

# Report to the Hague Suggested Revisions of Penal Law Relating to Sex Crimes and Crimes Against the Family

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# REPORT TO THE HAGUE: SUGGESTED REVISIONS OF PENAL LAW RELATING TO SEX CRIMES AND CRIMES AGAINST THE FAMILY

*Morris Ploscowe*†

## INTRODUCTION

The Association Internationale de Droit Pénal held its 9th International Congress on criminal law at the Hague, during the last week in August, 1964. Over 600 delegates from fifty countries (including the United States, Japan, and the Soviet block countries) participated in its deliberations. The problem of how the criminal law should formulate its provisions relating to sex crime and crimes against the family was one of the four subjects on the agenda of this Congress. The writer had the honor of being Rapporteur General on this subject to the Hague Congress.

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*Belgium:*

Prof. Raoul Declercq—Les infractions contre la famille et la moralite sexuelle en droit belge.

*Bulgaria:*

Dr. Ivan Nenov—Les infractions contre la famille selon le droit.

*Czechoslovakia:*

Dr. Adolf Dolensky—Delit contre la famille et contre la morale sexuelle.

*Egypt:*

Dr. Hassan el Marsafawi—Le delit d'abandon de famille.

*Ethiopia:*

Dr. Philippe Graven—La protection penale de la moralite publique et de la famille en Ethiopie.

*Germany:*

Dr. Gunter Blau—Les infractions relatives a la famille et aux moeurs.

Dr. Richard Sturm—Les infractions relatives a la famille et aux moeurs.

*Israel:*

Hon. Haim Cohn—Offences Against the Family and Sexual Morality.

*Italy:*

Prof. Gian Domenico Pisapia—Offences Against the Family and Sexual Morality.

*Japan:*

Prof. Ryuichi Hirano—Offenses Against Family and Sexual Morality.

*Poland:*

Prof. Igor Andrejew—Les delits contre la famille dans le droit Polonais/ Compare aux droits des autres pays socialistes.

*Sweden:*

Dr. Gerhard Simson—Les infractions contre la famille et la moralite sexuelle.

*Switzerland:*

Prof. Vital Schwander—Les infractions contre la famille et la moralite sexuelle.

*The United States:*

Prof. Henry H. Foster & Dr. Doris J. Freed—Offenses Against the Family.

*Yugoslavia:*

Prof. Mirjan Damaska—Les infractions contre la moralite sexuelle.

The Hague Congress was preceded by an earlier conference on the same subject, which took place in the summer of 1963, at the remarkable Villa operated by the Rockefeller Foundation at Bellagio, Italy. Approximately twenty-four selected criminal law professors and criminologists from many different countries participated in this conference. Many of the conclusions embodied in this article, are the fruit of the discussions of the Bellagio Conference. The resolutions which are presented at the end of the text discussions herein result from the Bellagio conference and were presented for the consideration of the delegates to the Hague Congress. The basic conclusions reached at Bellagio were in large measure adopted by the Hague Congress. This is apparent from a comparison of the text of the resolutions adopted by Bellagio with the text of the Hague Resolutions, reproduced at the Appendix. This article is substantially adapted from the report which I presented in my capacity as Rapporteur Général to the Hague Congress.

Though this article deals with sex crimes and crimes against the family, there cannot be any sharp differentiation between these two types of offenses. Certain sexual behavior, *e.g.*, adultery or incest, may at one and the same time be a sex crime as well as an offense against the family. Much of what is labelled as sex crimes may also fall within the category of crimes against the person, *e.g.*, rape, abortion, or indecent liberties with girls or boys who are too young to consent to sexual behavior. It is also not easy to categorize such behavior as the dissemination and sale of birth control information and the distribution of drugs and articles to prevent conception. Such behavior obviously has an impact on sexual morality as well as on the family. But the behavior itself may be included within those parts of the penal code which deal with freedom of the press and public health or even of obscenity.

Similarly, is the problem of artificial insemination to be dealt with as a family offense or as an offense against public health regulations or the professional obligations of physicians? Questions such as these make the classification of offenses a difficult one. There are, however, certain types of offenses which do fall within the specific categories of sex crime or crimes against the family. An example of the first is homosexual behavior between adults where such behavior is prohibited by the penal law. An example of the second is the non-support of wives and children by husbands and fathers who are able to do so.

This article will concern itself with the fundamental policy question—what shall the penal law do about certain kinds of sexual behavior and behavior which affects the family.

The regulation of sexual behavior raises vital questions as to how far the law can go in interfering with an individual's freedom to act in a sphere which is vital to the human being. As a general rule the criminal law steps in to control behavior where such behavior does harm or damage to another individual or to the community. However, in the area of sexual activity, there is not universal agreement as to which sex acts do such harm or damage that they must be prohibited by penal sanctions. People's views as to the harmfulness of specific sexual behavior are influenced in large measure by their religious training, cultural background, and ethical predilections. As a result views vary from individual to individual, and from country to country.

