least between consenting heterosexual adult couples, although such activity still, at least technically, constituted a crime against nature.[180] After *Post,* a distinction was made between conduct that was offensive to nature but not to the state (heterosexual, adult, consensual sodomy) and conduct that offended both nature and the state (non-heterosexual, adult, consensual sodomy, non-consensual sodomy, and sexual acts with minors). Thus, anal intercourse, anilingus, fellatio, cunnilingus, and a host of other activities undertaken for the purpose of sexual gratification are both proscribed and not proscribed under the statute—proscribed if undertaken without consent, or with a sexual partner or partners not of the opposite sex, but otherwise quite lawful. Notice the transformation of the goals and purposes of the statute. The statute proscribing crimes against nature was meant to prevent people from engaging in all manner of tabooed sexual practices. It was not an anti-homosexual measure; it was meant to be a means of preventing certain sexual practices—performed by whomever. After the 1970s, the sodomy statute became, more explicitly, a means of proscribing coercive conduct, and certain sexual acts when performed by some, but not all, of the citizens of the state. Thus, mirroring the approach of rape jurisprudence, the focus shifted away from a proscription of the act itself; criminality became not a function of performing an act of sodomy, but rather of the persons performing the act and the circumstances thereof. The reach of the statute was thus both substantially undercut and transformed by *Post.*

III. The Transformation of the Jurisprudence of Sodomy

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177. Kimbro v. State, 857 P.2d 798, 799 (Okla. Crim. App. 1990).

178. Martin, 747 P.2d at 318.

179. 715 P.2d 1105 (Okla. Crim. App.), *reh'g denied,* 717 P.2d 1151 (Okla. Crim. App.), *cert. denied,* 479 U.S. 890 (1986).

180. *Id.* Indeed, such conduct might not be actionable if undertaken by more than one man and one woman at one time. Thus, heterosexual orgies might well now be quite lawful under *Post*, at least so long as none of the participants, with or without consent, attempt any such activity with members of the same sex during the course of the orgy. *But see* OKLA. STAT. tit. 21, §§ 1029(a), 1030(5) (Supp. 1992) (proscribing lewd conduct, which is defined, in part, as "the giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct, with any person not his or her spouse").

The history of the ideas supporting enforcement of the crime against nature statute has undergone a fairly radical transformation since Oklahoma became a state in 1907. Courts originally interpreted the statute to encompass every act of sexual conduct other than heterosexual vaginal intercourse within marriage. By the end of the twentieth century, however, courts became far more eager to apply the statute to non-consensual sexual conduct and far more troubled by the notions of medical or moral depravity underlying the rationale of the statute. It is to the chronicle of the transformation of this thinking that I turn next.

A. Origins: Religious Morality

The early cases speak substantially in religious terms. The conduct proscribed represents the type of "moral filthiness and iniquity" that ought to be controlled through the criminal law.[181] This was a crime committed against the very foundation of the Christian, and therefore social, order, and was of so vile a magnitude as not to be named by Christians—*"Peccatum illud horrible inter christianos non nominandum."*[182] The crime was considered "one of the most revolting known to the law."[183] It was as simple as that. The description of the parties to the act, and the manner of prosecution, reflected the revulsion. In this sense, the scope of the legal proscription reflected the moral condemnation of the community. This was thought a sound basis of criminalization, especially where the moral order was unquestioned.[184] Thus, the party on whom the act was committed was described in law as the "pathetic" party,[185] and was the party to be pitied,

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181. *Ex parte* De Ford, 168 P. 58, 59 (Okla. Crim. App. 1917) (quoting State v. Start, 132 P. 512 (Or. 1913)).

182. *De Ford*, 168 P. at 59, (quoting Glover v. State, 101 N.E. 629, 631 (Ind. 1913)). Note, however, that Oklahoma courts have yet to consider a direct challenge to its sodomy laws on First Amendment grounds. Such a challenge was rejected in the District of Columbia. Stewart v. United States, 364 A.2d 1205, 1209 (D.C. 1976) (rejecting appellant's contention that sodomy laws violate the Establishment Clause on the theory that the prohibition is a direct and unbroken legacy of the Christian Church); *see also* Connor v. State, 490 S.W.2d 114 (Ark.) (holding sodomy statute was not unconstitutional even if it regulated conduct deemed sinful by some religious groups), *appeal dismissed*, 414 U.S. 991 (1973). For a fuller treatment of the (perhaps constitutionally impermissible) relationship between sin and the law of obscenity, see Henkin, *supra* note 27.

183. LeFavour v. State, 142 P.2d 132, 137 (Okla. Crim. App. 1943) (affirming conviction of man for fellating an eight-year-old boy).

184. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 73 (George Simpson trans., 1933) (describing the universal elements in crime, stressing moral condemnation and stating that crimes should consist of "acts universally disapproved of by members of each society"); Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (emphasizing the obligations imposed by community life, and arguing against a sentencing policy that, in pursuit of corrective and rehabilitative aims, loses sight of the moral condemnation that is a source of the law).

185. *See* Cole v. State, 175 P.2d 376, 379 (Okla. Crim. App. 1946) (reversing conviction of young minister of the gospel for engaging in anal intercourse with 14-year-old male congregant and stating that "if both of the parties are adults and both consent, the active and the pathetic party, then both are guilty, but if one of the parties is a young child only the adult is punishable"); Borden v. State, 252 P. 446, 447 (Okla.

and generally permitted to suffer no greater punishment than to testify as the prosecuting witness against the true criminal—the "active" party. The act itself was "disgusting"; so disgusting, in fact, that as late as 1969, the Oklahoma Court of Criminal Appeals could "deem it unnecessary to delineate the sordid details as reflected by the record."[186]

The reason for this vileness was self-evident for those who accepted the notion that sexual congress was meant primarily for the regeneration of the species and that otherwise it was wholly unnatural. The *Start* court, in a passage quoted with approval by the *Ex parte De Ford* court, explained the cause of this "unnaturalness" in detail: The human alimentary canal, starting with the mouth and ending with the rectum, has a single purpose—the nourishment of the body.[187] Use of the alimentary canal for other purposes is "unnatural."[188] To modern ears, the courts may have badly missed the point.[189] The acts constituting sodomy, especially by use of the mouth to stimulate either the penis or clitoris, was especially unnatural because it was considered unusual.[190] Thus, in analyzing the folly of the English court's decision in *Rex v. Jacobs*, holding that fellatio did not constitute actionable sodomy because sodomy is usually committed by means of anal penetration, the court in *Ex parte De Ford*, quoting the Indiana Supreme Court's opinion in *Glover v. State*, explained as follows:

> [B]y conceding that the act committed in some other part is not the usual offense, the statement concedes that the act, if committed in such other part, would be still more unnatural, because, if not more unnatural, it would not be more unusual. Certainly this unusual act is many times more "detestable and abominable" than that made criminal at common law.[191]

Crim. App. 1927) (affirming conviction of 18-year-old defendant charged with non-consensually fellating a 13-year-old boy and stating that "the accused would be guilty whether the penetration was *per os*, whether he was the pathetic or not"). Thus, the lust to be satisfied was presumed to be that of the inserter, the person whose anus is penetrated being characterized more as victim than as a partner in pleasure. *See* State v. Mays, 329 So.2d 65 (Miss. 1976) (quoting the indictment in a crime against nature prosecution, in which the purpose of the sexual act is allegedly "to gratify the lust" of the inserter).

186. Knowles v. State, 462 P.2d 290, 291 (Okla. Crim. App. 1969). *See also* LeFavour v. State, 142 P.2d 132, 137(Okla. Crim. App. 1943) ("The facts of this case are such that we do not care to place them in print."). Oklahoma judges were not prissier than judges in other states. *See* Commonwealth v. Poindexter, 118 S.W. 943, 944 (Ky. 1909) ("The acts charged against the appellees are so disgusting that we refrain from copying the indictment in the opinion."); Lewis v. State, 35 S.W. 372 (Tex. Crim. App. 1896) ("The details are revolting and not necessary to be stated.").

187. State v. Start, 132 P. 512, 512-13 (Or. 1913); *see supra* note 48 and accompanying text.

188. *Start*, 132 P. at 513.

189. The most detailed description of this process in Oklahoma's reported cases appears in *Ex parte* De Ford, 168 P. 58, 59 (Okla. Crim. App. 1917), which quotes the Oregon Supreme Court's discussion in *Start*, 132 P. at 512-13. *See supra* text accompanying notes 46-49. The logical extension of the alimentary canal argument—limiting the alimentary canal to a single, natural purpose—would require Oklahoma courts to criminalize kissing. For a contemporary discussion of the natural in sex, see, for example, FEDIGAN, *supra* note 48, at 142-43; R.H. Denniston, *Ambisexuality in Animals*, *in* HOMOSEXUAL BEHAVIOR, *supra* note 48, at 34-35; Spanier, *supra* note 48.

190. *See, e.g.*, *De Ford*, 168 P. at 60 (quoting the South Dakota Supreme Court's discussion in State v. Whitmarsh, 128 N.W. 580, 583 (S.D. 1910)).

191. Glover v. State, 101 N.E. 629, 632 (Ind. 1913), *quoted in De Ford*, 168 P. at 60.

Prior to the First World War, then, a consensus appeared to have been reached by American courts as evidenced by the survey of the law conducted by the court in *Ex parte De Ford*.[192] This consensus was based in large part on the acceptance of the Christian paradigm of sex and sexual conduct.[193] There were two kinds of sex, only one of which was, within the confines of marriage, licit. All other forms of sexual conduct were illicit—and an unthinkable violation of the absolute commandment of God. The "goodness" or "badness" of particular conduct was judged from the perspective of Christian sexual taboos—the closer the conduct resembled "good" sex the less offensive the conduct. Conversely, the less the conduct proscribed resembled the only form of licit conduct, the more vile was the conduct.[194]

Interestingly, the English courts and legislature, considering the same problem, took a very different course. In England, the closer the proscribed conduct resembled licit conduct, the viler the conduct was judged.[195] Under either conceptualization of the ordering of the perversity of non-licit sexual acts, the results were the same: "Once the sodomite's role was established, the law's principal concern was to contain his behavior and insulate it from the rest of male society."[196]

It is important to understand the firmness with which the American courts unquestioningly accepted this rationale. Even early decisions recognized the danger that a jury would convict a person because he was a "sodomite" rather than because sufficient evidence had been introduced of the commission of the crime charged. Thus, the court in *State v. Start* warned against the inclination to punish status as early as 1913:

> The relation between the sexes is so closely allied to all that mankind holds dearest that it is very difficult to get men to think and act with judicial calmness in cases where that relation is violated or debauched. Judges themselves are but human beings like other men, and this largely accounts for the exceptions that have been engrafted upon the law in respect to sexual crimes. Yet these exceptions . . . should be carefully guarded and not extended, for the law must protect the innocent while it pursues the guilty.[197]

The basic assumptions about the unacceptability of illicit sexual conduct was so strong that the courts could entertain doubts about the sanity of any person

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192. *See supra* notes 47, 101.

193. *See, e.g.*, NOONAN, *supra* note 10, at 238-46, 529-30 (describing the genesis and scope of the Christian conception of non-procreative sexual activity as unnatural and sinful); FUCHS, *supra* note 10, at 149-67 (describing the post-Reformation Catholic and Protestant ethics of sexuality).

194. *See* 43 ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, TEMPERANCE 247, 249 (Thomas Gilby trans., 1968) (ranking sexual sins by unnaturalness). Posner notes that for the medieval theologian, anal intercourse with one's wife was a worse sin than vaginal intercourse with one's mother on the theory that the latter more closely resembled licit *procreative* sexual activity. POSNER, *supra* note 11, at 17.

195. *See* discussion *supra* notes 40-45.

196. Trumbach, *supra* note 44, at 94 (discussing the role of social custom and law in the creation of modern gender roles in England in the 18th century).

197. State v. Start, 132 P. 512, 516 (Or. 1913) (reversing a conviction for sodomy where evidence was improperly introduced with respect to sexual activity between the accused and other parties).

who willfully chose to ignore societal sexual taboos. In an extreme case, a trial court delayed imposing a sentence on the accused pending consultation with state psychiatric officials, where the accused had been convicted of murdering his aunt and uncle in the course of the accused's attempt to sexually abuse his younger half-sister.[198] In affirming the death sentence imposed by the trial court, the Criminal Court of Appeals expressed its conviction that the sexually dissolute life led by the defendant prior to the murders contributed to the elimination of the accused's moral restraint.[199] The court stated: "The story related by defendant is a revelation of the depth of degradation to which a human may sink. The atrocious sexual crimes committed by the defendant, according to his story, are enough to make the average citizen shudder and blush with embarrassment . . . ."[200] The details, continued the court, are "so debased as to startle any rational, moral citizen."[201] The story, apparently, was so extreme at the time that the trial judge seriously believed that the defendant might well be insane.[202] However, the only disease from which the defendant suffered was a loss of moral restraint, for which a sentence of death (or in other cases a period of incarceration) would provide the cure.

To courts of an earlier age, there was perhaps only a difference of degree between the vileness of fellatio and that of, say, murder. Both amply demonstrated the election of the perpetrator to ignore as a matter of indifference the moral and ethical rules of a society based on the marriage relationship imposed on humankind by God.[203] To a society that unthinkingly accepts these fundamental norms of social ordering, any activity in derogation of the family, especially non-marital sexual activities, is not merely immoral and sinful, but also threatens the secular order of society, and is therefore a matter of state regulation.[204] This notion has been reflected from the time of American independence. Thus, in the guidebook published in 1795 for Virginia justices of the peace, the form to be used for

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198. Tuggle v. State, 119 P.2d 857, 863 (Okla. Crim. App. 1941).

199. *Id.* at 860.

200. *Id.*

201. *Id.* at 863.

202. *Id.* at 861-62.

203. *See id.* at 863. For many Protestants, the touchstone of the natural order as set forth in Scripture is the relationship between man and woman. Since marriage is the primary structure of human order as willed by God, any activity that might undermine this order represents an attempt to thwart the natural order of things. *See* FUCHS, *supra* note 10, at 161 & n.34 ("The couple is the archetype for all relationships, just as the family is the is the primary model for all social groups. In the words of a Puritan in an anonymous text from 1608: the husband/wife rapport is like 'the major wheels in a clock which ensure the good functioning of all other wheels.'").

204. The Supreme Court of Wisconsin could thus assert with a certain amount of bravado in a case in which it held that the state crime of sodomy included acts of oral-genital contact: "There is sufficient authority to sustain a conviction in [this] case, and if there were none, we should feel no hesitancy in placing an authority upon the books." Means v. State, 104 N.W. 815, 815 (Wis. 1905). *But cf.* Kinnan v. State, 125 N.W. 594, 594-95 (Neb. 1910) (holding that the state sodomy statute did not include acts of oral-genital contact and declaring their hope that "the lawmakers will speedily remedy this situation").

indictments for buggery declared that the acts giving rise to the crime resulted from a lack of fear of God, and a disregard for the order of nature, were instigated by the devil, which greatly displeased Almighty God, and were against the peace and dignity of the commonwealth.[205] Good public order, therefore, seems to require the containment of activity that might have posed a threat to the state as well as to the divine order.[206] With what must have been such a standard in mind, the Court of Criminal Appeals was inclined to pay particular attention to cases of consensual sexual activity proscribed by the statute.[207]

B. The Shift to the Language of Disease

Supplementing, and ultimately supplanting, mere religion-based revulsion at the violation of core Christian sexual conduct standards as the basis for enforcing the crime against nature laws, the language of science and the social sciences (primarily sociology and psychology) dominated the discourse of crime against nature decisions during the 1940s. In Oklahoma, such discourse came into the open as a result of the impact on the judiciary of popular culture "tell-all" depravity books about people in power, which

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205. The indictment read in full as follows:

_____

_____

_____

county to wit.

The jurors for the commonwealth upon their oath do present that _____ of the county of ____ aforesaid, labourer, not having the fear of God before his eyes, nor regarding the order of nature, but being moved and seduced by the instigation of the devil, on the ___ day of ___ in the year of our Lord ___with force and arms, at the county aforesaid, in and upon one _____, a youth about the age of ___ years, then and there being, feloniously did make an assault, and then and there feloniously, wickedly, diabolically, and against the order of nature had a venereal affair with the said _____ and then and there carnally knew the said _____ and then and there feloniously wickedly, and diabolically, and against the order of nature, with the said _____ did commit that detestable and abominable crime of buggery (not to be named amongst Christians) to the great displeasure of Almighty God, to the great scandal of all human kind, against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

Oaks, supra note 11 (quoting WILLIAM W. HENNING, THE NEW VIRGINIA JUSTICE 93-94 (1795)).

206. Possibly, the courts thought that a person who freely fellated his fellows was less likely to feel the taboos against murder than would the fellow who held all moral law in equal awe. Because of the secular consequences of the sinful nature of the conduct, punishment was the prescribed course of action necessary to remedy the situation, despite the inequities. For example, in Oklahoma, in affirming the conviction of a 16-year-old caught fellating a young boy, the Criminal Court of Appeals found it sufficient to note that "while it is hard for this court to think of a young boy of this age being sent to the penitentiary, . . . the law is so written that everyone must answer for the crime which he has committed. Under the Constitution and laws of this State, the pardon and parole power is vested in the Governor of this State." LeFavour v. State, 142 P.2d 132, 137 (Okla. Crim. App. 1943).

207. This conclusion is based generally on reported decisions of the Oklahoma Court of Criminal Appeals. No data has yet been assembled respecting the pattern of prosecutions for consensual and non-consensual sodomy in Oklahoma during the period immediately after statehood. Such a study would be a valuable addition to the literature in this area.

had become popular after the Second World War.[208] These tales, it was said by the Criminal Court of Appeals, "rival the lustful perversions of a Lucretia Borgia and the practices of the Godless and licentious ruling class at the time of the crumbling of the ancient Roman and Greek empires."[209] The court began to conceptualize those accused of sodomy less as moral free agents making terrible choices, and more as the product of "emotional instability, impulsiveness, lack of good judgment, [and] . . . irresponsibility in sex matters. . . ."[210] Deterrence, not punishment, seemed to be required. Elementary principles of sociology and psychology required early corrective action to prevent the perversions that resulted in the commission of crimes against nature. This was particularly important with respect to young offenders. Thus, the courts were quick to draw a connection between the kind of depravity that might result in the commission of homosexual or heterosexual fellatio and the taking of illegal drugs, primarily marijuana. The court in *Woody* stated:

> The early training and active interest of parents in the child's activities and associates are a deterring influence. Too many innocent youths are unconsciously led into trying a "red bird" or "reefer," and easily follow persuasion, and then we have a likely recruit for organized crime. After a time the pervert becomes callous, may no longer recognize the criminal act as wrong, and the debauchery may even be practiced in view of the public.[211]

The purpose of the crimes against nature laws, therefore, was less to rehabilitate the adult "pervert" than to insure that the victim of these depravities, usually an underage youth, was not misdirected into a life of perversion.[212] As a result, the courts became more inclined to hear and

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208. Foremost among these, apparently, was a McCarthy era scandal sheet, JACK LAIT & LEE MORTIMER, WASHINGTON CONFIDENTIAL (1951), purporting to tell tales of the depravities of persons at all levels of the national government. The depravities included homosexuality and the indulgence by the powerful and corrupt white ruling classes in the drug and alcohol addictions and sexual perversions of African-American Washington. Messrs. Lait and Mortimer had previously written well-received descriptions of the political and moral corruption of New York and Chicago. Books such as these were evidence of the sense of growing corruption expressed in cases such as Woody v. State, 238 P.2d 367, 371 (Okla. Crim. App. 1951).

209. *Woody*, 238 P.2d at 371. The court in *Woody* sought prompt action from the lower courts and the "officers, parents and the moral forces of the State and Nation, . . . if a Sodom and Gomorrah is to be forestalled."

210. Wheeler, supra note 14, at 260-61 (quoting from a 1949 Indiana statute described in CALIFORNIA DEP'T OF MENTAL HYGIENE, FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH 45 (1954)).

211. *Woody*, 238 P.2d at 371. There is a substantial echo between the comments of the court in this case and those of the court in Tuggle v. State, 119 P.2d 857 (Okla. Crim. App. 1941). *See supra* note 198. In both cases the court emphasized the connection between sexual depravity and criminal activity. However, in *Tuggle*, the earlier case, the court spoke of the connection in purely moral terms—breaking sexual conduct taboos is much like crossing the Rubicon; once done, there is no reason that any other social taboo ought to be respected. *Tuggle*, 119 P.2d at 863. In contrast, the court in *Woody* expressed the connection in more scientific terms. The connection is a result of poor environment and the ability of those who have no sense of right and wrong to control impressionable minds. *Woody*, 238 P.2d at 371.

212. Hopper v. State, 302 P.2d 162, 165 (Okla. Crim. App. 1956) (involving a male convicted of coercively fellating a 14-year-old male). On the cure of adult offenders, see Berryman v. State, 283 P.2d 558, 566 (Okla. Crim. App. 1961).

This does not capture the entire picture. The preeminence of the conceptualization of sexual "crimes"

prosecutors became more inclined to bring cases of primarily (homo)sexual gratification involving adolescents since, as the *Hopper* court explained, "the criminality aimed at is not the immediate result, but the evil possibilities of misdirection of its victims into a life of sexual perversion."[213]

In language such as that of the *Hopper* and *Woody* cases lies the beginnings of the judicial acceptance of the view of perversion as a disease—a disease easily transmitted and difficult to cure.[214] This disease,

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as medical problems gave rise to "sexual psychopath" statutes in the 1940s and 1950s. By the early 1950s, about 23 states and the District of Columbia had enacted such statutes. *See* Domenico Caporale & Deryl F. Hamann, Comment, *Identifying the Sexual Psychopath*, 36 NEB. L. REV. 322, 322 n.2 (1957) (evaluating critically Nebraska's then new Sexual Psychopath Law). These statutes were enacted on the theory that a sex offender, however defined, could be recognized and treated. As such, every effort ought to be made to identify such offenders and place them in mental institutions rather than prisons. Early on, these statutes were limited in application to those who might pose a danger to the community. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 275 (1940). In Nebraska, however, people posing a danger to society also included adults found to have engaged in consensual homosexual activity. *See* Caporale & Hamann, *supra*, at 325. The pseudo-medical hysteria of the times is well captured in as James M. Reinhardt & Edward C. Fisher, *The Sexual Psychopath and the Law*, 39 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 734 (1949). Sexual Psychopath laws were roundly criticized by a number of commentators. *See, e.g.*, PAUL W. TAPPAN, NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER, THE HABITUAL SEX OFFENDER

213. *Hopper*, 302 P.2d at 165. This conclusion is also based on the reported cases before the Oklahoma Court of Criminal Appeals. Substantial empirical research is necessary to amplify the evidence provided by the case law of the Court of Criminal Appeals. *See supra* note 207. Of all of the sodomy cases before the Court of Criminal Appeals between 1946 and 1966, all but two involved convictions of homosexual sodomy involving adolescents. *See* Johnson v. State, 380 P.2d 284 (Okla. Crim. App. 1963) (affirming conviction of adult male for non-consensual anal intercourse with 12-year-old boy); *In re* O'Neill, 359 P.2d 619 (Okla. Crim. App. 1961) (involving conviction of an adult male for sodomy and kidnapping of 9-year-old male); Hopper v. State, 302 P.2d 162 (Okla. Crim. App. 1956) (affirming conviction of adult male for non-consensual fellatio of 14-year-old boy); Berryman v. State, 283 P.2d 558 (Okla. Crim. App. 1955) (affirming conviction of adult male for consensual fellatio with 15-year-old boy); Woody v. State, 238 P.2d 367 (Okla. Crim. App. 1951) (affirming conviction of adult male for consensual fellatio of 15-year-old boy); Cole v. State, 179 P.2d 176 (Okla. Crim. App. 1947) (affirming conviction of adult male for non-consensual sex with 14-year-old boy); Cole v. State, 175 P.2d 376 (Okla. Crim. App. 1946) (involving adult male's consensual sex with 14-year-old boy); LeFavour v. State, 142 P.2d 132 (Okla. Crim. App. 1943) (affirming conviction of 16-year-old male for fellating 9-year-old boy). Of the cases heard by the Court of Criminal Appeals that did not involve sexual conduct with adolescent boys, one involved conviction for homosexual sodomy between males of indeterminate age. Crain v. State, 410 P.2d 84 (Okla. Crim. App. 1966). The other involved forcible anal intercourse between two adult male inmates in a county jail. Hill v. State, 368 P.2d 669 (Okla. Crim. App. 1962).

214. Indeed, the mid-twentieth century saw the full flowering of the notion of perversion, including, but not limited to, homosexuality as a disease. Much of this literature sprang from the work of Freud and his disciples, and thus is couched in the language of psychiatry. *See, e.g.*, IRVING BEIBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY 44-84, 119-25 (1962); Bernard Glueck, Sr., *Sex Offenses: A Clinical Approach*, 25 LAW & CONTEMP. PROBS. 279 (1960) (sketching orthodox psychoanalytic psychology). Others have argued that homosexuality is a pathological condition, resulting from abnormal genetic or hormonal influences. *See, e.g.*, William H. Perloff, *Hormones and Homosexuality*, *in* SEXUAL INVERSION 44 (Judd Marmor ed., 1965); *cf.* MODEL PENAL CODE, § 213.2 & cmt. at 367-368 (1980) (describing the disease view of homosexuality). Until 1973, the American Psychiatric Association listed homosexuality as a mental disorder. *See* GREENBERG, *supra* note 10, at 429 (citing American Psychiatric Association study). There exists a vast literature produced at the time and, later, criticizing this approach. For a sampling, see RICHARD C. FRIEDMAN, MALE HOMOSEXUALITY: A CONTEMPORARY PSYCHOANALYTIC PERSPECTIVE (1988) (presenting the current views of Freudian psychology); HERBERT MARCUSE, EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD (1955) (criticizing the Freudian conception of the utility of sexual sublimation); Karl M. Bowman & Bernice Engle, *Sex Offenses: The Medical and Legal Implications of Sex*

though characterized in moral terms in the earlier cases, was grounded in the language of psychiatric disease. Thus, in *Tuggle,* the depravity was caused by the association with prostitutes and whoremongers; the result of this association produced evidence of insanity.[215] The modern transformation, however, is represented by the actions of the *Tuggle* trial judge, who viewed the accused as a sexual psychopath, and insisted on independently satisfying himself that the defendant was sane before pronouncing sentence.[216] Although neither the district court nor the Criminal Court of Appeals concluded that the propensity to indulge in "perverted" sexual activity was evidence of insanity per se,[217] the Criminal Court of Appeals noted that "it is no discredit to the trial judge that he concluded, after hearing the defendant's story, to converse with [the psychiatrist] concerning the mental and physical condition of the defendant."[218]

Indeed, acceptance of the "disease" approach appears to have been a goal of the American medical community and "progressive" commentators.[219] The very public deliberations and report of the English Committee of Homosexual Offenses and Prostitution, formally presented on August 12, 1957, reflected the growing importance of this view, even as it criticized this view:

> There is a tendency, noticeably increasing in strength over recent years, to label homosexuality as a "disease" or "illness." This may be no more than a particular manifestation of a general tendency discernable in modern society by which, as one leading sociologist puts it, "the concept of illness expands continually at the expense of the concept of moral failure."[220]

Variations, 15 LAW & CONTEMP. PROBS. 292 (1960).

215. *Tuggle*, 119 P.2d at 863.

216. *Id.* at 861 (the trial judge sent a copy of the record to the head of the state psychiatric hospital for review prior to pronouncing sentence). The connection between sodomy crimes and insanity was drawn as early as the turn of the century. *See* Adams v. State, 86 S.W. 334, 334 (Tex. Crim. App. 1905) (reversing conviction for sodomy between two males on other grounds and stating: "Upon another trial, if the facts are the same as developed by this record, we suggest that a charge be given on the question of permanent as well as temporary insanity.").

217. "[A] morbid state of affections or passions, or an unsettling of the moral system, where the mental faculties remain in a normal, sound condition, excuses actions otherwise criminal." *Tuggle,* 119 P.2d at 862-63.

218. *Id.* at 863.

219. *See, e.g.*, Glueck, Sr., *supra* note 214, at 280-81. A clinical professor of psychiatry, Glueck explains that the debate respecting the utility of psychiatric principles to the administration of the criminal law cannot be resolved "until the law student, from the very beginning of his career, is exposed to and acquainted with the clinical approach to human conduct . . . [especially] in the field of criminal law." *Id.* This is so because, in the author's view, only psychiatric principles can provide an understanding of the "basic and indispensable phenomena of life that alone can furnish dependable guides for the intelligent administration of the problems of the sex offender." *Id. See also*, Wheeler, *supra* note 14, at 260. Wheeler argues that a new criterion for regulating sexual conduct has emerged, based on "the growing influence of rehabilitative concerns on the administration of criminal justice. This criterion reflects neither the moral condemnation nor the social danger of the offense; rather, the stress is on the degree of psychopathology characterizing the offender." *Id.* at 260. *Cf.* J.V. Barry, *The Problem of the Sexual Offender*, 2 RES JUDICATAE 214, 218-19 (1946) (arguing that criminal punishment of people who commit forbidden sexual acts is "socially undesirable" and that institutional treatment is necessary due to their mental impairment). The sexual psychopath laws, popular during mid-century, were also the product of this effort to turn sexual regulation into a psychiatric problem. *See supra* note 212.

220. THE WOLFENDEN REPORT, *supra* note 27, at 30, (quoting in part, BARBARA WOOTTON, *Sickness*

It is thus no surprise that in its most influential discussion of the reach of the crime against nature, the Criminal Court of Appeals in *Berryman* adopted the language of medical science as justification for its approach. Quoting from commentators in the field of sex law, the court accepted the notion that perversion was substantially affected by environmental considerations. Exposure of children to deviant behavior could seriously affect their adult behavior. The object of the law, therefore, was not so much the deterrence of activity of adult deviants (primarily homosexuals and lesbians, but presumably heterosexual fellators and practitioners of cunnilingus as well) as the shielding of the state's youth from any contact with such people.[221] On rehearing, Judge Powell emphasized the importance also of attempting to rehabilitate practicing adult deviants "in view of the demoralization and moral decay brought about by such persons and where the condition with which they may be afflicted is by many becoming recognized as a form of mental disease."[222]

Despite the adoption of the language of disease in cases such as *Berryman,* the Criminal Court of Appeals resisted the full implications of this view. After all, it was one thing to describe the practitioners of exotic sexual arts as colloquially "crazy," but it was quite another to permit such persons to assert this characterization as a means of avoiding prison terms. Thus, insanity was rejected as a blanket defense in *Tuggle,*[223] and the defense of irresistible impulse was rejected in *Berryman.*[224] The court in *Berryman,* however, expressed the hope that the "law must make it possible to take effective action against twisted adults who use children and minors as sexual objects" by providing for the cure of these diseased individuals rather than

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or Sin, *in* THE TWENTIETH CENTURY (1956)).

221. Berryman v. State, 283 P.2d 558, 566 (Okla. Crim. App. 1955) (Powell, J., on rehearing). Thus the court noted that:

> Exposure to the sex deviate may have a decisive and harmful effect upon a child's development of a normal sex life as an adult. Despite their differences of opinion, students of homosexuality seem to agree that exposure during adolescence may be the precipitating factor in the adult development of the homosexual or the Lesbian. The law must make it possible to take effective action against twisted adults who use children and minors as sexual objects.

Id. at 565 & n.1 (quoting MORRIS PLOSCOWE, SEX AND THE LAW (1951)).

It is interesting to note that Mr. Ploscowe, during the course of his service as associate reporter of the American Law Institute's Model Penal Code, apparently had a change of heart and argued in 1960 for a substantial revision of the sex offense laws on the grounds that much sex law is unenforceable and does more harm than good, at least with respect to the conduct of heterosexuals. Ploscowe, *supra* note 27, at 218 ("Sexuality simply cannot realistically be confined within present legal bounds. It does not mysteriously blossom when a man and a woman are united in holy matrimony; nor, despite legal prohibitions, is it thereafter restricted to conventional acts of coition between marital partners.").

222. *Berryman*, 283 P.2d at 566. Emphasizing the majority's discussion of the crime against nature as disease-based, Judge Powell also expressed his desire for the Legislature to attempt to do something about the cure of homosexuals by reducing the sentence of the defendant. *Id.*

223. Tuggle v. State, 119 P.2d 857, 863 (Okla. Crim. App. 1941).

224. *Berryman*, 283 P.2d at 564-65. Indeed, the Criminal Court of Appeals expressed its concern more for the presumptively unconsenting child victim than for the "sick" adult offender who abused the sexual objects of their lust. *Id.* at 565 n.1.

their incarceration.[225]

C. *The Adoption of the Language of Coercion*

After 1966, the emphasis of the court again began to undergo change. The nearly generation-long concentration on cases involving (homo)sexual conduct with male adolescents was intensified and was coupled with a growing interest in non-consensual heterosexual conduct, particularly conduct at the fringes of rape. Most of the modern law of sodomy is a product of the law addressing forcible acts of rape or the sexual violation of children (male and female). Indeed, the last case in which the Oklahoma Court of Criminal Appeals squarely considered consensual (homo)sexual conduct was *Canfield* in 1973.[226] Crimes involving the use of force or resulting in injury have always been at the core of the criminal law and are as easy to justify as proscriptions against murder.[227]

This shift in the types of cases reviewed by the Court of Criminal Appeals also evidenced a growing preoccupation with the nature of the injury in sexual crimes generally, which the Court of Criminal Appeals freely characterized as extreme personal humiliation.[228] Certainly, sexual activities freely undertaken by both parties cannot result in the kind of humiliation that so concerns the Court of Criminal Appeals. This type of activity recedes into insignificance in the jurisprudence of the Court of Criminal Appeals in the last quarter of the twentieth century. Instead, the Court of Criminal Appeals focuses on *coercive* sexual activity other than heterosexual vaginal intercourse, and especially on the unwanted touching of those incapable of giving consent, principally minors. Of the approximately 143 cases reported by the Court of Criminal Appeals involving allegations of sodomy between 1967 and 1992, about 98 of those cases involved charges of

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225. *Id.* (quoting THE WOLFENDEN REPORT, *supra* note 27, at 30); *see* THE WOLFENDEN REPORT, *supra* note 27, at 34 (discussing and rejecting the notion that an implication of the illness of homosexuality carries a diminished responsibility for his actions). *But see* Reinhardt & Fisher, *supra* note 212, at 742 ("The sexual psychopath suffers from a form of mental deviation not now generally recognized in our laws, although it may be far more insidious in its potentialities than many forms of insanity. Medical science knows and classified him. The layman recognizes him and his dangerous possibilities. It is time for the law to make provision for him, too.").

226. Canfield v. State, 506 P.2d 987 (Okla. Crim. App.) (upholding conviction of adult male for consensually fellating another adult male), *appeal dismissed*, 414 U.S. 991 (1973). An argument can be made that Post v. State, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986), was also a case of (hetero)sexual consent. In that case, however, the facts indicate that the issue of consent was disputed, and its resolution was left to the jury based on the evidence presented at trial. *Id.* at 1107.

227. The literature in this area is quite rich. For a discussion of the basis or soundness of proscriptions against conduct resulting in harm to others, see, for example, JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984).

228. Yates v. State, 620 P.2d 413, 416 (Okla. Crim. App. 1980) (reasoning that forcible fellatio is "one of the most personally humiliating of all crimes"). Although it lies outside the scope of this Article, I note that feminists have questioned the notion of current understandings of consent. *See, e.g.*, Chamallas, *supra* note 27, at 779-82.

heterosexual forcible fellatio, cunnilingus, or anal intercourse during the course of the rape of adult and minor females. Only two of those cases involved charges of crimes against nature in connection with adult, (arguably) consensual, sexual conduct, and of these, one involved heterosexual conduct and the other homosexual conduct; the homosexual conduct arguably did not occur in a private space (i.e., a parked car). About eleven of the reported decisions involved homosexual activity with children, and another eleven involved heterosexual activity between adult males and female children. One reported decision involved lesbian activity between an adult and minor females. Two other cases involved children of unreported sex. Four reported decisions involved charges of coercive homosexual conduct, and ten involved charges of coercive heterosexual sodomy. An additional four reported cases charged a male defendant with sodomy but did not identify the sex of the other party.[229] It is in this context, heavily charged with coercive *heterosexual* acts of sodomy and the sexual exploitation of minors, that the Court of Criminal Appeals became increasingly comfortable about enforcing, and even enlarging, the breadth of the crime against nature.

This shift away from notions of moral and psychiatric disease and toward a heightened concern with the inability of the state or the courts to use the sodomy statute as a means of curtailing coercive sexual conduct increasingly dominates the language of the opinions of the Court of Criminal Appeals. Thus, the old moral-psychiatric idiom became more overlaid with the language of judicial impatience than with the limitations of the crime against nature statute. To a large extent, this impatience grew out of the traditional "special" treatment accorded the crime against nature statute. Judge Brett's quasi-public dialogue with his colleagues about the crime against nature statute evidenced this impatience.[230] In *Hicks v. State*, Judge Brett forcefully argued that the Legislature's failure to amend the antiquated language of the statute complicated enforcement.[231] For instance, because of the archaic requirement of penetration,[232] forcible cunnilingus and

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229. The numbers set forth above are approximate. They are meant only to provide a rough sense of the relative quantity of the types of cases the Oklahoma Court of Criminal Appeals considered during the 26-year period between 1967 and 1992. The important point these numbers highlight is the Oklahoma courts' sharp shift to interest in coercive sex crimes after 1966.

230. The most enlightening of these opinions includes Harris v. State, 713 P.2d 601, 602 (Okla. Crim. App. 1986) (affirming conviction of adult male for forcible sodomy with a woman during the course of a burglary); Hicks v. State, 713 P.2d 18, 19-20 (Okla. Crim. App. 1986) (reversing conviction of adult male for engaging in forcible cunnilingus against an adult female in the course of a burglary because State failed to prove penetration); Golden v. State, 695 P.2d 6, 7-8 (Okla. Crim. App. 1985) (affirming conviction of adult male for coercively fellating a 13-year-old boy); Clayton v. State, 695 P.2d 3, 6 (Okla. Crim. App. 1984) (affirming conviction of adult male for attempting to engage in cunnilingus with an adult female during the course of a burglary); Canfield v. State, 506 P.2d 987 (Okla. Crim. App.) (Brett, J., concurring in part and dissenting in part) (arguing that Oklahoma's crime against nature statute is unconstitutionally vague in case affirming conviction of adult male for consensually fellating another adult male), *appeal dismissed*, 414 U.S. 991 (1973).

231. *Hicks*, 713 P.2d at 20.

232. OKLA. STAT. tit. 21, § 887 (1991).

fellatio can be punished only if penetration is proved when, in Judge Brett's view, conviction for such coercive sexual conduct should not depend on proof of the success of the perpetrator's efforts at penetration.[233]

But these troubling complications perhaps arise not because of statutory deficiencies, but because the statute fails to fully serve its principal purpose, at least as reconceived by the Court of Criminal Appeals. A statute conceived in terms of punishing the commission of the act itself, regardless of the consent of the parties to that act, becomes an ineffective instrument for the punishment of those who, through sexual acts, humiliate, degrade and embarrass the unwilling participant.[234] Indeed, the focus on injuries based on humiliation, degradation, and embarrassment takes us out of traditional sodomy jurisprudence; it has as its source the law of rape—a quintessential crime of consent, which defines the "essential guilt of rape . . . , except with the consent of a male or female . . ., [as] the outrage to the person and feelings of the victim."[235] Rape's adoption as part of the jurisprudence of sodomy—that is, that the purpose of the crime is to punish those who cause such injury—made it likely that the Court of Criminal Appeals would begin chafing at the definition of the elements of the crime, elements that had been formulated when the purpose of the statute had been viewed differently. While attempting to enforce the ancient crime against nature statute, the Court of Criminal Appeals began to reconceive its construction of the statute and to press for legislative overhaul and the construction of a crime neither tied to the irrelevancies of the intercourse-oriented limitations of the penetration requirements, nor perhaps overmuch concerned with the prosecution of consensual acts of sexual gratification.[236]

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233. *Hicks*, 713 P.2d at 20 (explaining that the Legislature has not responded to the court's request that the penetration requirement be eliminated from the sodomy statutes, and that the court therefore continues to dismiss charges for failure to prove penetration). *See* Phillips v. State, 756 P.2d 604, 609-10 (Okla. Crim. App. 1988) (dismissing conviction when only evidence of penetration was that the accused had bitten the prosecutrix's vagina); Salyers v. State, 755 P.2d 97, 100 (Okla. Crim. App. 1988) (reversing conviction of adult woman for violating sodomy statute by engaging in cunnilingus with minor daughters because State failed to prove penetration by the mother's tongue of daughter's vagina or anus). For a discussion of the penetration requirement, see *supra* text accompanying note 82.

234. *See Phillips*, 756 P.2d at 611-12 (Brett, J., concurring). In *Phillips*, Judge Brett, concurring in the reversal of a conviction for heterosexual criminal cunnilingus, explained:

> It is tacitly admitted that the accused did everything that was alleged, but the State failed to have the prosecutrix state that she felt the defendant's tongue inside her. Hence, the conviction must fail. This appears to be a sad state of affairs. The woman is humiliated, embarrassed and degraded but because of the antiquated nature of the Oklahoma Statutes, her assailant is allowed to go unpunished for that offense.

Id. at 611.

235. OKLA. STAT. tit. 21, § 1113 (1991). It is this implicit understanding of the connection between the basis of guilt in rape—lack of consent—and in sodomy that perhaps animates Judge Parks's opinion in *Hicks*, in which Judge Parks especially urged the Legislature to consider whether the crime against nature statute ought to be "rewritten and modernized by the Legislature." *Hicks*, 713 P.2d at 21 (Parks, P.J., concurring in part and dissenting in part). *See Salyers*, 755 P.2d at 100 (noting the failure of and need for the Legislature to modernize the statute).

236. Some academic commentary has explored the evolution of civil and criminal penalties for sexual

The Court of Criminal Appeals's impatience did not necessarily indicate a judicial unwillingness to apply the law even in cases of consensual sexual conduct between adults; consider the court's indifference to the facts of *Canfield*.[237] Rather, this impatience with the Legislature indicated a shift in the thinking of the court respecting the primary utility of statutes such as the crime against nature statute. This shift was marked by the overlaying of notions of coercion upon the traditional rationales for the criminalization of sodomy. Thus, the concern over the disease of sexual perversion, whether hetero- or homosexual, continued to manifest itself in published opinions. The opinions also demonstrate a concern about the language of moral discourse.[238] But even when the old language is present, the cases in which the language appears changed; the new cases usually involve extremely coercive sexual conduct, and the weight of the evidence against the defendants may well have presented the court with unappetizing fora for the abandonment of this type of traditional language. Moreover, cases involving coercive sexual conduct lent themselves particularly well to the quasi-moral and scientific language traditionally used in cases of injury resulting from non-sexual coercive conduct, such as murder, assault, and the like.