The penal law cannot be a mere decalogue of behavior which is deemed morally desirable. The problem of enforcement of its prohibitions must be considered before specific offenses are formulated. The penal code should not be a depository of dead letter law. It should not contain broad prohibitions which are never enforced but which are widely violated. This is likely to occur if a sharp line is not drawn between the demands of sexual morality and the requirements of the penal code.

Most sex behavior is the secret act of consenting individuals who derive pleasure from the behavior. Law enforcement is never very effective in dealing with behavior that occurs secretly and is consented to. If prohibitions against sexual activity are drawn broadly, law enforcement agencies can only uncover a small proportion of prohibited sex acts. There will necessarily be a wide disparity between sex acts committed and offenses which come to official attention. The limited enforcement of broad prohibitions against sex behavior widely indulged in, not only does not control such activity, but also causes disrespect for the law and for law enforcement. This is a fundamental argument for keeping the application of the penal law to a minimum in the sexual sphere. It is the belief of this writer that the area of sex crime should be limited generally to situations where real damage to the individual and the community occurs as a result of sexual activity, namely, where force and violence is used to compel sexual behavior; where juveniles are involved in sex acts; where the sexual behavior causes a public scandal or disorder; or where the behavior involves commercialized prostitution, both male and female.

How we formulate our sex crimes will have some relationship to the formulation of crimes against the family. Incest and adultery, as we have seen, are at one and the same time crimes against the family as well as sex crimes. Abortion is made necessary by sexual activity but it may also be deemed a crime against the family as well as a crime against the per-

son. The dissemination of birth control information and the sale of drugs and articles to prevent conception unquestionably affects sexual behavior as well as the family. To what extent it should be permitted or prohibited will depend on whether the penal law takes a permissive or a restrictive attitude towards sexual behavior.

#### THE PROBLEMS COVERED

We cannot in this article attempt to resolve all the problems inherent in the question of how we should formulate sex crimes and crimes against the family. Thus, this article will deal primarily with the problems which were discussed at a preliminary conference of the Association Internationale de Droit Pénal which was held in the summer of 1963 at Bellagio, Italy. In addition, the resolutions recommended to the subsequent Hague Conference will be presented.

The following problems were discussed or touched upon at the Bellagio conference:

a. Under what circumstances should the penal law prohibit an ordinary act of sexual intercourse between consenting adults who are not married to each other;

b. What should the law do about incest and incestuous relationships between members of the same family;

c. To what extent shall the law proscribe the dissemination of birth control information and the distribution of drugs and articles designed to prevent conception;

d. How shall the law formulate provisions with respect to the interruption of pregnancy through abortion;

e. What provision shall the law make for the offspring of non-marital sexual intercourse, and how shall the law treat the problem of artificial insemination;

f. Under what circumstances should criminal law prohibit deviant and abnormal forms of sexual behavior such as homosexuality or lesbianism;

g. To what extent shall the criminal law be used to compel recalcitrant husbands and fathers to support their wives and children.

The control of sexual behavior and the formulation of crimes against the family present emotion-charged problems. If criminological science could give a clear-cut answer to the problems presented, solutions might be easier despite differences of opinion concerning sexual behavior. Unfortunately, clear-cut answers from the point of view of criminal science are not available. I shall content myself with defining the issues involved in the above questions, presenting the Bellagio conference recom-

mendations and resolutions, and recommending certain solutions on my own authority. I do not expect unanimous agreement with any of my suggestions, nor with any of the recommendations made by the Bellagio conference. Nevertheless, I believe that our penal law should be revised in accordance with the data contained in this article.

## I

### THE PROBLEM OF FORNICATION AND ADULTERY—UNDER WHAT CIRCUMSTANCES SHALL AN ORDINARY ACT OF SEXUAL INTERCOURSE BETWEEN CONSENTING ADULTS BE PROHIBITED?

It was the unanimous opinion of those present at the Bellagio conference that a single act of sexual intercourse between persons above the age of consent fixed by the penal law should not be deemed a crime. There was no support among the delegates for the provision which is found in many American penal codes punishing a simple act of fornication. Even the American delegates felt that this was an aberration of American law. While fornication is made a crime in almost half of the American states, it is largely dead letter law. According to the Kinsey studies, practically all men engage in sexual intercourse before marriage. However there are very few convictions under fornication statutes. It should be noted that the Model Penal Code of the American Law Institute does not make fornication criminal. This unquestionably should be the approach of the modern penal law.<sup>1</sup>