Judicial impatience did appear to spill over into judicial activity in *Post v. State*.[239] If only for a brief moment, the *Post* court came close to converting the crime against nature statute into the crime of sexual battery in the manner in which Judge Brett hinted in his earlier opinions.[240] The court seemed to make clear its sense that, for all practical purposes, the statute would be best left to serve principally as a proscription of coercive sexual activity not otherwise covered by the rape and lewd molestation laws.[241] In doing so, the court recognized the continued energy of moral

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torts. *See, e.g.*, BRUNDAGE, *supra* note 10, at 608-17 (discussing survivals of medieval sex law in the United States); POSNER, *supra* note 11, at 324-350 (explaining the effects of the Supreme Court's privacy jurisprudence on sexual conduct regulation).

237. In *Canfield*, the defendant was convicted of engaging in consensual sexual activity with another adult male. Canfield v. State, 506 P.2d 987, 989 (Okla. Crim. App. 1973). Judge Bussey, in dissent in Post v. State, 715 P.2d 1105, 1110-1111 (Okla. Crim. App. 1986) (Bussey, J., dissenting), reminded the majority of this prior indifference in the face of the majority's apparent turnabout. Note, however, that even Judge Bussey might have been quibbling more about method than intent: "Clearly, it is a legislative function and not a judicial function to amend statutes if a change is to be enacted." *Post*, 715 P.2d at 1111 (Bussey, J., dissenting).

238. *See, e.g.*, Moore v. State, 501 P.2d 529 (Okla. Crim. App. 1972), *cert. denied*, 410 U.S. 987 (1973). In *Moore*, which involved the conviction of an adult male for the crime against nature for engaging in anal intercourse with his 11-year-old stepson, the court referred to the intercourse at issue as an "unnatural act," as opposed to characterizing it as a violent or coercive act. *Id.* at 532. This characterization, however, is ambiguous and could refer to: (i) the act of engaging in acts of sexual gratification with an 11-year-old child; (ii) the seeking of sexual gratification with a member of the family in a quasi-incestuous relationship; (iii) acts of anal intercourse in general; (iv) acts of anal intercourse with children; or (v) all of the above. *See also* Johnston v. State, 673 P.2d 844, 849 (Okla. Crim. App. 1983) (holding an information adequate when it recited the language of the statute, because it was "unnecessary to go into the loathsome and disgusting details thereof") (quoting Berryman v. State, 283 P.2d 558, 562 (Okla. Crim. App. 1955)).

239. 715 P.2d at 1106-10.

240. *Id.* at 1107.

241. Thus, the court expansively read the implications of the U.S. Supreme Court's privacy cases. It

discourse on the acceptability of private sexual conduct, the language of which had marked a substantial part of its earlier jurisprudence, even as it explicitly rejected this language of moral repugnance as the basis of its crime against nature jurisprudence. The court stated in *Post:*

> We recognize it is the opinion of many that abnormal sexual acts, even those involving consenting adults, are morally reprehensible. However, this natural repugnance does not create a compelling justification for state regulation of these activities.[242]

The court seemed to reject more than the language of morality; it also appeared to assail the proscription's basis in the "science" of the psychiatric illness of deviance:

> The State has failed to demonstrate that private, consensual acts between adult persons could significantly harm society so as to provide a compelling state interest in the regulation of such activities. The fact that twenty-two states have decriminalized private consensual sodomy between adults further illustrates that no harm to society is presently caused by these sexual acts.[243]

Like the language of moral reprehensibility, the language of psychiatry and of the disease of perversion, which had shaped the underpinnings of cases like *Berryman*, has also vanished and been replaced by a discourse of morally indifferent sex.[244]

Or had they? For all the world, Judge Parks wrote the opinion in the manner of a small child forced to swallow caster oil. While the cynic might conclude that the almost studied reticence of the opinion—the sense that "the

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was clear to the Court of Criminal Appeals that the right to privacy was not limited to the actions of individuals within marriage. *Post,* 715 P.2d at 1109. Indeed, the court was quite content to agree with the Supreme Court's opinion in Carey v. Population Servs., 431 U.S. 678 (1977), that the limitations of the right to privacy have not been marked—certainly by neither the Supreme Court, nor the Oklahoma court. *Post,* 715 P.2d at 1108. The Oklahoma court also did not attempt to quibble about the stare decisis effects of the Supreme Court cases. Thus, although Eisenstadt v. Baird, 405 U.S. 438 (1972), involved the privacy rights of individuals in the matter of procreative choice, the Oklahoma court had no trouble accepting as binding the implication that *Eisenstadt* extended the right of privacy to all matters of sexual gratification, and on that basis, significantly limited the enforceability of the crime against nature statute. *Post,* 715 P.2d at 1109.

242. *Post,* 715 P.2d at 1109. The Pennsylvania Supreme Court, in finding its own sodomy statute unconstitutional, took a similar approach: "With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce majority morality on persons whose conduct *does not harm others.*" Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980).

243. *Post,* 715 P.2d at 1109, (citing Rhonda R. Rivera, *Our Strait Laced Judges: The Legal Position of Homosexual Persons in the United States,* 30 HASTINGS L.J. 799, 950-51 (1979)). The implications of this passage, if broadly read, might well suggest the receptivity of the court to apply *Post* in a case of consensual adult homosexual sexual activity. Since *Post,* however, the court has declined to take that step.

244. *See* POSNER, *supra* note 11, at 85. Posner describes the concept of "morally indifferent sex" as follows:

> Suppose we were as matter-of-fact about sex as we are about eating or driving. Sex would nevertheless be an issue of public concern. There are all sorts of public regulations of food, and of driving as well, because these activities can impose . . . costs on third parties. But the question *what* regulations of these activities—these activities that, compared to sex, are for us morally so indifferent, emotionally so uncharged—are appropriate can be framed, quite satisfactorily for the most part, in functional (which largely means nowadays in economic) terms.

Id. Posner argues that the pattern made by the privacy decisions of the Supreme Court between 1965 and 1977 resembles the model of morally indifferent sex that he posits. *Id.* at 324.

U.S. Supreme Court made me do it"— resulted from the Court of Criminal Appeals' judges' need to protect themselves in a conservative state that elects its judges,[245] the language of the opinion does exhibit some judicial discomfort with the import of the implications of federal privacy jurisprudence.

Thus, the holding of the *Post* court is "compelled."[246] The "moral repugnance" that resulted in the creation of the statute in the first place is "natural", given the moral reprehensibility of the actions proscribed.[247] Sensing the full implications of its decision, and attempting in some manner to rein these in, the court attempts to do precisely what it had concluded the U.S. Supreme Court could not have done in its privacy decisions—to narrowly confine the decisions to its facts[248]—perhaps because other jurisdictions that had considered this question found the Supreme Court's privacy cases less "compelling."[249]

In the context of its discussion of the reach of the Supreme Court privacy cases, the Oklahoma court's attempted limitation sounds a bit disingenuous.[250] Indeed, the *Post* decision fell right in line with the thrust

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245. For a description of the manner in which the judges of the Court of Criminal Appeals are elected, see *supra* note 4.

246. *Post*, 715 P.2d at 1109.

247. *Id.*

248. The *Post* court insisted that its "holding today is simply to declare unconstitutional the application of section 886 to the facts of this case." *Id.* at 1109-10.

249. The Rhode Island Supreme Court had held that the federal constitutional "right to privacy is inapplicable to the private unnatural copulation between unmarried adults." State v. Santos, 413 A.2d 58, 68 (R.I. 1980). The facts of *Santos* were not the most auspicious ones for affirming any right to privacy. Like the *Post* case, *Santos* involved heterosexual activity that might reasonably have been characterized as coercive. The Missouri Supreme Court stated more bluntly in State v. Walsh, 713 S.W.2d 508 (Mo. 1986):

> The fact that the democratic process does not respond to those who violate its ordinances is no source of condemnation. Are we to say that drug addicts or pedophiliacs are a powerless class because the democratic process has refused to sanction the activity they seek to have sanctioned? . . . We think not. To hold that the losers in a public policy determination constitute a powerless class for purposes of determining the suspectness of the resulting classification is ludicrous on its face.

Id. at 511. *See also* Carter v. State, 500 S.W.2d 368, 372-73 (Ark. 1973) (upholding convictions under sodomy statute for consensual homosexual acts and finding no federal or state constitutional right to engage in private consensual sexual activity), *cert. denied*, 416 U.S. 905 (1974); Dixon v. State, 268 N.E.2d 84, 86 (Ind. 1971) (suggesting privacy rights do not extend to unmarried persons); Kelly v. State, 412 A.2d 1274, 1277 (Md. App. 1980) (holding right to privacy does not invalidate statutes prohibiting consensual sexual activity because the statute equally applicable to married and unmarried persons), *aff'd sub nom.* Neville v. State, 430 A.2d 570, 579 (Md. 1981); Pruett v. State, 463 S.W.2d 191, 194-95 (Tex. Crim. App. 1970) (holding privacy rights do not extend to consensual acts of sodomy). *But see* State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976) (holding privacy rights protect private adult consensual heterosexual activity); Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass. 1974) (holding statute prohibiting unnatural and lascivious acts inapplicable to private, consensual acts); People v. Onofre, 415 N.E.2d 936, 943 (N.Y. 1980) (overturning sodomy statute on federal constitutional grounds).

250. Certainly in his dissent in *Post*, Judge Bussey understood this full well, reminding the majority that there had been no question that the crime against nature statute included consensual sexual conduct and that the court's function was not to modify or rewrite legislation. *Post*, 715 P.2d at 1110 (Bussey, J., dissenting). Of course, in light of the majority's understanding of the imperatives of Supreme Court privacy jurisprudence, applying Judge Bussey's notions would surely have resulted in the total invalidation of the statute. With a majority anxious to leave undisturbed the bestiality provisions of the statute as well as its

of legislative modification of both the sodomy and rape provisions. These modifications, which began in earnest in 1981, pointed to a much greater emphasis on the coerciveness of the conduct proscribed and expressed far less of a concern with the "wrongness" of the conduct in the absence of coercion.[251] In this, at least, the Oklahoma Court of Criminal Appeals decisions were in sync with the state's changing approach to the crimes of sodomy and rape, as evidenced by the legislative amendments to those statutes.

In denying the State's petition for rehearing in *Post*[252] and subsequent cases,[253] the court made clear that even though the primary focus of the crime against nature statute had changed, the court would not reach the limits of the implications of that change without legislation or federal court guidance. Thus, in *Post,* the court reaffirmed its earlier conclusion that the state had been unable to demonstrate that the conduct at issue "could significantly harm society so as to provide a compelling state interest, or even a rational relationship to support, regulation of these activities."[254] However, the court also reaffirmed that its original opinion was limited to "heterosexual conduct, not homosexual acts."[255]

As it turned out, the *Post* court's reluctance to extend its holding beyond consensual heterosexual sexual conduct proved prophetic. Quite soon after the *Post* decision, the Supreme Court appeared to put the brakes on the expansion of privacy rights, at least with respect to the privacy rights of marginal groups, in *Bowers v. Hardwick.*[256] Although in *Hinkle v. State*[257] the Court of Criminal Appeals by a three-to-two margin affirmed its holding in *Post*, and reaffirmed the strict limitation of that decision to acts of consensual heterosexual adult sexual conduct, *Hinkle* is particularly striking for the reemergence of the language of morality as a basis for expansive treatment of the statute.[258] The dissent, by Judge Lumpkin, recalls a conceptualization of sex crimes as moral offenses. Quoting *Bowers,* Judge Lumpkin speaks approvingly of the notion that the determination by a

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applicability to coercive sexual conduct, this would have been a result the more cautious majority would not have wanted.

251. For a discussion of the Oklahoma Legislature's changing approach to the rape and sodomy laws, see discussion *infra* Part IV.A.

252. Because of the importance of the issues involved to the state in *Post*, the court stayed its mandate in order to permit the State to seek Supreme Court review of its decision. Certiorari was denied the same year. Oklahoma v. Post, 479 U.S. 890 (1986).

253. *See, e.g.*, Newsom v. State, 763 P.2d 135, 139 (Okla. Crim. App. 1988) ("This Court cannot, through judicial intervention, add an element to conduct which is proscribed by statute. However, we may review a statute to determine its constitutionality.").

254. *Post,* 717 P.2d at 1152.

255. *Id. See also* Hinkle v. State, 771 P.2d 232, 233 n.1 (Okla. Crim. App. 1989) (reversing oral sodomy conviction on *Post* grounds and affirming attempted rape conviction).

256. 478 U.S. 186 (1986).

257. 771 P.2d 232 (Okla. Crim. App. 1989).

258. *Id.* at 235.

majority of the electorate that specific sexual conduct is immoral and unacceptable is an adequate rationale to uphold any proscription of sexual conduct.[259] Judge Lumpkin's dissent reflects the fear that when society deprives men of their male nature, they become at odds with society."[260] This is an expression of the old fears of morality (for instance, that sin is evil and will undermine society) transformed into the language of science (sociobiology in particular).[261]

Despite the triumph of the language of coercion, the language of science, psychology, and moral discourse did not disappear from Oklahoma sodomy jurisprudence.[262] *Hinkle* serves as a reminder that the traditional approach, so confidently repudiated by the majority in *Post,* remains a potent force in the jurisprudence of sodomy. That view, and the expansive reading of the acts constituting the crime against nature that went hand-in-hand with this view, however, have had little affect on current Court of Criminal Appeals sodomy jurisprudence—except perhaps to keep the court from expanding the *Post* holding to include adult consensual acts of sexual gratification between people of the same sex. In this reluctance to abandon the language of disease and immorality, the Oklahoma Court of Criminal Appeals reflects the current public debate over the importance and place of

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259. *Id.* (Lumpkin, J. concurring in part and dissenting in part) (quoting *Bowers*, 478 U.S. at 196). On that basis, the holdings of the older cases that recognized that sodomy is no less a crime if it is committed with a consenting person, in the opinion of Judge Lumpkin, were to be reestablished: "It is the duty and exclusive function of the legislature to determine whether the sodomy statute should include the defense of consent." *Id.* at 236. Judge Bussey, also concurring in part and dissenting in part, relied on a similar rationale in his dissent in *Post.* He stated there: "Clearly, it is a legislative function and not a judicial function to amend the statutes if a change is to be enacted." *Post*, 715 P.2d at 1111.

This has been the position taken or urged by other state courts as well. *See* Schochet v. State, 580 A.2d 176, 187 (Md. 1990) (Murphey, C.J., dissenting) (arguing that if a massive sexual revolution has occurred, making commonplace what had once been deemed perverted, then the legislature, as the body charged with declaring public policy, should decriminalize such acts); State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986)(deferring to the legislature the evaluation of social science data regarding homosexuality).

260. Judge Lumpkin must have been a student of George Gilder; the language of his dissent echoes the sentiments expressed by George Gilder, who asserts that men were born to hunt, and women were born to procreate and "tame" men, turning male lust into love and "civilization." GILDER, *supra* note 71, at 37. When women become men and men women, social cohesiveness disappears, anarchy prevails and humanity goes to hell in a hay basket. *See* note 235 and, 237 below.

261. Sociobiologists believe that sexual difference orders life — that one is one's genitals. Gender differences and (traditional) gender roles merely express biological imperatives that are disobeyed at the peril of social order and the attainment of the most efficient and happy civilization possible. *See* DAVID BARASH, THE WHISPERINGS WITHIN (1979); POSNER, *supra* note 11, at 108-10 (critically summarizing tenets of sociobiology); EDWARD WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975). For criticism of sociobiology, see EISENSTEIN, *supra* note 71, at 90-98); ROGER SCRUTON, SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC 180-95 (1986); Marion Blute, *The Sociobiology of Sex and Sexes Today*, 25 CURRENT ANTHROPOLOGY 193 (1984).

262. *See, e.g.,* Moore v. State, 501 P.2d 529, 531 (Okla. Crim. App. 1972) (affirming conviction of adult male for anal intercourse with 11-year-old stepson and referring to such intercourse as unnatural, not as violent or coercive.), *cert. denied*, 410 U.S. 987 (1973); Knowles v. State, 462 P.2d 290, 291 (Okla. Crim. App. 1969) (affirming a conviction for oral sodomy and declining to address the "sordid" details of the evidence in connection in
their reviewing the conviction).

medical and moral characterizations of sex in criminal law. The court reflects the strongly held popular belief that the road to sexual freedom leads to the weakening of the social and economic order.[263]

Since *Post* and *Hinkle*, the Court of Criminal Appeals has limited its function to urging the Legislature to modernize the sodomy laws. Thus, in a number of decisions in the years after *Post*, the Court of Criminal Appeals appeared to harden its resolve to prevent the extension of the *Post* holding beyond consensual heterosexual sexual couplings,[264] even in connection with heterosexual conduct.[265] On the other hand, the court has continued to criticize the legislature for failing to modernize the narrow and antiquated sodomy statutes by making it easier to prosecute non-consensual sexual activity.

The Court of Criminal Appeals has not repudiated its decision in *Post*. Rather, it has confirmed its view that the prevention of unwelcome sexual conduct ought to be the primary focus of the sex laws. The court also left open the door to completely rejecting the traditional basis of that regulation—that the conduct is immoral or evidence of psychiatric disorder—by refusing to indicate whether non-heterosexual sexual conduct between consenting adults would also fall outside the reach of the statute. The court has not indicated much interest in the expansion of the scope of the crime against nature, *except where the conduct is non-consensual*. Thus, as recently as 1990, the court refused an invitation to give expanded content to the crime against nature statute by including within the proscription digital-anal contact, instead limiting such crimes to acts involving genital contact by the genitalia or mouth of another.[266] Indeed, the courts have not expanded the reach of the crime against nature statute in substantial manner since *Warner v. State*,[267] despite the fact that the Legislature has continuously

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263. For judges like Judge Lumpkin on the Court of Criminal Appeals, there is frightening power in George Gilder's parable of *The Princess and the Barbarian*. GILDER, *supra* note 71, at XV. The moral of this parable seems to be that as a result of sexual liberation and the breakdown of (biologically necessary) traditional gender roles, the "nation fell into ruin and the forest became a jungle, ruled by barbarians, where no princess ever dared to tread." *Id.* at XIX.

264. *See* Hinkle v. State, 771 P.2d 232, 233 (Okla. Crim. App. 1989) (upholding conviction of adult male for attempted rape a 76-year-old female); Newsom v. State, 763 P.2d 135, 139 (Okla. Crim. App. 1988) (affirming conviction of adult male for burglary and rape of an adult female); McBrain v. State, 763 P.2d 121, 123 (Okla. Crim. App. 1988) (affirming conviction of adult male for kidnapping, rape, and sodomy of 14-year-old female); Salyers v. State, 755 P.2d 97, 100 (Okla. Crim. App. 1988) (affirming adult woman's conviction for indecent acts with her minor daughters and reversing oral sodomy conviction for failure to prove penetration).

265. *See McBrain*, 763 P.2d at 123 (rejecting argument that *Post* made constitutionally invalid the assertion of a sodomy charge against accused, since the *Post* court specifically stated that its decision did not apply to forced sexual activity); Little v. State, 725 P.2d 606, 608 (Okla. Crim. App. 1986) (affirming conviction for rape and sodomizing of 15-year-old step-daughter and rejecting privacy right defense on theory that the victim was incapable of giving consent).

266. Virgin v. State, 792 P.2d 1186, 1188 (Okla. Crim. App. 1990) (dismissing adult male's conviction for forcible sodomy because the crime against nature did not include the act of inserting a finger in the rectum of another).

267. 489 P.2d 526 (Okla. Crim. App. 1971). *See* discussion *supra* part II.B.4.

recognized additional forms of sexual gratification other than vaginal or anal intercourse, fellatio, and cunnilingus.[268] In light of the Legislature's specific and expanded vocabulary in the area of proscribable sexual conduct and the court's traditional expansionist posture in the area of sexual conduct regulation, this reticence can be explained primarily as a function of the change in the underlying conception of sexual conduct crimes. The rejection of the expansionist view, having its source in cases like *Ex parte De Ford*, which had dominated the outlook of the Court of Criminal Appeals until the early 1970s, and the substitution of a concern with issues of consent, perhaps, is the most important lesson of *Post* and later cases.[269] The Court's shift away from notions of morality and psychiatric disease to an increased concern with the use of the statute as a means of curtailing coercive conduct of a sexual nature appears, in this respect, to be confirmed.

Should the court continue in this direction, it is not improbable that the crime against nature may come to resemble more the traditional crime of rape and much less the anti-pleasure proscription of traditional sodomy. This pronounced de-emphasis on consensual sodomy might lead most observers to believe that the Court of Criminal Appeals might eventually make explicit the implication of its recent sodomy jurisprudential discourse—that the crime against nature is another form of rape and ought to be treated as such. It would therefore not be inconceivable to see the crime against nature reduced to a generalized proscription against bestiality.[270] Such a course would be in line with the Court of Criminal Appeals' emphasis on the injury—humiliation, degradation and embarrassment, which derive precisely from the lack of consent to the conduct. This would also confirm the implication of recent opinions that the language of deviance, disgust, moral opprobrium, and disease has been largely abandoned as primary justifications for the continued viability of the statute.

IV. The Emphasis on Consent; Legislative and Judicial Efforts to Merge Sodomy into Rape

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268. Thus, urination or defecation upon a child under sixteen years of age and ejaculation in the presence of a child is a crime in Oklahoma. OKLA. STAT. tit. 21, § 1123(A)(5) (Supp. 1992). None of these activities constitute the crime against nature under OKLA. STAT. tit. 21, § 886 (Supp. 1992).

269. After Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986), the Court of Criminal Appeals might well have abandoned its "slow and painful process wherein the Court of Criminal Appeals has attempted to discreetly define the multiple acts encompassed in the offense of Crime Against Nature." Warner v. State, 489 P.2d 526, 527 (Okla. Crim. App. 1971) (affirming convictions of defendants, adult husband and wife, who were convicted of engaging in various acts of oral and vaginal sex with an 18-year-old female they enticed into their car).

270. The decision in Bowers v. Hardwick, 478 U.S. 186 (1986), would not affect this determination. All the Supreme Court held in *Bowers* was that a state could (but need not) continue to criminalize the sexual conduct of those who indulge in non-heterosexual sexual conduct; *Bowers* does not compel the state to discriminate in this manner. As a result, a state more interested in controlling unwelcome conduct than in policing the consensual sexual practices of its adult population might well remove or otherwise minimize prohibitions on such conduct.

Though perhaps originally conceived to serve exclusively as a testimonial to the Legislature's formal and official blanket disapproval of certain sexual acts, the crime against nature in the last half of the twentieth century has served as an integral part of the state's effort to control non-consensual as well as consensual sexual acts. Indeed, the second half of the twentieth century has seen radical changes to the uses to which the sodomy statute has been put. It has also seen significant, though spotty, legislative efforts to modernize the sodomy statute. In each case, the driving force was consent. The result: Sodomy law in Oklahoma has increasingly merged into rape, and to the extent sodomy and rape have not merged, it has served as a means of multiplying the number of charges that may be made in connection with many sexual assaults. Additionally, sodomy (whether in the form of the crime against nature or forcible sodomy) is prosecuted substantially like rape.

A. Merger By Legislation

Traditionally, the rape and crime against nature statutes in Oklahoma were two pieces of a fairly comprehensive system of sexual conduct regulation. Sexual acts were divided into two types, licit and illicit.[271] The origin of this division was purely religious,[272] reflecting a belief that the primary purpose of sexual gratification was to reproduce.[273] Since sex for the purpose of reproduction was the only proper vehicle for sexual gratification, heterosexual vaginal intercourse was not deemed contrary to the law of God. To ensure that reproduction was a primary purpose for sexual activity, the only licit sexual activity was heterosexual vaginal intercourse between married couples. All other forms of sexual activity—masturbation, same sex

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271. *See supra* note 10.

272. The discussion of the religious origin of sexual conduct regulation is derived in substantial part from BOSWELL, *supra* note 44; FRANK BOTTOMLEY, ATTITUDES TO THE BODY IN WESTERN CHRISTENDOM (1979); BRUNDAGE, *supra* note 10; GARY CLABAUGH, THUNDER ON THE RIGHT: THE PROTESTANT FUNDAMENTALISTS 1, 1-31 (1974); ALLEN J. FRANZTEN, THE LITERATURE OF PENANCE IN ANGLO-SAXON ENGLAND (1983); FUCHS, *supra* note 10; NOONAN, *supra* note 10; PIERRE J. PAYER, SEX AND THE PENITENTIALS: THE DEVELOPMENT OF A SEXUAL CODE (1984); POSNER, *supra* note 11; Oaks, *supra* note 10; Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism and the Law*, 1 COLUM. J. GENDER & L. 67 (1991); Pierre J. Payer, *Early Medieval Regulations Concerning Marital Sexual Relations*, 6 J. MEDIEVAL HIST. 353, 358 (1980). It is arguable that the origins of these sexual proscriptions were the religiously affirmed notions of women as property of their husbands. This view provides insight respecting rape and the regulation of female sexuality; however, it contributes less toward an understanding of proscriptions of homosexual conduct.

273. As such, contraception was also a proscribable offense. The most extreme form of contraception—abortion—has been the subject of much debate in the last quarter century, a discussion of which lies outside the scope of this essay. But abortion was not the only means of contraception, as many teenagers, certainly, are well aware. Mutual masturbation, fellatio, and cunnilingus can serve as acceptable substitutes for vaginal intercourse. Traditionally, sexual activity between people of the same sex has also been characterized as deviant because it was sterile, and, as such, also an extreme form of contraception. *See, e.g.*, NOONAN, *supra* note 10, at 222-27 (narrating ecclesiastical descriptions of forms of sinful contraception); *supra* note 272.

sexual activity, oral-genital contact, and anal intercourse, none of which could result in conception—were condemned as a perversion of the limited purpose for which God had endowed people with sexual capabilities. In the practice of such activities lay the road to spiritual ruin. Since immoral conduct—conduct inimical to salvation under the Christian conception of things—violated the natural order (only moral or "right" conduct, prescribed by God, was natural), illicit sexual activity—activity involving the use of certain body parts for purposes other than reproduction—was unnatural as well. It is this conception of the naturalness of sexual activity that was reflected in early opinions of the Oklahoma Criminal Court of Appeals.[274]

The rape and sodomy laws were conceived as an effort by the civil authorities to mimic the fundamental division that Christianity made between the different forms of sexual conduct. Rape laws were intended to regulate a narrow aspect of heterosexual vaginal intercourse and proscribed all acts of coercive heterosexual vaginal intercourse between people not married to each other.[275] Oklahoma's rape statute also provided special definitions for determining the absence of consent, a core element of the crime.[276]

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274. *See, e.g.*, *Ex parte* De Ford, 168 P. 58 (Okla. Crim. App. 1917) (interpreting sodomy statute to include all unnatural carnal copulation). On Protestant notions of the natural and sin see FUCHS, *supra* note 10, at 159-60; discussion, *supra* parts II.A, III.A.

275. The original statute defined rape as "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator," under one of seven enumerated circumstances: (i) where the female is under 14 years of age; (ii) where she is incapable of giving legal consent through permanent of temporary unsoundness of mind; (iii) where she resists; (iv) where she fails to resist by reason of threats of immediate and great bodily harm, accompanied by apparent power of execution; (v) where she is prevented from resisting by reason of the administration of a drug by or with the privity of the accused; (vi) where she is unconscious at the time of the intercourse and this is known to the accused; and (vii) where she submits under the mistaken belief that she is married to the accused and this belief is falsely induced by the accused. OKLA. STAT. art. 26, § 1 (1890) (current version of OKLA. STAT. tit. 21, § 1111 (1991)). There have been a great number of articles written discussing the shortcoming of traditional rape statutes. *See, e.g.*, Estrich, *Rape*, *supra* note 14; Garcia, *supra* note 18. "Sexual intercourse" was not defined in the statute. The Oklahoma Criminal Court of Appeals defined sexual intercourse to mean the penetration, by a man's penis, of a woman's sexual organs. Miller v. State, 82 P.2d 317, 322 (Okla. Crim. App. 1938); *accord* Commander v. State, 734 P.2d 313, 315 (Okla. Crim. App. 1987) (requiring proof of penetration of the vagina of the prosecutrix for conviction); Wallace v. State, 620 P.2d 410, 413 (Okla. Crim. App. 1980) (upholding conviction of adult male for rape and robbery and rejecting argument that State had failed to prove penetration because prosecutrix's testimony deemed sufficient on this issue). Since the court in *De Ford* defined all but the vagina as non-sexual organs, "sexual organs" as used by the Oklahoma courts would be limited to the vagina. *See De Ford*, 168 P. at 59. Indeed, until the enactment of the 1990 amendments to the rape statute, 1990 OKLA. SESS. LAWS ch. 224, § 2, now codified in OKLA. STAT. tit. 21, § 1111 (1991), the Court of Criminal Appeals continued to insist that sexual intercourse could only be effected between a man and a woman by the insertion of a penis in a vagina. *See* Brown v. State, No. F-86-433, slip op. at 2 (Okla. Crim. App. May 21, 1990) (unpublished opinion) (opinion on rehearing); Robert E. Richardson, *Is it Rape, Sodomy, Or What?* 62 OKLA. B.J. 1597, 1598 (1991) (describing the history of the passage of the 1990 amendments to the Oklahoma rape statute).

276. The version of the Oklahoma rape provision in traditional form defined the following circumstances as presumptively coercive:

1. Where the victim is under sixteen (16) years of age; or
2. Where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent; or
3. Where force or violence is used or threatened, accompanied by apparent power

Heterosexual vaginal intercourse between unmarried couples was considered prostitution and, on that basis, proscribed even if neither party received compensation.[277] After 1992, heterosexual vaginal intercourse between unmarried couples, while no longer punishable as prostitution, constituted the crime of "lewdness."[278] Substantially all other types of sexual conduct in the nature of copulation were considered deviant and proscribed by the crime against nature statute, whether or not the activities were engaged in with consent and within marriage.[279] In addition, acts that might not amount to crimes against nature, when conducted with or in the presence of minors,[280] or otherwise without consent,[281] were also proscribed. Each provision thus served a specific function in the state's effort to regulate sexual conduct;[282] each stood separate and apart.[283]

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of execution to the victim or to another person; or

4. Where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit; or

5. Where the victim is at the time unconscious of the nature of the act and this is known to the accused; or

6. Where the victim submits to sexual intercourse under the belief that the person committing the act is a spouse, and this belief is induced by artifice, pretense or concealment practiced by the accused or by the accused in collusion with such spouse with intent to induce such belief. . . . "

After 1983, the definition of rape was modified in substantial ways, creating a substantial overlap with the crime against nature provision. OKLA. STAT. tit. 21 § 1111 (Supp. 1983).

277. OKLA. STAT. tit. 21, § 1030 (1991) provided that the "term 'prostitution' as defined in this Act shall be construed to include the giving or receiving of the body for sexual intercourse for hire, and shall also be construed to include the giving or receiving of the body for indiscriminate sexual intercourse without hire." The definition of prostitution was significantly amended in a number of respects in 1992, primarily by broadening the description of conduct that is proscribed if done for hire, and eliminating the criminalization of the indiscriminate giving or receiving of the body for sexual intercourse when not done for hire. *See* OKLA. STAT. tit. 21, § 1030 (Supp. 1992). The Oklahoma prostitution provisions served as the equivalent of the fornication provisions, which were traditionally part of the criminal code of other states. For a general discussion of traditional fornication prohibitions, see, e.g. MODEL PENAL CODE § 213.6 note on *Adultery and Fornication* (Proposed Official Draft 1962).

278. OKLA. STAT. tit. 21, §§ 1029, 1030(5) (Supp. 1992) (defining lewdness as "the giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct with any person not his or her spouse"). Unlike sodomy or rape, conviction on a charge of lewdness is a misdemeanor. OKLA. STAT. tit. 21, § 1031(A) (1991).

279. See discussion, *supra* part II, for a description of the acts covered and not covered under the crime against nature provision.

280. OKLA. STAT. tit. 21, § 1123 (Supp. 1992). This provision is the current elaboration of the lewd molestation provision that has been in effect in substantially the same form since 1945. The most significant difference between the original version and the current version is the detailed description of the types of conduct deemed covered by the statute, and the broadening of the statute to include the lewd molestation of male minors.

281. OKLA. STAT. tit. 21, § 1123(B) (Supp. 1992) (sexual battery). Sexual battery is described as "the intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner and without the consent of that person." *Id.* To date, the Court of Criminal Appeals has not significantly considered this statute.

282. This scheme was common knowledge among the members of the Oklahoma legal community. *See* Joplin, *supra* note 14.

283. *See, e.g.*, McDaniel v. State, 509 P.2d 675, 680-81 (Okla. Crim. App. 1973) (upholding conviction of adult male for sodomy, assault with a dangerous weapon, and rape of adult female and rejecting the argument that all but one of the sexual offenses should have been dropped since they all arose out of the same

One consequence of this integrated scheme of sexual conduct regulation was that much of the conduct that might be typically involved in forcible sexual activity was technically not punishable under the rape statutes.[284] Forcing a female against her will to perform fellatio, or to submit to cunnilingus, or anal intercourse, was not rape, even though most women in such circumstances might well consider themselves raped. Such conduct could be punished only under the statute proscribing acts of deviant sexual activity. In this manner, sodomy and rape worked in tandem in traditional prosecutions for coercive sexual activity.[285]

After 1981, the Oklahoma Legislature began a long process of blurring the old distinction between illicit sexual acts (which were to be proscribed regardless of consent) and licit sexual conduct (which was to be regulated

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transaction on the grounds that the rape and sodomy acts were separated by a significant amount of time and because proof for conviction of sodomy different from that required for conviction of rape); Ziegler v. State, 610 P.2d 251, 253-54 (Okla. Crim. App. 1980) (upholding conviction of adult male for, among other things, two counts of rape, and two counts of sodomy and rejecting the argument that only one count should have been charged since all of the acts arose out of a single transaction).

284. From the cases, it appears that a substantial number of the men who ultimately raped or had anal intercourse with their victim required some sort of oral genital stimulation before they were physically capable of penetration. A partial listing of such cases considered by the Court of Criminal Appeals includes Pierce v. State, 786 P.2d 1255 (Okla. Crim. App. 1990); Doyle v. State, 785 P.2d 317 (Okla. Crim. App. 1989); Miller v. State, 781 P.2d 846 (Okla. Crim. App. 1989); Hinkle v. State, 771 P.2d 232 (Okla. Crim. App. 1989); Childers v. State, 764 P.2d 900 (Okla. Crim. App. 1988); Newsom v. State, 763 P.2d 135 (Okla. Crim. App. 1988); McBrain v. State, 763 P.2d 121 (Okla. Crim. App. 1988); Johnson v. State, 760 P.2d 838 (Okla. Crim. App. 1988); McKinnon v. State, 752 P.2d 833 (Okla. Crim. App. 1988); Hepp v. State, 749 P.2d 553 (Okla. Crim. App. 1988); Waxler v.State, 747 P.2d 964 (Okla. Crim. App. 1987); Rowe v. State, 738 P.2d 166 (Okla. Crim. App. 1987); Williams v. State, 733 P.2d 22 (Okla. Crim. App. 1987); Casey v. State, 732 P.2d 885 (Okla. Crim. App. 1987); Eberhart v. State, 727 P.2d 1374 (Okla. Crim. App. 1986); Little v. State, 725 P.2d 606 (Okla. Crim. App. 1986); Peninger v. State, 721 P.2d 1339 (Okla. Crim. App. 1986); Freeman v. State, 721 P.2d 1327 (Okla. Crim. App. 1986); Williams v. State, 721 P.2d 1318 (Okla. Crim. App. 1986); Lucero v. State, 717 P.2d 605 (Okla. Crim. App. 1986); Bryson v. State, 711 P.2d 932 (Okla. Crim. App. 1985); Johnson v. State, 710 P.2d 119 (Okla. Crim. App. 1985); Glass v. State, 701 P.2d 765 (Okla. Crim. App. 1985); Johnston v. State, 673 P.2d 844 (Okla. Crim. App. 1983); Crisp v. State, 667 P.2d 472 (Okla. Crim. App. 1983); Wooldridge v. State, 659 P.2d 943 (Okla. Crim. App. 1983); Ziegler v. State, 610 P.2d 251 (Okla. Crim. App. 1980); Costilla v. State, 609 P.2d 788 (Okla. Crim. App. 1980); Thompson v. State, 560 P.2d 221 (Okla. Crim. App. 1977); Carson v. State, 529 P.2d 499 (Okla. Crim. App. 1974); McDaniel v. State, 509 P.2d 675 (Okla. Crim. App. 1973); Bigsby v. State, 489 P.2d 1352 (Okla. Crim. App. 1971); Turnbow v. State, 451 P.2d 387 (Okla. Crim. App. 1969); Brown v. State, 435 P.2d 173 (Okla. Crim. App. 1967).

285. Consider, for example, the testimony of the prosecuting witness in Pebeahsy v. State, 742 P.2d 1162, 1164 (Okla. Crim. App. 1987):

> Q. How many times did he attempt to make penetration on you in your rectum? Do you remember whether that happened more than once?
> A. Just he [sic] tried the vagina and couldn't penetrate.
> Q. Did he—the reason he couldn't penetrate is because he didn't have his pants zipped down or was it because he couldn't get an erection?
> A. He just couldn't get an erection.
> Q. Did he ever get an erection that night?
> A. Rectally.

Other males were better able to vaginally penetrate their victims after oral or rectal stimulation. As a result, it was not unusual to charge both rape and sodomy in a number of prosecutions before the Court of Criminal Appeals especially after 1967. *See supra* note 284 (partially listing cases).

only to the extent necessary to prevent coercive activity). This blurring was accomplished by expanding the definition of rape to include activities traditionally encompassed under the crime against nature statute and by broadening the crime against nature statute primarily by focusing on non-consensual activities, especially those involving minors. The result has been to substantially confuse the traditional working relationship between rape and sodomy, and perhaps even to merge the two crimes.

In 1981, the Legislature took the first substantial step in this regard. Changing the common-law rule that a female could not rape a male,[286] it amended the rape statute to provide for the possibility of rape by a male or by a female. As a result, the concept of rape was expanded to include "sexual intercourse" of a male by a male or a female by a female under the circumstances described in the statute.[287] This amendment also appeared to affect the definition of "sexual intercourse," the predicate activity proscribed. Since a man does not have a vagina, in order to cover a male's rape of another male the penetration required by title 21, section 1113 of the Oklahoma Statutes would have to include penetration of either the anus or the vagina.[288]

Commentators argued that the statute could not be so construed and urged a continuation of the traditional interpretation.[289] The Legislature disagreed and attempted to demonstrate its intent to include in rape what had been at the core of traditional definitions of sodomy—anal intercourse between people of the same or of opposite sexes—by further amending the rape statute in 1983 to provide that rape can be accomplished with a male or with a female "who is not the spouse of the perpetrator."[290] In the face of the refusal of the Court of Criminal Appeals to permit this *sub silentio* repeal of the sodomy statute,[291] the Legislature further amended the rape statute in 1990 to provide that sexual intercourse includes "vaginal or anal penetration accomplished with a male or female" and that the prosecuting witness "may be of the same or the opposite sex as the perpetrator."[292] As

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286. Richardson, *supra* note 23, at 2483.

287. *Id.* at 2484 n.33.

288. "Any sexual penetration, however slight, is sufficient to complete the crime." OKLA. STAT. tit. 21, § 1113 (1991).

289. *See* Richardson, *supra* note 23, at 2484-86. The argument made was that the modification abrogating the common-law limitation of rape of males was limited to making it possible to charge a woman with the rape of a man. As a result, the term "sexual intercourse" would continue to mean the penetration of a vagina by a penis. Any other interpretation would result in a direct conflict with the crime against nature stature.

290. Act of Apr. 20, 1983, ch. 41, 1983 Okla. Sess. Laws 157, 157. In 1989, in the face of the incredulity of the Court of Criminal Appeals on this point, the Legislature adopted a Concurrent Resolution that declared that it had been the intent of the earlier Legislature in modifying the rape statute to include within the definition of rape acts of anal intercourse between men. H.R. Con. Res. 1001, 42d Leg., 1989 Okla. Sess. Laws A-12.

291. *See* Brown v. State, No. F-86-433, slip op. at 2 (Okla. Crim. App. May 21, 1990) (unpublished opinion) (opinion on rehearing).

292. Act of May 18, 1990, ch. 224, 1990 Okla. Sess. Laws 741, 742.

a result of this amendment, the argument was first explicitly advanced that the sodomy statutes (crime against nature and forcible sodomy) "now only apply to oral penetration, either fellatio or cunnilingus."[293] Certainly, a *de facto* repeal of the crime against nature statute, without the political burden of *de jure* repeal, would greatly benefit the Legislature, and be in line with the current consent-based focus of the Legislature.

Additionally, the Legislature added the new crime of rape by instrumentation in 1981, which consisted of penetration of the anus or vagina of any other person, without consent, by an inanimate object, resulting in bodily harm under one of the circumstances described in the general rape provision.[294] From the first, the Legislature made clear in the black letter of the statute that the crime included anal as well as vaginal penetration. This statute was less troublesome than traditional rape statutes because the crime against nature traditionally did not include within its definition the acts contemplated by rape by instrumentation.[295] However, the statute as originally written was limited to penetration by an inanimate object. As a result, in cases like *Virgin v. State,* the accused could not be prosecuted.[296] The rape by instrumentation provision was amended in 1987 to fill this gap.[297]

Note, however, that until 1993 a man could be charged with rape by instrumentation for inserting a finger into the rectum of his unwilling wife, but could not be charged with rape if he instead inserted his penis into the anus or vagina of the same unwilling spouse, except under very limited circumstances. Indeed, the Oklahoma Legislature has had a difficult time criminalizing any aspect of heterosexual vaginal intercourse between husband and wife (but not, of course, with the criminalization of non-vaginal sexual

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293. Richardson, *supra* note 275, at 1602. This argument is based, in part, on the rule of construction that later specific statutes trump earlier general statutes. Furthermore, as expressed by the Court of Criminal Appeals in *Brown,* where, in holding that the rape statute required the penetration of a vagina by a penis, the court implied that to hold otherwise would effectively repeal the crime against nature statute. *Brown,* No. F-86-433, slip op. at 2.

294. Act of June 30, 1981, ch. 325, 1981 Okla. Sess. Laws 1139, 1139. *See* Richardson, *supra* note 23, at 2486.

295. Virgin v. State, 792 P.2d 1186 (Okla. Crim. App. 1990) (holding insertion of finger in rectum not "sexual penetration" within meaning of forcible anal sodomy statute). As such, males have been convicted of the rape by instrumentation of other males. Silver v. State, 737 P.2d 1221, 1222 (Okla. Crim. App. 1987) (affirming conviction of adult male for rape by instrumentation of an elderly male, the evidence consisting of the insertion of the barrel of gun in the male's anus during the course of a robbery).

296. The insertion of a finger in the rectum of another did not fall within the meaning of crime against nature. *Virgin*, 792 P.2d at 1187. Such an act did not amount to the commission of rape by instrumentation because a human finger was not an inanimate object. *See* Richardson, *supra* note 23, at 2486-87 (concluding that "inanimate" means "not having the qualities associated with active, living organisms").