The problem of adultery, however, presented a different situation. Present legislation on adultery runs the gamut of (a) making a man and woman equally guilty of adultery because of a single act of sexual intercourse where one partner in the said intercourse is married to someone else; (b) providing for the incrimination of adultery only where the relationship is more or less permanent or continuous, *e.g.*, habitual or notorious; (c) providing that only the woman may be guilty of adultery; (d) providing that a man may be guilty of adultery, only under special circumstances, *e.g.*, if he brings a concubine into the home, while making a single act of extra-marital intercourse on the part of a married woman a punishable offense; (e) making adultery nonpunishable.<sup>2</sup>

<sup>1</sup> An exception may be made to this general rule—that ordinary acts of sexual intercourse should not be punished when consenting adults are involved—in situations involving an abuse of authority by custodians, guardians, etc., if the woman is being detained or is serving a sentence on a charge of crime, or is in a hospital or is dependent upon her partner in the sex act. Schwander, Paper at 9.

<sup>2</sup> In his report, Dr. Gerhard Simson notes that formerly adultery was severely punishable in Sweden. Until 1779, it was possible to impose the death penalty where both parties in the adulterous act were unmarried. Simson, Paper at 6. Less severe punishments were provided by the penal code of 1864. In 1937, the crime of adultery was eliminated

The discussion at Bellagio clearly underlined the ineffectiveness of criminal sanctions against adultery in whatever form the offense has been formulated. The sanctions which presently exist in the penal law are rarely enforced. There is enormous disparity between adulterous acts committed and convictions for the crime. Despite these facts, there was some concern among the Bellagio delegates that elimination of adultery from the penal law might be construed as a sanctioning of adultery. It was felt by some at the Bellagio conference that the penal law in this area has a moral and educational effect and that prohibitions against adultery have a place in the penal law. Nevertheless, the consensus of opinion at the conference was that adultery should no longer be made subject to criminal sanctions. The treatment of adultery should be solely a matter for family law and not for the criminal law.

The following resolution on adultery was adopted by the Bellagio Conference:

RESOLUTION #1

The law has the duty of protecting the family. But it is believed that this can best be done by:

*First*—policy declarations, like those placed in constitutions;

*Second*—by the family law. It is feared that the negative effects of the prohibition of adultery by the penal law outweigh the positive effects.

It is regarded as desirable that social or religious organizations, public or private, with their more personal control over human conduct in this area of personal behavior, exercise an increasingly strong influence.

This resolution was considered too general in character and the following resolution on the treatment of adultery by the penal law was submitted to the Hague Conference:

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from the Swedish Penal Law. Adultery was left to be dealt with by the civil law in divorce cases. Adultery is also no longer punishable in Poland and other Communist countries, with the exception of Romania. See Andrejew, Paper at 15. Compare, Nenov, Paper at 9: "L'adultere qu'il sort passager, ou durable n'est pas erige chez nous en delit."

This legal position of the nonincrimination of adultery should be contrasted with the Italian and French law, summarized by Pisapia, Paper at 23:

Italian law is similar to French law and to the legislation of other countries insofar as it holds that adultery is an offence which is exclusively committed by a man's wife. Infidelity on the part of the husband is punishable under another title. . . .

Concubinage, i.e., those instances where a man (a husband) keeps a concubine in the house of his family or some other place—and this fact be of public knowledge . . . .

Italian Penal Code art. 560. See also Declercq, Paper at 6-7. For the situation under German law, see Blau, Paper at 17-18; Sturm, Paper at 4, 20. See Schwander, Paper at 14-15 (Swiss law); Graven, Paper at 16 (Ethiopian law); Hirano, Paper at 6 (Japanese law); Damaska, Paper at 9 (Yugoslav law). On the problem of adultery in American law, see Foster & Freed, Paper at pt. 2, § 6. See also Declercq, Paper at 6-7. For the situation under German law, see Blau, Paper at 17-16, Sturm, Paper at 4; id. at 20. For Swiss law, see Schwander, Paper at 14-15; Ethiopian law, see Graven, Paper at 16; Japanese law, see Hirano, Paper at 6; Yugoslav law, see Damaska, Paper at 9. On the problem of adultery in American law, see Foster & Freed, Paper at pt. 2, § 6.

## RESOLUTION #1

Adultery is only too frequently a factor in the disruption of families. Nevertheless, penal sanctions have proven to be ineffective in controlling this threat to family life. Such sanctions should be eliminated from the penal law. Adultery should be dealt with by civil courts in connection with divorces and separation actions and other types of matrimonial proceedings. Social, religious and educational organizations, with their more personal control over human behavior can be more effective in dealing with adultery than the penal law.

## II

THE INCEST PROBLEM—WHAT SHOULD THE LAW DO ABOUT  
INCEST AND INCESTUOUS RELATIONSHIPS BETWEEN MEMBERS  
OF THE SAME FAMILY?