297. Act of July 5, 1987, ch. 224, 1987 Okla. Sess. Laws 1431, 1437, which provides:

> Rape by instrumentation is an act within or without the bounds of matrimony in which any inanimate object or any part of the human body, not amounting to sexual intercourse is used in the carnal knowledge of another person without his or her consent and penetration of the anus or vagina occurs to that person. Provided, further, that at least one of the circumstances specified in Section 1111 of this title has been met.

activities, even between spouses). A limited form of spousal rape was introduced into the criminal law by amendment in 1990, criminalizing coercive heterosexual vaginal intercourse between spouses only if, at the time of the intercourse, a divorce petition, protective order, or a petition for separation was pending, had been granted, or the couple was otherwise living separate and apart;[298] the 1993 amendment to the spousal rape provisions eliminated these limiting conditions.[299]

The crime against nature provisions were also substantially amended in 1981, when the Legislature created the new crime of "forcible sodomy."[300] Under this provision, any person convicted of the crime against nature who uses force in order to engage in the activity from which conviction arose can be punished for the crime of forcible sodomy. The elements of the crime of forcible sodomy are identical to that of the crime against nature, except that, in addition, the State must prove that the accused used force to engage in the activity at issue. Conviction for forcible sodomy can result in up to twenty years imprisonment—twice that permitted under the crime against nature statute.[301]

The increasing emphasis by the Legislature on the consensual element of sexual crimes was evidenced by the 1990 and 1992 amendments to the sodomy provisions, and by the creation of the new crime of sexual battery and the expansion of the definition of lewd molestation. In 1990, the Legislature refined the law of forcible sodomy by specifying which general actions would constitute actionable coercion under the forcible sodomy statute. Perhaps unsurprisingly, the Legislature accomplished this refinement by drawing on the law of rape for the specifications. As in rape cases, forcible sodomy includes an element of the equivalent of statutory rape: "Statutory sodomy"[302] includes the commission of the act upon anyone incapable of giving consent through mental disorder,[303] or by means of

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298. The 1990 version of the spousal rape provisions were enacted as 1990 Okla. Sess. Laws ch. 224, § 2. As in 1981, when the first attempt was made in the Legislature to proscribe spousal rape, the Legislature was unable to bring itself to criminalize coercive sexual conduct within marriage. The exception it provided in 1990 essentially covered only those situations where the couple was no longer living as man and wife. For a brief discussion of the 1981 attempt, *see* Richardson, *supra* note 23, at 2482.

299. The 1993 amendments, ch. 62, 1993 Okla. Sess. Laws 150, 150 (effective September 1, 1993) (enrolling Okla. House Bill 1060), extended the application of spousal rape to married couples who are neither separated nor filing for divorce.

300. Act of June 30, 1981, ch. 57, 1981 Okla. Sess. Laws 87, 87. The Act that created this crime was entitled "An Act relating to crimes and punishments; prohibiting persons from forcing certain persons to engage in certain crimes against nature; providing for penalties; directing codification; and providing an effective date." *Id.* The 1982 amendment lengthened the possible sentence from 10 to 20 years in the penitentiary.

301. OKLA. STAT. tit. 21, § 886 (Supp. 1993). Every person guilty of crime against nature is punishable by imprisonment not exceeding ten (10) years. OKLA. STAT. tit. 21, § 888 (Supp. 1993). Any person who forces another person to engage in a crime against nature (forcible sodomy) is guilty of a felony punishable by imprisonment for not more than twenty (20) years.

302. The crime of forcible sodomy thus includes "sodomy committed by a person over eighteen (18) years of age upon a person under sixteen (16) years of age." OKLA. STAT. tit. 21, § 888(B)(1) (Supp. 1992).

303. Forcible sodomy includes "sodomy committed upon a person incapable through mental illness or

force.[304] The 1992 amendments enhanced the sentences of repeat offenders where the victim who was violated by means of force is under sixteen years of age.[305]

In 1989, Oklahoma created the new crime of sexual battery.[306] The statute attempted to cover the field, regulating conduct that was sexual in nature, but that amounted neither to sodomy or rape.[307] In this, perhaps, the Legislature was attempting to take up a task that it had traditionally left to the Court of Criminal Appeals, and that the court had begun to resist—adding content to the amorphous crime against nature. It is somewhat telling, however, that the Legislature included lack of consent as an element of the crime, irrespective of the sex of the people engaged in the activity. As such, under the sexual battery statute, both same sex and opposite sex couples may engage in acts of mutual masturbation, for instance, as long as the acts were consensual in nature. Illogically, if the same two couples proceeded to acts of anal intercourse, the same sex couple but not the opposite sex couple would have committed an act of criminal sodomy. Clearly, the enactment of the sexual battery statute evidences the Legislature's loss of interest in the preservation of the morals of the community in crafting sexual crimes; it had also lost interest in fine-tuning its proscription of the conduct of adult sexual outcast groups, particularly those who engaged in same-sex sexual acts.

That consent replaces the language of scientific or medical pathology, or even the language of divine condemnation of groups of people or practices, is also clear when one examines the legislative preoccupation with the regulation of sexual conduct of adults seeking to satisfy their sexual appetites on minors. The Legislature has gone to great lengths to proscribe all imaginable types of sexual conduct when accomplished with or on children— persons deemed incapable of giving consent. Thus, boldly going where no legislature had gone before, and unconcerned with the tastelessness and obscenity of its description, the Legislature proscribed ejaculation, urination, or defecation on or about the persons of minors.[308] But in this, as in the creation of the sexual battery crime, the conduct of the Legislature compliments the language of the Court of Criminal Appeals in its decisions

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any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime." OKLA. STAT. tit. 21, § 888(B)(2) (Supp. 1992).

304. Forcible sodomy includes "sodomy accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the victim or the person committing the crime." OKLA. STAT. tit. 21, § 888(B)(3) (Supp. 1992).

305. For the text of the 1992 changes to OKLA. STAT. tit. 21, §§ 886, 888, see *supra* note 21.

306. *See supra* note 25 (quoting relevant text of the provision).

307. The statute has been described as nothing more than "a specific battery statute pertaining to unconsented sexual touching." Richardson, *supra* note 275, at 1601. Note, however, that consensual acts of masturbation or sodomy, if engaged in indiscriminately, are punishable as lewdness—in Oklahoma, a form of prostitution. *See* OKLA. STAT. tit. 21, §§ 1029(a), 1030(5)(b) (Supp. 1992).

308. OKLA. STAT. tit. 21, § 1123(A)(5) (Supp. 1992).

after *Post*.

As a result of the amendments, the rape and sodomy statutes overlap in significant ways. Thus, under a wide variety of circumstances, the same acts can be prosecuted under the rape and the forcible sodomy provisions. A male who engages in anal intercourse with a female other than his wife, if the act resulted from the male's threats of force or violence, can be charged with rape,[309] forcible sodomy,[310] or the crime against nature.[311] Before 1993, if the female with whom the male engaged in anal intercourse upon threat of force was the male's wife, and the couple was separated, subject to a protective order, or living apart, or a petition for divorce or separation was pending or had been granted, the result was the same.[312] Likewise, the same charges may result if the female is under sixteen years of age and the male is more than eighteen years old, whether or not the acts were accompanied by threats of force or violence.[313]

This overlapping, however, is not complete. For example, the rape and forcible sodomy laws do not have identical age exceptions. Thus, forcible sodomy is limited in this respect to the commission of the crime against nature by a person over eighteen years old with a person under sixteen.[314] In contrast, the rape statutes except from its coverage anal or vaginal penetration by a person eighteen years old or younger with a person older than fourteen.[315] No age exceptions exist for the commission of the crime against nature for the obvious reason that consent is never at issue.[316] It is possible, then, for a sixteen-year-old who engages in consensual anal intercourse with a fifteen-year-old to be charged with committing the crime against nature but to not be chargeable with rape. Thus, heterosexual vaginal intercourse between a sixteen-year-old and a fifteen-year-old is left unregulated, while anal intercourse between the same couple is proscribed. This distinction makes no sense given the purposes of the statutes and is probably the result of legislative oversight when the acts were modified. It ought to be corrected.[317]

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309. Such an act is an act of sexual intercourse involving anal penetration with a woman not the spouse of the perpetrator in a situation where force or violence is used or threatened. OKLA. STAT. tit. 21, § 1111(A)(1) (1991).

310. Anal intercourse constitutes a crime against nature under OKLA. STAT. tit. 21, § 886 (Supp. 1992). Such an act constitutes forcible sodomy where force or violence is used or threatened. OKLA. STAT. tit. 21, § 888(B)(3) (Supp. 1992).

311. OKLA. STAT. tit. 21, § 887 (Supp. 1992) (requiring "penetration, however slight," as an element, but not consent).

312. A person could be charged with the rape of a spouse only under the limited circumstances set forth in OKLA. STAT. tit. 21, § 1111(B) (1991). The status of the parties was not a predicate for conviction of the crime of forcible sodomy. As such, the perpetrator could be charged with forcible sodomy, whether or not the circumstances described in OKLA. STAT. tit. 21, § 1111(B) (1991) existed. OKLA. STAT. tit. 21, § 888 (Supp. 1992). These limitations on spousal rape were eliminated in 1993. *See supra* note 299.

313. OKLA. STAT. tit. 21, §§ 888(B), 1111(A)(1), 1112 (1991 & Supp. 1992).

314. OKLA. STAT. tit. 21, § 888(B)(1) (Supp. 1992).

315. OKLA. STAT. tit. 21, § 1112 (1991).

316. OKLA. STAT. tit. 21, § 886 (Supp. 1992).

317. For a brief discussion of the potential political benefits and problems for the Legislature confronted

This merging of sodomy into rape applies with equal force to homosexual or lesbian sexual acts. Thus, for example, a male can now be charged with rape, as well as forcible sodomy, for engaging in acts of anal intercourse with another male by coercion or with an underage male or a male otherwise incapable of giving consent.[318] A female who engages in sexual acts with an underage female or with any female through coercive means, where anal or vaginal penetration is achieved, say by a dildo, can be charged with forcible sodomy or with rape by instrumentation.[319] In both cases, the perpetrator could also be charged with the crime against nature, consent being irrelevant to that offense.[320]

What is the effect of this merger? If the merger is complete, then perhaps the merger amounts to the wholesale repeal of consensual as well as forcible sodomy. The Legislature, by including traditional acts of sodomy within the definition of rape, fused the two crimes, and rape remains the only actionable offense. While this argument might have some appeal, it is fairly aggressive and unlikely to be convincing to a court mindful of its morals. On the other hand, as some have argued, the merger of sodomy into rape is substantially but not totally complete. Under this view, sodomy (whether consensual or not) may well be limited to acts other than those amounting to rape.[321] Consensual anal intercourse would no longer be actionable because rape criminalizes only non-consensual anal intercourse. Cunnilingus and fellatio, if consensual, would be actionable as the crime against nature if the participants are both of the same sex, but not otherwise. If such conduct were non-consensual, it would constitute forcible sodomy but not rape. Masturbation of another person, if consensual, would not constitute a crime, irrespective of the sex of the participants. The core of the traditional consensual sodomy proscription would be gutted; only consensual fellatio and cunnilingus, if undertaken by members of the same sex, would be proscribed. This state of affairs is illogical and so far from the basis of the traditional

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with the correction of statutory inanities such as the one illustrated, see discussion infra Part V. This subject is explored in detail in ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961) (describing the context of decisionmaking and choices among policy alternatives at the municipal level); RICHARD E. NEUSTADT, PRESIDENTIAL POWER (1960) (examining several examples of presidential decisionmaking as evidence that the nature of presidential decisionmaking is a function of bargaining games); Ralph K. Huitt, *The Congressional Committee: A Case Study*, 48 AM. POL. SCI. REV. 340-65 (1954) (studying the way in which congressional committees determine amongst policy and legislative alternatives, where each member of the committee represents a special interest, and the product resulting from the resolution of the clashes between those special interests).

318. The rape statute is now crystal clear on this point. OKLA. STAT. tit. 21, § 1111(A) (1991) (stating that the victim of rape "may be of the same or opposite sex as the perpetrator"); Richardson, *supra* note 275, at 1598. For a discussion of the ambiguities of prior attempts to incorporate elements of traditional sodomy into the rape statute, see Richardson, *supra* note 23, at 2484 (noting, among other things, that the principal author of the House version of the 1981 amendments to the rape statute intended for the law to cover rape of a male by a male or of a female by a female).

319. OKLA. STAT. tit. 21, § 1111.1 (1991) (proscribing rape by instrumentation).

320. OKLA. STAT. tit. 21, § 886 (Supp. 1992).

321. Richardson, *supra* note 275, at 1602.

prohibition as to leave the sodomy statute with little, if any, support for its continued existence.

Thus, even if the merger of sodomy into rape, as a legislative matter, is not complete, the resulting regulation is no less illogical or senseless. While a person who forces another to engage in acts of vaginal or anal intercourse without consent is now chargeable with either rape or forcible sodomy, the same does not apply if, with the same lack of consent, the person engages in other acts of sexual (mis)conduct. A female who forces an underage male to engage in cunnilingus has committed forcible sodomy and the crime against nature, but not rape. Had she inserted a dildo in the underage male's anus during the act of cunnilingus, she could then be charged with rape by instrumentation, forcible sodomy, and the crime against nature. Had a male forced an underage male to witness him ejaculating or defecating for the purpose of sexual gratification, the older male could be charged with lewd molestation,[322] but not forcible sodomy or rape, unless there was penetration of the anus.

The variations of the last examples are almost infinite; the result, however, is always the same—a senseless distinction between different acts although the deleterious effect on the victim is always the same. These byzantine distinctions make little sense; they are perhaps best conceptualized as the hangover of an age where the violation of the integrity of a person's body was not as important as the illicitness of the conduct constituting the violation. What the changes evidence, more than anything else, is the invitation for those who actually enforce the provisions (the courts) to do what the Legislature couldn't bring itself to do—repeal the sodomy provisions.

How does this work? Rape and forcible sodomy are the same crime in many instances. Non-consensual anal intercourse is now equally prosecutable as rape or forcible sodomy. Fellatio and cunnilingus, committed without consent, however, are still chargeable only as forcible sodomy, while the insertion of an inanimate object in the vagina or anus of a person is chargeable only as rape by instrumentation. Arguably, then, the only distinction between the crimes is not the act prosecuted, but the burden on the state to prove the charge[323] and the sentencing discretion of the court. Thus, rape in the first degree is a capital offense in Oklahoma[324]; the crime against nature can result in a sentence no greater than ten years, and forcible sodomy can result in a sentence no greater than twenty years. In light of these differences, and especially when force is not difficult to prove, prosecutors will ignore the sodomy provisions in favor of conviction for

322. OKLA. STAT. tit. 21, § 1123(A)(5) (Supp. 1992).

323. Proof of lack of consent is not required for a conviction under the crime against nature statute, but lack of consent is required for conviction of forcible sodomy and rape. OKLA. STAT. tit. 21, §§ 886, 888 (Supp. 1992).

324. It is unlikely to be punished as such since Coker v. Georgia, 433 U.S. 584 (1976).

rape—effecting a *de facto* repeal of the sodomy statutes.

B. The Judicial Merger of Sodomy and Rape

The formal merging of the elements of rape and sodomy is not an unnatural process. Indeed, this might well be viewed as the Oklahoma courts' latest step in a long process of melding the two crimes. It is a step, however, that the Court of Criminal Appeals has resisted with uncharacteristic determination when confronted with an evolving substantive law. In the most notorious recent example, the Court of Criminal Appeals refused to construe broadly the rape statute's 1981 amendments, which arguably broadened the statute's scope to include anal intercourse, reasoning that to conclude that the Legislature did what it said would be tantamount to a repeal of the sodomy statutes, which the court could not do absent more explicit legislative action.[325] What makes the Court of Criminal Appeals' action startling is that this pronouncement comes after over seventy years of legislating the content of the crime against nature statute by determining which acts constitute the crime against nature and which acts do not.[326] Clearly, the Court of Criminal Appeals was committed to a new course.

Despite the reticence of the Court of Criminal Appeals when confronted with questions of the disappearance of sodomy (in marked contrast to the earlier eagerness of the same court to legislate in the same area by giving the term "crime against nature" substance), Oklahoma courts traditionally have looked to the law of rape respecting questions of evidence and proof.[327] In this respect, at least, the Court of Criminal Appeals has prepared the way for the merger of sodomy into rape. The Court of Criminal Appeals has long

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325. Brown v. State, No. F-86-433, slip op. at 2 (Okla. Crim. App. May 21, 1990) (unpublished opinion) (opinion on rehearing). Ultimately, the Court of Criminal Appeals's squeamishness resulted in the enactment of additional legislation amending the rape statute to make it clear that the victim of rape may be of the same or of the opposite sex as the perpetrator. OKLA. STAT. tit. 21, § 1111 (1991). For an extended discussion of this episode, see Richardson, *supra* note 275, at 1597-98.

326. The aggressive legislative activity of the Court of Criminal Appeals with respect to the crime against nature is discussed *supra* part II.A.

327. The seminal case in this regard is Borden v. State, 252 P. 446 (Okla. Crim. App. 1927) (affirming the conviction of an 18-year-old defendant charged with non-consensually fellating a 13-year-old boy), in which the court applied evidentiary rules analogous to those for proof of rape. On a theory of res gestae, the court allowed primary testimony of witnesses who spoke with the victim minutes after the alleged sodomy. The Oklahoma courts have been quite conscious about the borrowing from rape legislation. *See* Hopper v. State, 302 P.2d 162, 165 (Okla. Crim App. 1956) (using *Borden* to rationalize the admission of the victim's utterances into evidence and stating: "This court has long recognized the analogy between sodomy and rape, and that the principles of law applicable to rape apply to sodomy."). The relationship between sodomy and rape has at times been a two way street. *Compare* Hill v. State, 368 P.2d 669 (Okla. Crim. App. 1962) (holding that the principles of rape law are applicable to sodomy jurisprudence) *and* Kimbro v. State, 857 P.2d 798, 799 (Okla. Crim. App. 1990) (affirming adult male conviction for several counts of forcible anal and oral sodomy against a 7-year-old boy and holding that principles of law of rape are applicable to sodomy) *with* Harris v. State, 204 P.2d 305, 308 (Okla. Crim. App. 1949) (reversing and remanding a charge of attempted rape and using a sodomy case as authority on exclusion of evidence of defendant's commission of other crimes).

held that, as in rape cases, proof of ejaculation or emission is not an essential element of the crime.[328] However, proof of emission can be used as circumstantial evidence of penetration, and might be the subject of inquiry by the defense of the prosecuting witness.[329]

The treatment of the penetration requirement provides an additional point of congruence between the laws of rape and sodomy. Since the penetration requirements of the crime against nature statute and of the rape statute are substantially the same, the courts interpret the requirement for both crimes in substantially the same manner.[330] Proof of penetration does not require testimony that in explicit terms recites that the penis entered the vagina, mouth, or anus of another[331] or an extensive evidentiary showing; some minimum testimony to the effect of penetration is required.[332] Despite the unity of treatment of the penetration requirement, the Court of Criminal Appeals has, on occasion, called into question the wholesale application of this antique requirement to the various practices that can constitute the crime against nature, primarily cunnilingus.[333] The court has had a far easier

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328. *Hopper*, 302 P.2d at 165 (Okla. Crim. App. 1956) (excluding testimony regarding ejaculation or emission as immaterial and not within the purview of cross examination).

329. *Id.* at 165-66; Pebeahsy v. State, 742 P.2d 1162, 1164 (Okla. Crim. App. 1987) (reversing a first-degree rape conviction in which the presence of sperm in the victim's rectum but not in the victim's vagina corroborated sodomy but not rape charge).

330. Conviction of the crime against nature required "completion," and "[a]ny sexual penetration, however slight, is sufficient to complete the crime against nature." OKLA. STAT. tit. 21, § 887 (1991). The penetration requirement for a rape conviction was slightly more elaborate, though the essential requirement was identical to that of sodomy. The rape statute provided that the "essential guilt of rape or rape by instrumentation, except with the consent of a male or female over fourteen (14) years of age, consists in the outrage to the person and feelings of the victim. Any sexual penetration, however slight, is sufficient to complete the crime." OKLA. STAT. tit. 21, § 1113 (1991). The two penetration requirements are treated as essentially the same. *See* Bales v. State, 829 P.2d 998, 999-1000 (Okla. Crim. App. 1992) (affirming conviction and sentence of adult male for rape and sodomy of 14-year-old female and applying penetration rules based on *Commander*); Davenport v. State, 806 P.2d 655, 657 (Okla. Crim. App. 1991) (affirming conviction of adult male for lewd molestation and multiple counts of crime against nature with his nine-year-old stepson and holding penetration was proved by evidence that appellant had put victim's penis in his mouth or evidence that he had put his penis in victim's mouth); *Pebeahsy*, 742 P.2d at 1164-65 (reversing conviction for rape when State was able to prove anal penetration but not vaginal penetration); Commander v. State, 734 P.2d 313, 315 (Okla. Crim. App. 1987) (affirming conviction of male for rape, assault with a dangerous weapon and kidnapping when there was proof of penetration of the vagina of the prosecutrix).

331. "The testimony need not be graphic; it is sufficient if there is some testimony to show penetration." *Commander*, 734 P.2d at 315 (citing Huddleston v. State, 695 P.2d 8, 11 (Okla. Crim. App. 1985)); Miller v. State, 629 P.2d 370, 371 (Okla. Crim. App. 1981).

332. *Compare Bales*, 829 P.2d at 999 (holding proof of penetration sufficient where the prosecutrix testified that the accused "fucked" her) *with* Phillips v. State, 756 P.2d 694, 610 (Okla. Crim. App. 1988) (reversing conviction for cunnilingus in which only testimony was that victim's vagina was bitten) *and* Salyers v. State, 755 P.2d 97, 100-01 (Okla. Crim. App. 1988) (reversing conviction because State failed to prove penetration of vagina by mother of prosecuting witness).

333. *See* Hicks v. State, 713 P.2d 18, 20 (Okla. Crim. App. 1986) (overturning conviction for forcible cunnilingus for failure to prove adult male's penetration of adult female victim); *see also Phillips*, 756 P.2d at 609-10 (reversing conviction of adult male with respect to cunnilingus of adult female where the state introduced evidence only that the accused bit the prosecutrix's vagina); *Salyers*, 755 P.2d at 100 (dismissing conviction of adult woman for cunnilingus with minor daughter for failure to prove penetration).

Of course, the Court of Criminal Appeals's problem with penetration in this case stemmed more from

time with fellatio.[334]

More importantly, perhaps, is the problem the courts have had in both rape and sodomy jurisprudence respecting which acts are sufficient to constitute the completed crime when the act is repeated over a short period of time. Thus, consider the number of counts of rape and forcible sodomy with which the state might be able to charge a male who forces a female to fellate him, and then engages in forcible vaginal intercourse with her, and immediately thereafter forces her to fellate him again, and then immediately afterward forcibly engages in vaginal intercourse again, and then forcibly engages in anal intercourse with her. Can the state charge the accused with one count of rape and one count of forcible sodomy, or can the state charge the accused with two counts of rape and three counts of forcible sodomy? Obviously, the repercussions are great, especially where each count can result in a maximum sentence of death for rape in the first degree, and up to twenty years in the penitentiary for each count of forcible sodomy.[335] Complexity is added when the actions outlined above are examined from the perspective of the double jeopardy prohibitions.[336]

The answer to this question is still muddled in Oklahoma, with respect to both rape and sodomy. The muddle is perhaps most clearly outlined in *Hepp v. State*.[337] Prior to the *Hepp* decision, when "two acts of rape have

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problems of proof than any problems with penetration per se. In *Hicks*, Judge Brett noted how the Legislature's use of "delicate" language had actually made the enforcement of the crime against nature far more difficult. *Hicks*, 713 P.2d at 20. Indeed, as noted in part I.A., there are many sexual practices that are as "unnatural" as fellatio but that are not proscribed under the statute that supposedly proscribed all such crimes against nature. Of course, the entire effort to regulate "right conduct" in sexual matters might well be a ludicrous enterprise in the first place, but having determined to intrude into the consensual sexual practices of its citizens, the Legislature has proven itself surprisingly inept in defining the proscribed acts or the elements of the acts regulated. Then again, even Judge Brett's imagination failed him in *Hicks*. The judge asserted that "[o]f course penetration should be required to prove bestiality." *Id.* However, if the object of the statute is to prevent sexual gratification by humans with animals, penetration by or of an animal certainly does not exhaust the sexual possibilities.

334. Davenport v. State, 806 P.2d 655, 657 (Okla. Crim. App. 1991) (rejecting argument that the State failed to prove penetration because "[i]n the present case, we are not dealing with cunnilingus, but rather, fellatio. Thus, penetration would be proved by evidence that appellant had put M.C.'s penis in his mouth or evidence that he had put his penis in M.C.'s mouth").

335. OKLA. STAT. tit. 21, § 1115 (1991) provides that "[r]ape in the first degree is punishable by death or imprisonment in the penitentiary, not less than five (5) years, in the discretion of the jury, or in case the jury fail or refuse to fix this punishment then the same shall be pronounced by the court." OKLA. STAT. tit. 21, § 1116 (1991) provides for a prison sentence of one (1) to fifteen (15) years for conviction of rape in the second degree. Rape in the first and second degree are defined in OKLA. STAT. tit. 21, § 1114 (1991). The punishments for forcible sodomy are set forth in OKLA. STAT. tit. 21, § 888(A) (Supp. 1992), which provides for a maximum prison term of twenty years, enhanced for additional convictions involving persons under 16 years of age.

336. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."); OKLA. CONST. art. 2, § 21 ("[N]or shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted."); OKLA. STAT. tit. 21, § 11 (1991).

337. 749 P.2d 553, 554 (Okla. Crim. App. 1988) (affirming the conviction of the accused on two counts of rape and three counts of forcible sodomy but arguing in dissent that under Oklahoma precedent, only one count of rape and two counts of forcible sodomy should have been prosecuted on the facts presented).

occurred within a short period of time, it is part of a continuous process and constitutes only one crime."[338] An exception to this rule was expressed in modern form in *Colbert v. State*,[339] in which the court affirmed a conviction on two counts of rape where the prosecution was able to show that after the accused had raped his victim once, "he formed the intent to commit a second assault on her."[340] However, the state had to show that enough of a gap occurred between the acts so that it could reasonably be inferred that the accused had time to form the intent needed to prove the additional count of rape or sodomy.[341] In *Hepp*, the accused raped and anally sodomized

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338. Crawford v. State, 688 P.2d 347, 348-49 (Okla. Crim. App. 1984) (affirming the conviction of an adult male for burglary and rape while rejecting defendant's allegation of error based on the admission of two separate acts of rape). The *Crawford* court explained that while the general rule is that the State must elect between acts of intercourse where a single act is charged but a series of acts are proven, when multiple acts of rape occur within a short period of time the acts constitute a "continuous process" and only one crime. *Id.*; *see* Turnbow v. State, 451 P.2d 387, 389-90 (Okla. Crim. App. 1969) (affirming the conviction of an adult male who engaged in vaginal intercourse with prosecutrix twice, each act separated by an act of forced fellatio which was not charged). In *Turnbow*, the court rejected the argument that the State was required to elect which act of vaginal intercourse it would rely for conviction on the grounds that the State could treat the acts of intercourse as a single act. *Id.* The basis for this rule of election when multiple acts are proven but only one act charged had been explained earlier in McManus v. State, 297 P. 830, 831 (Okla. Crim. App. 1931) (affirming the trial court's treatment of a gang rape as a single, continuous act where the acts occurred within a short period of time of each other, even though victim was raped twice by two of the six men). The court in *McManus* stated that "a defendant has a constitutional right to be put on trial for a single offense . . . and that he has the right to a verdict in which all jurors concur upon the same criminal act or transaction." *McManus*, 297 P. at 831. *See also* Shapard v. State, 437 P.2d 565, 608-11 (Okla. Crim. App. 1967) (affirming the treatment of a gang rape as a single continuous act since all acts occurred within a short period of each other and discussing the law respecting the power of the State to charge separate offenses when prosecuting witness subjected to multiple acts of intercourse).

339. 714 P.2d 209 (Okla. Crim. App. 1986).

340. *Id.* at 212. The State demonstrated the accused's intent to commit the second offense by showing that between the rapes there was an interval of time during which the accused conversed with the prosecutrix during which the prosecutrix pleaded for her freedom, and the accused tried to bargain with the prosecutrix to have sex with him an additional time; failing the bargaining, the accused raped the prosecutrix a second time. *Id.*

341. The determination respecting the power of the state to charge two or more offenses in the face of multiple acts of intercourse (or acts chargeable under the crime against nature) depends on the ability of the State to show that there was enough time between the acts to demonstrate that the accused formed a new intent to commit an additional offense. *Shapard*, 437 P.2d at 608-11 (treating gang rape of prosecutrix as single continuous act); Cody v. State, 361 P.2d 307, 319-20 (Okla. Crim. App. 1961) (reversing defendant's conviction on one count of rape because the state introduced evidence of two acts of rape separated by a substantial period of time and failed to elect the act on the basis of which it sought conviction); Dugan v. State, 360 P.2d 833, 834 (Okla. Crim. App. 1961) (reversing conviction on basis of trial court instruction that the exact date of the occurrence of the act charged was immaterial where there was proof of eight separate acts of lewd molestation); Louis v. State, 222 P.2d 160, 162-63 (Okla. Crim. App. 1950) (reversing conviction of one count of rape because the state failed to make an election between the five separate acts of intercourse of which evidence was introduced at trial); Kilpatrick v. State, 109 P.2d 516, 518 (Okla. Crim. App. 1941) (reversing conviction on one count of rape when state failed to elect between the several acts of intercourse between defendant and prosecutrix for which evidence was adduced at trial, since each act, separated by a significant period of time, was deemed a separate act); Cooper v. State, 238 P. 503, 504 (Okla. Crim. App. 1925) (requiring State to elect between the defendant's multiple acts of intercourse, which were separated by significant amounts of time, so that the court is able to determine with respect to which act the defendant was convicted). This principle is one of general application in the criminal law of Oklahoma. *See, e.g.*, Weatherly v. State, 733 P.2d 1331, 1336-38 (Okla. Crim. App. 1987) (rejecting the contention that conduct amounted to single uninterrupted act when adult male convicted of two counts of

the prosecutrix, raped and anally sodomized her again, and then forced her to fellate him, all within a matter of minutes, without pause.[342] The *Hepp* majority, citing *Colbert*, concluded that the defendant could be convicted of multiple counts "where every element of rape was proven as to each count, even though the violations occurred within minutes of each other."[343] Judge Parks, dissenting in part, argued that the majority ignored established Oklahoma case law.[344] At a minimum, after *Hepp*, it became much harder to determine when a defendant could be charged with multiple counts. Later cases have not clarified Oklahoma's approach charging multiple acts of proscribed sexual activity; they appear to accept a facts and circumstances approach within the parameters of *Hepp* and *Colbert*.[345] What the courts have explained is that "[o]ffenses are distinct and separate if they 'are not mere means to some other ultimate objective, nor are the offenses included in some other offense, nor are they merely different incidents or facets of some primary offense.'"[346] What troubles the court in these cases, and perhaps rightly so, is that "[i]t would be utterly unreasonable to hold that an accused could repeatedly rape or sodomize a victim until he felt that he had completed the act to his own satisfaction."[347] On the other hand, it would be equally unreasonable to charge an accused with a separate count of rape for each penetration.[348]

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assault with intent to kill for having stabbed the victim forty times, because there was a significant time gap between the first series of stabbings and the second, and citing rape cases). This picks up a theme of the earlier cases: that a gap in time between two related continual acts may render them separate acts, each of which must be charged and proved separately.

342. Hepp v. State, 749 P.2d 553, 554 (Okla. Crim. App. 1988).

343. *Id.*

344. *Id.* at 555. In effect, it could be argued that the *Colbert* exception swallowed the general rule. Note, though, that the *Hepp* majority did not explicitly overrule Turnbow v. State, 451 P.2d 387 (Okla. Crim. App. 1969), and its progeny; that line of cases was merely read significantly more narrowly, even as the result in *Colbert*, and related cases was magnified well beyond its facts.

345. *See, e.g.*, Gregg v. State, 844 P.2d 867, 878 (Okla. Crim. App. 1992) (upholding multiple charges "where the criminal episode involves separate and distinct offenses consisting of dissimilar proof"); Doyle v. State, 785 P.2d 317, 324 (Okla. Crim. App. 1989) (affirming the conviction of adult male charged with three counts of forcible sodomy and three counts of rape all of which occurred during the course of one evening and upholding multiple charges and citing *Colbert* in which every element of offense could be proven independently for each charge irrespective of the limited time between acts); Salyers v. State, 761 P.2d 890, 892-94 (Okla. Crim. App. 1988) (reversing one count of forcible oral sodomy because the time and distance separating the act with another act of sodomy were insignificant).

346. *Gregg*, 844 P.2d at 878 (quoting Clay v. State, 593 P.2d 509, 510 (Okla. Crim. App. 1979)). A "continuing offense is 'a transaction or series of acts set on foot by a single impulse, and operated by an unintermittent force, no matter how long it may occupy.'" *Id.* (quoting Estep v. State, 143 P. 64, 66 (Okla. Crim. App. 1914)).

347. *Doyle*, 785 P.2d at 324. *See also Gregg* 844 P.2d at 878 (explaining that the double jeopardy limitation "was not intended as a method of *carte blanche* extending to the accused the prerogative of committing as many offenses as he desired within the same transaction with the protective shield of permitting only one prosecution to arise and be pursued from that transaction") (quoting Hoffman v. State, 611 P.2d 267, 269 (Okla. Crim. App. 1980)).

348. At this extreme, of course, the problems of proof become practically insurmountable. That, perhaps, more than any conceptual reluctance, might explain the reluctance of Oklahoma's courts and Legislature to permit the charging of multiple offenses for each penetration.

Oklahoma courts also have long held that "the quantum of proof necessary to sustain a conviction for rape should likewise apply to a case of sodomy."[349] Thus, the uncorroborated testimony of an unwilling participant is sufficient to sustain a conviction for sodomy.[350] But, as in cases of rape, in sodomy cases the appellate court must "carefully examine the record to see that there was some substantial evidence to warrant a verdict of guilty."[351] This standard is more often described as permitting conviction on the uncorroborated testimony of the unconsenting prosecuting witness if the "victim's story was not so incredible or unsubstantial as to make it unworthy of belief, thus requiring corroboration," or variations of this standard.[352] This standard has also been used on occasion to weigh a

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349. Taylor v. State, 537 P.2d 434, 438 (Okla. Crim. App. 1975); Cole v. State, 179 P.2d 176, 177 (Okla. Crim. App. 1947).

350. *Cole*, 179 P.2d at 177 (citing Gullatt v. State, 158 P.2d 353, 354 (Okla. Crim. App. 1945)); *see also* Studie v. State, 706 P.2d 1390, 1391 (Okla. Crim. App. 1985) (upholding conviction of adult male on testimony of 9-year-old prosecuting victim); Golden v. State, 695 P.2d 6, 7-8 (Okla. Crim. App. 1985) (finding sodomy conviction could be sustained on the uncorroborated testimony of 13-year-old boy).

351. *Cole*, 179 P.2d at 177. *See also* Roberts v. State, 47 P.2d 607, 612 (Okla. Crim. App. 1935) (overturning conviction of 69-year-old man for performing cunnilingus on 9-year-old girl because testimony of two witnesses contradictory and therefore verdict was result of jury prejudice). This rule is based on *Gullatt*, 158 P.2d at 360, a rape case. The *Roberts* court applied the old adage respecting charges of rape, that the "crime charged belongs to that class of offenses of which it has been often said; the charge is easily made, hard to prove, and still harder to disprove. In such cases jurors are sometimes moved by abhorrence of the offense to convict upon slight evidence. . . ." *Roberts*, 47 P.2d at 612. *See also* Woody v. State, 238 P.2d 367, 372 (Okla. Crim. App. 1951) (affirming adherence to the rule followed in rape cases that a conviction could be sustained upon the uncorroborated testimony of the prosecuting witness, "unless such testimony appears incredible and so unsubstantial as to make it unworthy of belief") (citing *Gullat*, 158 P.2d at 353); Coppage v. State, 142 P.2d 371, 377 (Okla. Crim. App. 1943) (finding alibi evidence overwhelming despite positive identification by the prosecuting witness, in addition to prejudicial prosecutorial misconduct).

This standard of evidentiary review was mentioned, if not always applied in later cases as well. *E.g.*, Thompson v. State, 560 P.2d 221, 222-23 (Okla. Crim. App. 1977); Wade v. State, 556 P.2d 275, 279 (Okla. Crim. App. 1976); Kiser v. State, 541 P.2d 208, 210 (Okla. Crim. App. 1975); *Taylor*, 537 P.2d at 438; McDaniel v. State, 509 P.2d 675, 679 (Okla. Crim. App. 1973); Overton v. State, 489 P.2d 799, 801 (Okla. Crim. App. 1971); Warner v. State, 489 P.2d 526, 527-28 (Okla. Crim. App. 1971); Johnson v. State, 380 P.2d 284 (Okla. Crim. App. 1963); Hopper v. State, 302 P.2d 162, 165 (Okla. Crim. App. 1956).

352. Pierce v. State, 786 P.2d 1255, 1266 (Okla. Crim. App. 1990); Hinkle v. State, 771 P.2d 232, 234 (Okla. Crim. App. 1989) (holding the testimony of prosecutrix not "contradictory, uncertain and improbable"); Plotner v. State, 762 P.2d 936, 944 (Okla. Crim. App. 1988) ("We cannot say that J.R.B.'s testimony was inherently improbable, contradictory, or unreasonable, so as to require corroboration."); McKinnon v. State, 752 P.2d 833, 834 (Okla. Crim. App. 1988); Waxler v. State, 747 P.2d 964, 965-66 (Okla. Crim. App. 1987); Williams v. State, 733 P.2d 22, 24-25 (Okla. Crim. App. 1987); Binder v. State, 717 P.2d 1143, 1145 (Okla. Crim. App. 1986); Lucero v. State, 717 P.2d 605, 606-07 (Okla. Crim. App. 1986); Studie v. State, 706 P.2d 1390, 1390-91 (Okla. Crim. App. 1985); Webb v. State, 684 P.2d 1208, 1210 (Okla. Crim. App. 1984); Johnston v. State, 673 P.2d 844, 848 (Okla. Crim. App. 1983); Bruner v. State, 612 P.2d 1375, 1379 (Okla. Crim. App. 1980); Costilla v. State, 609 P.2d 788, 791 (Okla. Crim. App. 1980); Wells v. State, 604 P.2d 144, 145 (Okla. Crim. App. 1979); Moore v. State, 501 P.2d 529, 532 (Okla. Crim. App. 1972), *cert. denied*, 410 U.S. 987 (1973); Hattan v. State, 492 P.2d 670 (Okla. Crim. App. 1971); Bigsby v. State, 489 P.2d 1352, 1354 (Okla. Crim. App. 1971).

In the later cases, especially after Bryant v. State, 478 P.2d 907, 909 (Okla. Crim. App. 1971) ("[A] conviction for rape may be had on the uncorroborated testimony of the prosecutrix, or on slight corroboration when the testimony of the prosecutrix is not inherently improbable or unworthy of credence."), the court has fused the two statements of the law respecting the weight of the uncorroborated testimony of a prosecuting

prosecuting witness's testimony, even when some or all of the testimony has been corroborated.[353] However, as in rape cases, even when corroboration is required, the amount of corroboration necessary may be slight, and it is not necessary for all of the prosecuting witness's testimony to be corroborated.[354]

However, the Oklahoma courts were as likely to apply a different standard especially but not exclusively in the earlier cases. In cases in which the evidence presented was highly conflicting, Oklahoma courts tended to defer to the determination of the jury whether or not the testimony of the prosecuting witness was uncorroborated.[355] This iteration of the standard presents substantial difficulties, as well as the temptation to abandon review of sexual conduct cases. Thus, it is difficult to reconcile the standard applied in cases such as *Roberts*[356] and *Coppage*,[357] which required that the re-

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witness, explaining that "a conviction for rape may be had on the uncorroborated testimony of the prosecutrix, or on slight corroboration, where the testimony of the prosecutrix is not inherently improbable or unworthy of credence. That rule has been limited to the extent that this Court will carefully examine the record to see that the evidence of the prosecutrix is clear and convincing and is not inconsistent, incredible, or contradictory." *Bruner*, 612 P.2d at 1379. Note that this standard also applies in rape cases. *E.g.*, Sutton v. State, 759 P.2d 235, 238 (Okla. Crim. App. 1988) (affirming conviction, requiring corroboration only where the witnesses' testimony is of such contradictory and unsatisfying nature, or the witness has been so thoroughly impeached, that the reviewing court must say that such testimony is clearly unworthy of belief); Capps v. State, 674 P.2d 554, 556 (Okla. Crim. App. 1984) (requiring corroboration when the testimony of the prosecutrix is "contradictory, uncertain, improbable or impeached").

The standard also applies in cases of lewd molestation of minors. *E.g.*, Salyers v. State, 755 P.2d 97, 102 (Okla. Crim. App. 1988) (reversing the conviction of an adult woman for State's failure to prove penetration); Beshears v. State, 738 P.2d 1375, 1377 (Okla. Crim. App. 1988) (affirming conviction where child's testimony was clear, lucid, and devoid of ambiguity sufficient to permit affirmance of conviction "upon the uncorroborated testimony of the prosecuting witness, unless such testimony appears incredible and so unsubstantial as to make it unworthy of belief").

353. *See, e.g.*, Fincher v. State, 711 P.2d 940, 942 (Okla. Crim. App. 1985) (holding that partially corroborated testimony of an adult female with respect to rape and anal intercourse by an adult male would have been sufficient under this standard even if not corroborated).

354. *See, e.g.*, Dunham v. State, 762 P.2d 969, 974 (Okla. Crim. App. 1988) (holding sufficient corroboration of child victim's testimony that consisted of testimony of other witnesses who had learned of the defendant's conduct through the child's statements prior to trial); Hall v. State, 762 P.2d 264, 265-266 (Okla. Crim. App. 1988) (finding that sufficient corroboration of an admission by the accused that he was in the location of the victim's cell at the time of the attack in statements by the prison laundry supervisor respecting prior reports of sexual advances and the victim's absence from work on the day of the attack); Williams v. State, 721 P.2d 1318, 1320 (Okla. Crim. App. 1986) (affirming conviction and holding sufficient corroboration consisting of evidence of break-in and injuries to body); *Fincher*, 711 P.2d at 942 (affirming conviction substantially on testimony of prosecuting witness corroborated by medical expert who opined that she had been sexually assaulted); *Studie*, 706 P.2d at 1391 (holding alternatively that testimony of nine-year-old prosecuting witness was sufficiently corroborated by testimony by doctor who examined the witness and confirmed that she had intercourse).

355. Hill v. State, 368 P.2d 669, 670-71 (Okla. Crim. App. 1962); *Accord* Davenport v. State, 806 P.2d 655, 657 (Okla. Crim. App. 1991); Rowe v. State, 738 P.2d 166, 169 (Okla. Crim. App. 1987); Little v. State, 725 P.2d 606, 607-08 (Okla. Crim. App. 1986); Soap v. State, 562 P.2d 889, 896 (Okla. Crim. App. 1977); Webb v. State, 538 P.2d 1054, 1057 (Okla. Crim. App. 1975); Taylor v. State, 537 P.2d 434, 438-39 (Okla. Crim. App. 1975); Sier v. State, 517 P.2d 803, 804 (Okla. Crim. App. 1973); *Warner*, 489 P.2d at 527-28; *Hopper*, 302 P.2d at 165. *Accord* Joplin, *supra* note 14, at 468.

356. Roberts v. State, 47 P.2d 607 (Okla. Crim. App. 1935). *See supra* note 353.

357. Coppage v. State, 142 P.2d 371, 376-77 (Okla. Crim. App. 1943) (reversing conviction where alibi

cord must be carefully examined to assess the substantial nature of the evidence presented, especially when conviction rests on the uncorroborated testimony of the prosecuting witness, with the standard used by the court in cases such as *Hopper*[358] and *Hill*,[359] and later cases[360] which required that the court defer to determination of the jury when conflicting testimony was presented, even when conviction was based on the uncorroborated testimony of the prosecuting witnesses. Perhaps the cases are irreconcilable. A cynical view might lead to the conclusion that the court has deliberately created two standards, one for use in cases in which it determines that the verdict must be overturned[361] and another for use when the court seeks to affirm the verdict.[362] The best argument that can be made for reconciliation is that in cases like *Hopper* and *Hill*, the court had implicitly examined the record with due care, found substantial evidence to warrant a verdict of guilty, and on that basis allowed the jury verdict to stand in the face of conflicting testimony.[363]

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evidence was overwhelming despite positive identification by the prosecuting witness and prejudicial prosecutorial misconduct).

358. Hopper, 302 P.2d at 165.

359. *Hill*, 368 P.2d at 671 (Okla. Crim. App. 1962).

360. *See* sources cited *supra* note 357.

361. *Coppage*, 142 P.2d at 376-77; *Roberts*, 47 P.2d at 610.

362. *Hill*, 368 P.2d at 671; *Hopper*, 302 P.2d at 165. *Accord* Hughes v. State, 557 P.2d 464, 465 (Okla. Crim. App. 1976) (affirming conviction of man for forcing an adult woman to fellate him); Lewis v. State, 462 P.2d 336 (Okla. Crim. App. 1969) (affirming conviction of male defendant, a prisoner in a county jail, who was convicted of forcing another prisoner to engage in anal intercourse with him after district court denied continuance to obtain testimony of cell mate favorable to defendant); Cole v. State, 179 P.2d 176, 177-78 (Okla. Crim. App. 1947) (holding that uncorroborated evidence of 14-year-old boy was sufficient to support a conviction for sodomy where the jury determined that the boy did not consent). In the *Cole* case, the evidence that the prosecuting witness did not consent to engage in anal sodomy seems somewhat weak because the boy stayed with the defendant overnight even after participating in the sexual conduct complained of. Conviction, in this case, probably resulted from the fact that this was the second time that the defendant, a minister of the gospel, had been charged with and convicted of sodomy within a very short time. In the earlier case, Cole v. State, 175 P.2d 376 (Okla. Crim. App. 1946), the defendant's conviction had been reversed because of a finding that the uncorroborated testimony of the prosecuting witness, another 14-year-old boy, was insufficient, because the boy had consented to the activity complained of. The court in the 1947 *Cole* case, therefore, might have been looking especially hard for a way in which to affirm the judgement without doing too much damage to the law in this area.

363. Taylor v. State, 537 P.2d 434 (Okla. Crim. App. 1975), perhaps provides the best evidence for this argument. In that case, a man was accused under the crimes against nature statute of forcing his 12-year-old daughter to fellate him. The court carefully reviewed the uncorroborated evidence in the record, determined that the evidence was without contradiction, and on that basis applied the *Hill* rule, as set forth in Warner v. State, 489 P.2d 526 (Okla. Crim. App. 1971), that the court would not interfere with a jury verdict despite a conflict in the evidence. *Taylor*, 537 P.2d at 438-39. *See also* Davenport v. State, 806 P.2d 655, 657 (Okla. Crim. App. 1991) (noting that the weighing of the uncorroborated testimony of the prosecuting witness was a matter for the jury, but that, in any case, the prosecuting witness's testimony was adequately corroborated by the appellant's own confession); Rowe v. State, 738 P.2d 166, 168-69 (Okla. Crim. App. 1987) (affirming conviction for fellatio where ample evidence supported the jury's determination that the accused raped the prosecutrix, and she testified that fellatio was brief and that accused ejaculated in her vagina); Little v. State, 725 P.2d 606, 607-08 (Okla. Crim. App. 1986) (affirming conviction, which was based on inconsistent testimony of prosecutrix, defendant's minor stepdaughter, and holding such evidence sufficiently competent to submit to jury, where the older sister testified to the commission of similar acts).

Rape law was also the likely source of a solution to a problem, which was somewhat peculiar to sodomy, respecting the quantum of proof necessary to support a conviction for sodomy when the prosecuting witness consented to participation in the act. The solution lay in the law relating to statutory rape, another offense of which consent is not an element.[364] Applying the law of rape by analogy, the Court of Criminal Appeals has held that evidence of the commission of similar sexual activity by the same parties on other occasions, or of other, related crimes, is admissible in a prosecution under the sodomy statutes even though the evidence might tend to prove other and distinct offenses either prior to or subsequent to the act charged.[365] As in statutory rape cases, such evidence is deemed relevant for the limited purpose of providing circumstantial evidence of the veracity of the prosecuting witnesses' testimony with respect to the act charged.[366] This rule finds generalized expression in the practice of permitting the introduction of evidence of the commission of related crimes when such evidence tends to establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other,[367] or when the evidence of similar offenses shows that in the com-

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364. OKLA. STAT. tit. 21, § 1111(A)(1) (1991) defines statutory rape as anal or vaginal penetration where the victim is under 16 years of age. An exception to § 1111(A)(1) is provided by OKLA. STAT. tit. 21, § 1112 (1991), which prohibits prosecution for statutory rape when the "victim" is over 14 years of age, consented to the sexual intercourse, and his or her partner was not over 18 years old. Prior to 1981, the statutory rape provisions, OKLA. STAT. tit. 21, § 1111(2) (1971), defined statutory rape as sexual intercourse with a female "where the female is over the age of sixteen and under the age of eighteen and of previous chaste and virtuous character." As a result, the chastity of the prosecutrix was an element of the offense. Humphrey v. State, 246 P. 486, 486 (Okla. Crim. App. 1926). *See* McManus v. State, 297 P. 830, 831 (Okla. Crim. App. 1931) (affirming the convictions of six males who raped a 14-year-old female and explaining that in "cases of statutory rape other acts of sexual intercourse may be proven for the purpose of corroboration and as showing the intimate relations of the parties . . ."); Richardson, *supra* note 23, at 2482.

365. Woody v. State, 238 P.2d 367 (Okla. Crim. App. 1951). In *Woody*, the defendant, of unknown age, was charged with fellating a 15-year-old high school student. *Id.* at 369-70. Evidence was introduced at trial that the student had consented on two other occasions to be fellated by the defendant. *Id.* at 370. Defendant's counsel objected to the introduction of this evidence, and this evidence was stricken from the record, although defense counsel raised the issue again on cross-examination without objection. *Id.* In reviewing the subsequent conviction of defendant, the Court of Criminal Appeals took the opportunity to validate the use of testimony relating to other sexual acts between the defendant and the prosecuting witness in cases in which the prosecuting witness consented to the criminal sexual acts. *Id.*

366. *See, e.g.*, Johnson v. State, 760 P.2d 838, 840-41 (Okla. Crim. App. 1988) (Parks, J., specially concurring) (affirming the conviction of an adult male where evidence of shooting immediately prior to sexual acts was admitted to prove that the prosecutrix was fearful of accused); Webb v. State, 684 P.2d 1208, 1210 (Okla. Crim. App. 1984) (admitting testimony of foster mother stating that after placement of defendant's children (aged 2 to 11 years) with her, she discovered the children engaged in various acts of oral and anal sodomy and incest among themselves as relevant to show veracity of testimony of 11-year-old daughter); *Woody*, 238 P.2d at 370. This use of evidence of other related offenses as circumstantial evidence has, in turn, been exported to the law of indecent exposure. *See* Bales v. State, 829 P.2d 998, 1000 (Okla. Crim. App. 1992) (affirming the conviction of an adult male where testimony of prior sexual activity with prosecutrix over a two year period was admitted to show a "system, plan or scheme embracing the commission of two or more crimes so related to each other that the proof of one tends to establish the other"); Wollaston v. State, 358 P.2d 1111, 1114 (Okla. Crim. App. 1961) (allowing the use of evidence of similar indecent exposure with other children as corroborative evidence of the act of indecent exposure charged).

367. Where the offenses are part of the "entire transaction" evidence of such offenses are properly

mission of the offense the accused used a system or plan characterized by a peculiar method of operation tending to establish the offense charged,[368] to establish motive, intent, absence of mistake or accident, and when there is a logical or visible connection between the evidence and the offense charged.[369] Introduction of this type of evidence is permitted as an

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admissible on that basis alone. Freeman v. State, 721 P.2d 1327, 1329 (Okla. Crim. App. 1986) (affirming the conviction of an adult male where an objection to introduction of evidence of possession of alcoholic beverages, indecent exposure, and indecent exposure of minor's genitals was rejected). In earlier cases, the courts had treated evidence of such related crimes as admissible as part of the "res gestae." *See generally* Little v. State, 725 P.2d 606, 607 (Okla. Crim. App. 1986) (affirming the conviction of a man for the rape and sodomizing of his 15-year-old stepdaughter which rested in part on testimony of older sister to effect that the defendant had committed same acts with her in earlier years); Huddleston v. State, 695 P.2d 8, 11 (Okla. Crim. App. 1985) (affirming conviction and rejecting defendant's objection to introduction of evidence of molestation of prosecuting witness by defendant during two month period culminating in the acts for which defendant convicted on basis that such prior action was evidence of a prior scheme or plan); Crisp v. State, 667 P.2d 472, 474 (Okla. Crim. App. 1983) (affirming the conviction of an adult male who raped an adult woman and rejecting objection to introduction of evidence of coercive oral sodomy on basis that the sodomy was part of a series of continuing offenses); Wooldridge v. State, 659 P.2d 943, 946 (Okla. Crim. App. 1983) (affirming the conviction of an adult male and rejecting objection to introduction of evidence of sodomy because the sodomy was part of a series of continuing offenses and therefore admissible as part of res gestae of the rape); Hawkes v. State, 644 P.2d 111, 113 n.2 (Okla. Crim. App. 1982) (affirming the conviction of an adult male of rape of underage female, and rejecting objection to introduction of testimony relating to coercive anal intercourse and fellation (crimes not charged) because it was part of a continuing course of events); Bruner v. State, 612 P.2d 1375, 1377 (Okla. Crim. App. 1980) (holding admissible evidence of subsequent rapes by the defendant's compatriots); Wade v. State, 556 P.2d 275, 279 (Okla. Crim. App. 1976) (holding that where a defendant is charge with rape, evidence that defendant engaged in cunnilingus and anal intercourse is admissible as part of the res gestae); Carson v. State, 529 P.2d. 499, 508 (Okla. Crim. App. 1974) (holding that where a defendant is charged with rape, evidence of molestation and oral sodomy occurring within two hours of the rape is admissible as part of the res gestae); Shapard v. State, 437 P.2d 565, 610-11 (Okla. Crim. App. 1967) (regarding a gang rape where many separate penetrations occurred as one continuous act); Brown v. State, 435 P.2d 173, 173 (Okla. Crim. App. 1967) (affirming a rape conviction in which the lower court overruled an objection that sought to exclude evidence offered to prove that defendant and his two accomplices beat up prosecutrix's boyfriend, robbed him, forced prosecutrix to perform oral sodomy on two of them and that the two accomplices attempted to penetrate the prosecutrix). *But see* Burks v. State, 594 P.2d 771, 772-74 (Okla. Crim. App. 1979) (holding that it was error to admit evidence of a burglary in a robbery trial because no connection existed between the robbery on June 16 and the burglary on June 17).

368. Eberhart v. State, 727 P.2d 1374, 1379-80 (Okla. Crim. App. 1986) (admitting evidence of other crimes where method of operation was so unusual and distinctive as to be like a signature); *Little*, 725 P.2d at 607 (affirming admission of testimony of victim's older sister to effect that the defendant had committed same acts with her in earlier years); Horton v. State, 724 P.2d 773, 774-75 (Okla. Crim. App. 1986) (affirming admission of evidence offered by another prostitute of similar conduct engaged in by defendant); Johnson v. State, 710 P.2d 119, 120 (Okla. Crim. App. 1985) (affirming the admission of evidence over objection that defendant committed four prior crimes and in all instances victims were moderately young white females who had placed ads in newspapers with items for sale, and the rape and sodomy of all victims proceeded along substantially similar ways); Turnbow v. State, 451 P.2d 387, 390 (Okla. Crim. App. 1969) (affirming admission of testimony concerning other laundromat rapes committed by defendant in a prosecution for rape and sodomy in a laundromat).

369. OKLA. STAT. tit. 12, § 2404(B) (1991). *See* Wells v. State, 799 P.2d 1128, 1129-30 (Okla. Crim. App. 1990) (citing OKLA. STAT. tit. 12, § 2404(B) (1991) and *Burks*, 594 P.2d at 772, for the proposition that "proof that one is guilty of other offenses not connected with that for which one is one trial must be excluded"); King v. State, 748 P.2d 531, 534 (Okla. Crim. App. 1988) (admitting evidence concerning accused's arrest at a different laundromat with the same gun to establish identity); Bryson v. State, 711 P.2d 932, 935 (Okla. Crim. App. 1985) (admitting evidence that defendant used marijuana during the crime); *Hawks*, 644 P.2d at 113 n.2 (rejecting objection introduction of testimony relating to coercive anal intercourse

exception to the general rule prohibiting the admission of evidence of the commission of another crime by the accused.[370] Especially in the earlier cases, the courts perhaps felt freer to use of this type of evidence in sodomy cases because of the court's (mis)understanding of pathologies of deviation.[371] On many occasions, especially when presented with other compelling facts establishing the guilt of the defendant, the court has been more willing to permit the introduction of this kind of evidence, even when rather loosely connected and potentially highly prejudicial.[372] However, the courts have enforced the commonly applicable limitations on the use of this evidence when the facts are clear that the bounds have been exceeded, and clear prejudice has resulted.[373]

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and fellation (crimes not charged) because it was part of a continuing course of events); Bruner v. State, 612 P.2d 1375, 1377 (Okla. Crim. App. 1980) (citing in support of this rule of evidence, Miles v. State, 554 P.2d 1200 (Okla. Crim. App. 1976), Bray v. State, 450 P.2d 512 (Okla. Crim. App. 1969), and *Burks*, 594 P.2d at 771); Wade v. State, 556 P.2d 275, 279 (Okla. Crim. App. 1976) (admitting evidence that defendant engaged in cunnilingus and anal intercourse with defendant); Carson v. State, 529 P.2d. 499, 508 (Okla. Crim. App. 1974) (rejecting defendant's objection to introduction of evidence of forcible fellatio and child molestation to prove rape).

370. The exception has been characterized as coming within the general exception permitting use of such evidence to show a common plan of operation or system of common criminal action, or where the evidence tends to connect the defendant with the crime, or to identify the accused with the crime. *Turnbow*, 451 P.2d at 390 (allowing testimony of other laundromat rapes committed by defendant, where two of the three total incidents included oral sodomy); *Wollaston*, 358 P.2d at 1114. Note that a defendant who does not formally object to the introduction of evidence of other crimes at time of trial waives the objection on appeal. *E.g.*, Godbey v. State, 731 P.2d 986, 987 (Okla. Crim. App. 1987); *Burks*, 594 P.2d at 775.

371. The *Wollaston* court, citing an Ohio sodomy case, Barnett v. State, 135 N.E. 647, 649 (Ohio 1922), explained the common knowledge about the habits of devotees of non-vaginal heterosexual intercourse that induced the court to adopt this rationale:

> It is more or less a matter of common knowledge, among those who have made a study of sexual perversion as it manifests itself in human degenerates, that each sexual pervert follows some habitual, unnatural method of gratifying his perverted passion. It may be unnatural commerce with one class of beasts or another class of beasts; it may be by one mature male upon another mature male; and it may be, which is to-day of too frequent occurrence, a degenerate sexual commerce with little boys or little girls.
>
> Just as the professional bank robber uses habitually certain methods in his course of criminal conduct, so the sexual pervert, as a general rule, confines himself to a certain limited line, a certain habitual form of sexual degeneracy, from which he rarely, if ever, departs; and those methods that he habitually employs leave their indicia, their footprints, or finger marks, their traces, in one form or another, of his personal criminal identity.

Wollaston, 358 P.2d at 1117. These views, of course, have been largely discredited for a number of years. FREIDMAN, *supra* note 214 (agreeing with established medical standards (DSM III-R) that homosexuality is not a mental disorder); GREENBERG, *supra* note 10 (citing the American Psychiatric Association's study that repudiated the determination that homosexuality is a mental disorder); TAPPAN, *supra*, note 212, at 13-16 (discussing the fallacies concerning sex offenders). The views expressed in cases such as *Wollaston* reflect the continuing effect of the mixing of religious and moral taboos with the criminal law. *See* discussion *supra* Part III.A.

372. *See, e.g.*, Silver v. State, 737 P.2d 1221, 1224-25 (Okla. Crim. App. 1987) (affirming conviction of adult male for rape and rape by instrumentality of an elderly couple when evidence of statements accused made respecting other crimes to cell mates not sufficiently prejudicial to require reversal).

373. *See Wells*, 799 P.2d 1128, at 1130 (reversing adult male's conviction for rape and lewd molestation of his seven-year-old daughter because the State introduced evidence of prior sexual offenses that had occurred years before and with people other than the prosecutrix, and distinguishing Little v. State, 725 P.2d 606 (Okla. Crim. App. 1986) and Huddleston v. State, 695 P.2d 8 (Okla. Crim. App. 1985)); Lewis v. State,

V. Observations in the Form of a Summary: Making Sense of the 1981-1992 Amendments of the Sodomy and Rape Statutes

Why is there a growing, if imperfect, overlap between rape and sodomy? Clearly, the modifications indicate an increasing legislative preoccupation with the coerciveness of particular sexual conduct and less concern with the fundamental or overarching goodness or badness—the immorality—of particular modes of sexual expression. The activities of the Oklahoma Legislature over the past twelve years and the changing direction of the Oklahoma Court of Criminal Appeal's sodomy jurisprudence point to the consummation of the fusion of rape and sodomy: Dropping the antique preoccupation with consensual activity and regulating in a comprehensive statute for all acts of non-consensual sexual gratification.

The Legislature, however, has not taken this additional step, and the Court of Criminal Appeals refuses to lead the Legislature in that direction, except by the occasional request to modernize the sodomy laws.[374] The courts and the Legislature have transformed the sexual conduct laws of the state, trimming the acts constituting classical sodomy and transforming a portion of the part that remains into rape. Neither the Legislature nor the courts have endeavored to expand the reach of the sexual proscription laws by including "newly discovered" forms of sexual gratification. But rape still doubles as forcible sodomy when it involves the penetration of the anus or vagina, irrespective of the sex of the parties involved. Furthermore, other acts of non-consensual sexual gratification, which might well constitute an outrage on the victim no less outrageous than vaginal or anal penetration,[375] are engineered into other lesser, yet at the same time more senselessly comprehensive, crimes.

Why has the Legislature been so reluctant to correct the deficiencies inherent in the criminal code's current patchwork coercive sexual conduct provisions? That is the obvious question lurking in the background of all of the movement (and lack of movement) in rape and sodomy jurisprudence.[376]

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651 P.2d 1344, 1345 (Okla. Crim. App. 1982) (reversing conviction for rape where police testimony indicated police officer believed that the defendant was the same person who had raped a different female about six months prior, but failed to show a particular method of operation that would strongly link the crimes); Green v. State, 596 P.2d 895, 897 (Okla. Crim. App. 1979) (reversing conviction for rape where police testimony was admitted relating to prior arrest and trial for sodomy and where the testimony indicated that the charges had been dismissed "on a technicality").

374. *See* Hicks v. State, 713 P.2d 18, 19-20 (Okla. Crim. App. 1986) ("It is truly unfortunate that the Oklahoma Legislature has not seen fit to rewrite the antiquated statutes that make sodomy a crime. Its use of 'delicate' language complicates the enforcement of the crime."). *See* discussion, *supra* part II.B.

375. "The essential guilt of rape or rape by instrumentation, . . . consists in the outrage to the person and feelings of the victim." OKLA. STAT. tit. 21, § 1113 (1991).

376. Although beyond the scope of this Article, I note that, even in this respect, there is a question respecting the utility of expending state resources to police its citizens' conduct with animals, except, perhaps, in cases where the animal suffers unnecessary injury as a result of the actions. Bestiality prohibitions might well be as beside the point as prohibitions on consensual sexual conduct. For a historical perspective, see

Likewise, given the thrust of cases such as *Post*, the Court of Criminal Appeals's reluctance to take the plunge and do what its decisions have implied, that is, to expand the *Post* limitation to all consensual sexual conduct irrespective of the gender of the participants, is unexplainable except in nakedly political terms. Certainly, the question in this respect is no longer a matter of the delicacy that Judge Brett derided in *Canfield v. State.*[377] After all, the modern Oklahoma Legislature is not averse to describing all sorts of sexual activity with a remarkable amount of equanimity.[378] A consideration of three factors may provide the beginnings of an explanation for the inertia. For one, the actions of the Legislature might, in some part, reflect the piecemeal nature of the legislative statutory modification process. Thus, some of the legislative activity might be explained as little more than the attempt to eliminate gaps left in the wake of the *Post* decision. Since the *Post* case held that the crime against nature provision was inapplicable to consensual activity,[379] much of the legislative activity might be interpreted as an attempt to limit the definition of consensual activity in the wake of *Post*. As such, the Legislature's actions can best be understood in terms of reaction and the attempt to preserve the reach of the statute in the wake of an unfavorable court holding.

Moreover, the separation of acts associated with rape into more than one crime makes it possible to enhance the sentence of people who engage in coercive sexual activity. The Oklahoma Court of Criminal Appeals has long taken the position that if two crimes charged require proof of at least one fact that is not required to be proved in the other, the defendant can be charged with more than one crime, even though the crimes charged relate to the same transaction, or are part of the same "incident."[380] As such, to the extent

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Canup, *supra* note 11; Liliequist, *supra* note 11.

377. 506 P.2d 987, 989 (Okla. Crim. App. 1973) (Brett, J., dissenting) ("[J]ust because the persons of 1890 and 1910 . . . may have been offended at the word 'sodomy,' that puritan belief is no justification for perpetuating an unconstitutionally vague statute."), *appeal dismissed*, 414 U.S. 991 (1973).

378. See, for example, OKLA. STAT. tit. 21, § 1030 (Supp. 1992), which contains fairly lurid (from a historical perspective) descriptions of acts that, if engaged in for compensation, constitute the modern crime of prostitution, including cunnilingus ("any act of oral stimulation of the vulva or clitoris"), fellatio ("any act of oral stimulation of the penis"), and masturbation ("stimulation of the genital organs by manual or other bodily contact exclusive of sexual intercourse"). Even more interesting, perhaps, is OKLA. STAT. tit. 21, § 1123(A)(5) (Supp. 1992), which proscribes urination or defecation upon, or ejaculation upon or in the presence of a child under 16 years of age for the purpose of sexual gratification.

379. Post v. State, 715 P.2d 1105, 1109 (Okla. Crim. App.), *reh'g denied*, 717 P.2d 1151 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986).

380. Salyers v. State, 761 P.2d 890, 893 (Okla. Crim. App. 1988) (rejecting the argument that the fondling of boy was merely a prelude to forcible fellatio and therefore part of the same incident since the "factual and legal elements of the two crimes differ so as to render prosecution for both offenses proper even though they might arise from the same incident"); Simmons v. State, 748 P.2d 996, 999 (Okla. Crim. App. 1988) (rejecting the argument that only one of two crimes—burglary and sodomy—should have been charged since both arose from the same transaction, on the grounds that each charge requires proof of different facts); Simms v. State, 735 P.2d 344, 347 (Okla. Crim. App. 1987) (rejecting double jeopardy argument with respect to two assault and battery charges); Smith v. State, 651 P.2d 1067 (Okla. Crim. App. 1982) (rejecting the argument that one charge of carrying a firearm should be dismissed on double jeopardy grounds since

that rape and sodomy can be defined as slightly different, the effect is that the statutes act as sentence enhancers. The creation of slight differences in definitions of crimes is particularly easy with coercive sexual acts, since the definitions can be limited to specific acts—"fellatio," "anal intercourse," "vaginal intercourse"—rather than a general prohibition of "all coercive acts committed for the purpose of sexual gratification." When the possibility of sentence enhancement is important, the more particular definitions can result in the imposition of longer aggregate sentences.[381] Indeed, the cases suggest that males who tend to rape females also tend to force the females to fellate them or to engage in anal intercourse at some point during the sexual assault.[382] The courts also enhance the sentences by ordering the sentences for each conviction to run consecutively,[383] although consecutive sentences

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the defendant's two charges required proof of different facts); Ziegler v. State, 610 P.2d 251 (Okla. Crim. App. 1980) (rejecting the argument that only one count of rape or sodomy should have been charged since all of the acts arose out of a single transaction); DeLaune v. State, 569 P.2d 463, 467 (Okla. Crim. App. 1977) (rejecting double jeopardy attack on grounds that different facts were at issue in two cases regarding embezzlement since the charges centered on the theft of different sums of money).

381. The danger, of course, is that in creating a convoluted system of definitions and crimes, the Legislature may *decrease* the offenses that might be charged by making the elements of the offense the same for a number of crimes. This certainly has occurred when a person anally penetrates another with force. Such an act is chargeable as the crime against nature (up to 10 years incarceration), forcible sodomy (up to 20 years incarceration), or rape (death penalty). In such a case, the prosecutor must elect as between offenses. *See* OKLA. STAT. tit. 21, § 11 (1991); Clark v. State, 678 P.2d 1191, 1192 (Okla. Crim. App. 1984) (rape and sodomy); Wooldridge v. State, 659 P.2d 943, 946 (Okla. Crim. App. 1983) (rape and sodomy); King v. State, 640 P.2d 983, 985 (Okla. Crim. App. 1982) (rape, arson, assault, and battery); Ziegler v. State, 610 P.2d 251, 253-54 (Okla. Crim. App. 1980) (rape and sodomy); McDaniel v. State, 509 P.2d 675, 680 (Okla. Crim. App. 1973) (sodomy, assault with a dangerous weapon, and rape); Richmond v. State, 492 P.2d 349 (Okla. Crim. App. 1971) (attempted robbery with firearms, assault and battery with a dangerous weapon, and burglary). *But see* Brown v. Ohio, 432 U.S. 161 (1977) (holding that defendant was in double jeopardy for the same offense when he was convicted of both joyriding and auto theft that, under state law, constituted one crime, even though there was a nine-day interval between incidents). Clearly, the cases indicate a substantial amount of variation in the decisions based on the facts of the particular cases.

382. The pattern that emerges from a review of the rape and sodomy cases heard by the Oklahoma Court of Criminal Appeals is one where a defendant is sentenced for the acts of rape and additionally for the acts constituting sodomy. *See supra* note 284.

383. *See, e.g.*, Pierce v. State, 786 P.2d 1255, 1267 (Okla. Crim. App. 1990) (affirming consecutive sentences of adult male convicted of rape, crime against nature (fellatio and anal intercourse), burglary, and assault with a deadly weapon); Doyle v. State, 785 P.2d 317, 326-27 (Okla. Crim. App. 1989) (affirming consecutive sentences of adult male convicted of multiple counts of forcible sodomy, rape, kidnapping, and robbery of male and female); Hawkins v. State, 782 P.2d 139 (Okla. Crim. App. 1989) (reversing conviction of adult male for rape and forcible sodomy of adult female which resulted in the imposition of consecutive sentences); Childers v. State, 764 P.2d 900, 904 (Okla. Crim. App. 1988) (affirming the conviction of adult male for rape and forcible sodomy of 15-year-old female and affirming trial court order that sentences run consecutively rather than concurrently, as had been recommended by the jury). In Oklahoma, the decision to require sentences to run concurrently or consecutively is discretionary and rests, as an initial matter, with the trial court. Rowe v. State, 738 P.2d 166, 172 (Okla. Crim. App. 1987); Lloyd v. State, 654 P.2d 645 (Okla. Crim. App. 1982). This is true even when the accused is convicted of crimes committed during a single criminal episode. *Childers*, 764 P.2d at 904; Carpenter v. State, 668 P.2d 347 (Okla. Crim. App. 1972). The court's determination is rarely overturned. *See* Taylor v. State, 490 P.2d 1404 (Okla. Crim. App. 1971) (affirming conviction of defendant for burglary of six parking meters for a total of $3.73, but modifying consecutive sentences, running 90 years, to run concurrently because it was an abuse of discretion in light of the crime committed and jury recommendation that the sentences run concurrently).

are not invariably ordered.[384]

While sentence enhancement of this type might well be deserved in connection with the brutally violent coercive sexual crimes reported, achieving this by means of separating the sexual activities encompassed by rape and those encompassed by sodomy into two distinct crimes might be among the least efficient means of achieving this result. Certainly, the Legislature is free to provide sentence enhancers for multiple acts; for instance, it can provide that each penetration be charged as a separate offense. The courts have already begun to move in this direction.[385] Likewise, sentences can be enhanced when a victim is physically injured as a result of the sexual conduct. Such an approach might be more in line with the Legislature's increasing focus on the coerciveness of the activity proscribed. It might be argued on this basis that legislative modifications indicate no general change in the underlying legislative view of sex crimes in general, or of rape and sodomy in particular. These explanations are unsatisfactory, however, primarily because the legislative concentration on the preservation of bodily integrity and the abandonment of the preoccupation with the unqualified evil of certain sexual acts began long before the *Post* decision was rendered.

The other reason is more perverse in a way and can be characterized in two ways: (i) inability to move beyond the historical separation of sex crimes into two categories, the first involving forcible licit sexual activity and the latter involving the perversion of the licit sexual act; and (ii) the need to reaffirm the position that only heterosexual vaginal intercourse is licit in the eyes of God and the State. Traditional sexual conduct proscriptions have been divided between punishing abuses of licit sexual activity and suppressing all expression of illicit sexual activity. The former has been traditionally regulated by the laws of rape and lewd molestation of minors, and the latter by the laws of sodomy and bestiality. But not all illicit sexual conduct can be suppressed any more. Some forms of such conduct have, in fact, been transformed into licit sexual activity by operation of privacy jurisprudence and perhaps as well by the common practices of the general population. It should follow that rape laws—based on consent—ought to be limited to regulating the crime of rape only. Recognizing this to a limited extent, the Legislature has not, however, chosen to limit the reach of sodomy. It might well be that, whether licit or illicit, deviance is deviance, and the Legislature might feel the continuing need to affirm its official disapproval of acts of "deviate" sexual conduct. If this is the case, this additional disapproval

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384. *See, e.g.*, Kimbro v. State, 857 P.2d 798 (Okla. Crim. App. 1990) (affirming conviction of adult male on three counts of forcible sodomy and lewd molestation with seven-year-old boy and imposition of concurrent sentences); Miller v. State, 781 P.2d 846 (Okla. Crim. App. 1989) (affirming conviction of adult male for rape, forcible sodomy, and burglary, and imposition of sentences to run concurrently).

385. *See* Hepp v. State, 749 P.2d 553, 554 (Okla. Crim. App. 1988) (holding multiple acts of penetration chargeable as separate counts).

serves more as frosting on the cake than as any real attempt to more tightly control the conduct proscribed. As commentators have noted for at least a generation, these laws "are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."[386]

This rationalization of consensual sexual conduct controls thus leaves us with the residue of traditional sodomy—the proscription of acts categorized as illicit, irrespective of the consent of the adult parties thereto. That, after all, was at the heart of the ancient regulation of this type of sexual activity. That, I suppose, is the sole remaining purpose of the consensual residue of the "crime against nature"—to occasionally frighten the mature practicing homosexual and lesbian. Similar to the raising of the American flag on Iwo Jima, classical sodomy certainly stands as a wonderful testimonial to the strength of the sexual conduct taboos of Western society and the premium placed on observing the rules of gender differentiation.[387] Preserving our culture's traditional sexual conduct taboos, at least those affecting adult consensual activities, is certainly a wonderful endeavor and is one that all of our churches valiantly, but unaided by government, should continue to actively pursue. However, as many have argued before, in our increasingly non-homogeneous society, preserving such taboos should not be the business of the state.[388] This is especially so when the state has a choice among a number of moralities, and the choice made depends upon the ability to control the legislative process.[389]

Even if a state, through its legislature, insists on staying in the business of regulating adult consensual sexual conduct, the crime against nature is a

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386. Ralph Slovenko, *Sex Mores and the Enforcement of the Law of Sex Crimes: A Study of the Status Quo*, 15 KAN. L. REV. 265, 271, 277-78, 280, 283 (1967); Joplin, *supra* note 14, at 470.

387. On the importance of gender identification, see, for example, Elizabeth Castelli, *"I Will Make Mary Male": Pieties of the Body and Gender Transformation of Christian Women in Late Antiquity, in* BODY GUARDS, *supra* note 2, at 29; Trumbach, *supra* note 44, at 89-106.

388. *See, e.g.*, FEINBERG, *supra* note 27; Copelon, *supra* note 30; Hart, *supra* note 27; Hugh M. Hefner, *The Legal Enforcement of Morality*, 40 U. COLO. L. REV. 199 (1968); Karst, *supra* note 27; Rivera, *supra* note 243, at 950-51. *But see* Hafen, *supra* note 27; Sandel, *supra* note 27; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1817-19 (1985); Selznick, *supra* note 27.

389. Thus, it is argued that the need for the state to regulate morals exists independent of the moral system chosen. Any moral system will do, as long as it is enforced and reflects the values of the majority. For example, in the course of dismissing the contention that adherents of the Native American Church had no particular right to prevent the State of Oregon from (incidentally) regulating core portions of their religious practices and rituals, in the name of protecting its citizens from the evils of drug use, Justice Scalia noted:

> But to say that a non-discriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990). The danger, of course, is that one era's majority is another era's minority. A legislature free to proscribe homosexual sodomy ought to be free to permit same-sex marriage.

ludicrously unsuccessful "anti-homosexual" measure, and an even more ostentatiously unsuccessful method of curbing homosexual *conduct*. If all homosexual conduct of a sexual nature consisted of fellatio, anilingus, cunnilingus, and anal intercourse, perhaps the sodomy laws could be seen as a means of providing a comprehensive means of preventing such conduct; but, to the extent that sexual gratification consists of other conduct—say kissing and mutual masturbation, both far more likely in the age of AIDS—the criminal law is of slight help to those seeking to suppress homosexual conduct, except to the extent that the continued existence of such laws enrages gay people whose sexual conduct is more regulated than is the identical conduct of heterosexuals.[390]

Oklahoma's courts and Legislature have implicitly recognized this. The courts, over the past thirty years, have abandoned the rhetoric of moral disapproval and the psychiatric conclusions of disease *as a basis* for continued enforcement of the sexual conduct laws, especially with respect to consensual activity by adults. The courts replaced this rhetoric with an increasing impatience with the antiquities of the law they are required to apply. Coercion has become the focus of the courts. In the wake of this new focus, the Court of Criminal Appeals abandoned a long tradition of expansively interpreting the reach of the crime against nature, even as the Legislature created additional categories of illicit sexual conduct (at least as practiced upon children). Although unwilling to read consent into the crime against nature respecting adult behavior, the court has broadly hinted that this result would not be unwelcome if it came from the Legislature.

The Legislature has followed a parallel course. It is clear that, at least since 1981, the Legislature has concentrated on the issue of coercive activities. It is less and less interested in the regulation of the consensual sexual conduct of adults. Thus, the Legislature has devoted much time to the specification of particular acts of sexual gratification in addition to those traditionally (even recently) defined as a crime against nature in only two significant contexts: where such sexual gratification is sold[391] and where such acts involve children.[392] While the Legislature has not decriminalized

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390. The literature of the law and the social sciences is peppered with studies of the actual effect of sodomy laws on the practice of homosexuals and lesbians. Most modern studies have concluded that such laws do little to prevent such activities between consenting adults. Such legislation, however, has served as a wonderfully effective means of blackmail, a vehicle for social and economic disgrace, and a means of meeting hidden agendas by selective prosecution. *See, e.g.*, Project, *supra* note 31, at 734-42, 763-66.

391. *See* OKLA. STAT. tit. 21, § 1030 (Supp. 1992) (defining the sexual acts that can be lawfully donated, but not sold). But note that there are even limits to "charity" in this context. OKLA. STAT. tit. 21, § 1030(5) (Supp. 1992) makes it a crime to "indiscriminately" engage in sexual acts with someone other than one's spouse. This may well be the golden rule of moderation written into state sexual conduct law. Neither statute nor case law, however, make clear where the law draws the line between "discriminating" sexual conduct and "indiscriminate" sexual conduct. Moreover, what constitutes "lustful" conduct, which is a misdemeanor, OKLA. STAT. tit. 21, § 1030(5)(a) (Supp. 1992), is likewise left to the imagination and the wide prosecutorial discretion of the state.

392. In addition to OKLA. STAT. tit. 21, § 886 (Supp. 1992), see, for example, OKLA. STAT. tit. 21,

adult consensual sexual activity, it has not sought to expand the crime against nature either, reflecting the growing legislative concern with the pederast and the waning interest with adult forms of consensual sexual play.

VI. Conclusion

Oklahoma provides a well developed and amply evidenced archetype of the manner in which state sodomy jurisprudence is transforming itself. The experiences of Oklahoma with the enforcement of its sodomy statutes tell us several things about modern state sodomy jurisprudence in general. Such a transformation might well have occurred even in the absence of the aggressive privacy jurisprudence of the U.S. Supreme Court and continues despite the opinions of the Supreme Court permitting states to continue to act in traditional ways. Reflecting the slow evolution of opinion as various groups engage in a never-ending debate over the scope of the power of the state to regulate sexual conduct, state sodomy jurisprudence has detached itself from its federal constitutional moorings and has begun to chart its own slow, irregular course. Oklahoma has transformed its sodomy jurisprudence indirectly and slowly; other jurisdictions have taken a more direct route.[393] Oklahoma provides a typical example of the journey being made.

The musings of the Oklahoma courts and Legislature, written in case law and legislation over the past decade or so, suggest that classical sodomy is increasingly a freak of the criminal law and no longer worth the effort to enforce, except perhaps as a palpable sign of fervent adherence to a religion's sexual code. Indeed, the Legislature recognized this to a large extent when it "created" the new crime of forcible sodomy. However, even this is a halfway measure and is more a nod to traditional divisions between "good" sex and "bad" sex than an acknowledgement of the true character of over a decade of reform of the sex laws. In this respect, even forcible sodomy is a freak of the criminal law, a weak and incomplete imitation (in part) and reflection (in part) of evolving rape jurisprudence. In fact, it is in the evolution of the rape laws that the future of Oklahoma sexual conduct jurisprudence ought to lie. The rape laws have begun to reflect this conceptualization of the proscription of sexual conduct; further untangling is hindered by the antique structure of sexual conduct rules, which are based on religious teaching and mid-twentieth century psycho-babble that have been largely repudiated by the courts and the Legislature. Oklahoma lawmakers

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§ 856(a) (1991) (proscribing contribution to the delinquency of a minor); OKLA. STAT. tit. 21, § 866 (1991) (proscribing trafficking in children); OKLA. STAT. tit. 21, § 1021.2 (1991) (proscribing the use of minors in the production of obscene materials); OKLA. STAT. tit. 21, §§ 1087, 1088 (1991) (proscribing pandering involving children under 18 years of age); OKLA. STAT. tit. 21, § 1123 (Supp. 1992) (proscribing lewd or indecent proposals to children under 16 years of age and sexual battery).

393. Typically, in such jurisdictions, the state courts have found a state law or state constitutional basis for invalidating consent-based sexual conduct regulation. *See supra* note 28.

have sensed the generalized need for a shift in the criminal law away from notions of "good" sex and "bad" sex. The Crimes and Punishments Subcommittee to the Recodification Committee of the State of Oklahoma attempted a step in the direction indicated by this Article. While it retained the current split between rape and other sexual crimes, it eliminated the proscription for consensual sexual acts and clarified the reach of rape and other sexual gratification crimes.[394] Whether any of its recommendations will ever become law is another story.

For now, the law remains senselessly jumbled, merged and yet not merged, and tied to an antique vision of the division between types of sexual acts, double-covering some sexual acts, ignoring others of equal outrage, and permitting the proscription of other sexual acts that outrage none of the participants to the acts. It is easy to defend the crime against nature provision on the basis of the cases decided. There is little resistance to punishing adults who derive sexual gratification from children, especially children who have yet to attain puberty. However, the basis of this jurisprudence, it seems to me, provides an exceedingly weak foundation on which to rest the continued proscription of adult consensual sexual activity, especially in light of the Court of Criminal Appeals' decision in *Post v. State*.[395] The attainment of a realistic approach to sexual conduct laws will elude Oklahoma and other states with similar laws, as long as courts and legislatures continue to hide behind the skirts of raped females and victimized children.

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394. The State of Oklahoma Recodification Committee has proposed keeping the distinction between rape and sodomy. Rape is limited to acts of sexual intercourse achieved by force or deceit, or upon those incapable of giving informed consent. STATE OF OKLAHOMA RECODIFICATION COMMITTEE, PROPOSED CRIMINAL CODE (to be codified at OKLA. STAT. tit. 21, § 118 (proposed Jan. 6, 1992) (unpublished letter from Justice Hardy Summers to Hon. Glen D. Johnson and Hon. Robert V. Cullison, members of the Oklahoma Legislature) (on file with author). Sexual intercourse is defined in the traditional manner as the actual contact of sexual organs. *Id.* § 117(E). The crime of rape by instrumentation is kept in substantially the same form as it currently appears, by defining the activity covered as any act of "sexual intrusion," *id.* § 119, which is defined as the insertion of animate or inanimate object in anus or vagina. *Id.* § 117(F). The crime against nature is abolished under the proposed new code. In its place is a broader forcible sodomy provision. *Id.* § 120. The crime is limited to the commission of sodomy achieved by force or deceit, or upon those incapable of giving informed consent, which is substantially the same as the corresponding rape provision. *Id.* § 120(A). The only difference is that rape can occur when "consent is obtained through the belief, intentionally induced by the actor, that engaging in sexual intercourse will influence the exercise of the actor's official authority as an employee or agent of an entity that has legal custody of the victim." *Id.* § 118(A)(5). Apparently, forcible sodomy is not actionable under similar circumstances. Longer periods of incarceration are available upon conviction for aggravated rape or aggravated forcible sodomy. *Id.* §§ 118(C), 120(B).

395. 715 P.2d 1105 (Okla. Crim. App.) *reh'g denied*, 717 P.2d 1151 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986).