The Bellagio conference did not take up in detail the problems involved in the formulation of the crime of incest and did not vote any resolution on this matter. However, there is considerable discussion of this problem in the reports which were submitted to the Bellagio conference.

A review of modern incest law indicates that there is considerable variation in the formulation of this crime. There are laws which simply provide that a sexual act between relatives whose marriage is forbidden by law constitutes an offense. If the civil law of marriage prohibits many different kinds of relatives from marrying (*e.g.*, Ethiopia prohibits the marriage of relatives up to the seventh degree of relationship),<sup>3</sup> then the crime of incest encompasses considerable sexual behavior. Many American states also have broad incest statutes since they extend the prohibitions of marriage and sexual intercourse to first cousins, and also prohibit marriage and sexual intercourse between persons related by marriage as well as by blood (*e.g.*, step-children and step-parents). Such wide ranging incest legislation is to be contrasted with Belgian law and the project for the new German Penal Code. Incest, as such, is not punishable in Belgium.<sup>4</sup> Sexual acts with ascendants and descendants, however, where the child is under twenty-one, is a serious crime punishable by ten to fifteen years of imprisonment. The German Penal Code project also takes the position that incest, as such, should no longer be a punishable offense. However, sexual acts with children or dependent persons by members of the family group are punishable under other provisions of the Penal Code.<sup>5</sup>

An intermediate position between the legislation which defines incest broadly and statutes which would eliminate the crime of incest entirely from the penal law should be adopted. The eugenics argument which for-

<sup>3</sup> See Graven, Paper at 17.

<sup>4</sup> See Declercq, Paper at 8-10.

<sup>5</sup> See Blau, Paper at 15-17. Compare Sturm, Paper at 13-14.

merly supported broad incest prohibitions has lost much of its force because of advances in biological sciences. There is, however, considerable weight in the religious, moral, and sociological arguments for keeping incest as a specific offense in the criminal law. There can be little doubt from criminological and sociological studies that incest is largely a product of abnormal personalities as well as unhealthy or abnormal familial relationships. The criminal law can perform an educational and therapeutic role in prohibiting incestuous relationships between closely related members of the same family. Swedish<sup>6</sup> and Polish legislation<sup>7</sup> which limit the crime of incest to sex relations between ascendants and descendants and brothers and sisters should be followed. The penal code should provide for intensive psychological and sociological study of individuals concerned in such offenses and flexible treatment provisions to deal with them. Long term imprisonment is not the most appropriate means for dealing with the crime of incest.

The following resolution concerning the crime of incest was recommended to the Hague Conference:

#### RESOLUTION #2

Each country should reexamine its criminal law provisions concerning incest. The crime of incest should not be made dependent upon the limitations of the civil law with respect to marriage. The crime of incest should be formulated in such fashion that it prohibits sexual intercourse between a limited number of close relatives. It is suggested that these relatives be restricted to ascendants and descendants and brothers and sisters of the whole and half blood. New penal law provisions should be framed in such fashion as to make possible adequate sociological and psychological studies of offenders. Penal treatment of offenders should be based on the findings of such studies.

### III

#### THE BIRTH CONTROL PROBLEM—TO WHAT EXTENT SHOULD THE LAW PROSCRIBE THE DISSEMINATION OF BIRTH CONTROL INFORMATION AND THE DISTRIBUTION OF DRUGS AND ARTICLES DESIGNED TO PREVENT CONCEPTION?

The increasing concern throughout the world with the growth of population makes it necessary to reexamine the penal law prohibitions which are found in many countries against the dissemination of books, publications, and pamphlets containing birth control information and the sale and distribution of articles and drugs designed to prevent conception.<sup>8</sup>

<sup>6</sup> See Simson, Paper at 7-8.

<sup>7</sup> See Andrejew, Paper at 14. See also Dolensky, Paper at 8-9; Damaska, Paper at 9.

<sup>8</sup> There was considerable discussion of problems of birth control in some of the reports. See, e.g., Declercq, Paper at 13-14; Simson, Paper at 10; Schwander, Paper at 13.

As might be expected, many of the delegates at the Bellagio conference expressed the fear that widespread dissemination of birth control information and widespread and uncontrolled sale of drugs and articles designed to prevent conception would materially contribute to a breakdown of sexual morality. Moreover, the Catholic delegates, particularly, underlined the religious and moral objections to the use of any article which artificially interfered with processes of conception. Nevertheless, it was the view of most of the delegates present at the Bellagio conference that birth control was preferable to abortion as a means of preventing the birth of unwanted children. It was the opinion of these delegates that so long as the existing prohibitions against obscenity and pornography are not violated, the dissemination of birth control information and the sale and distribution of articles to prevent conception should be encouraged. Obviously the sale and distribution of such articles, drugs, and information may be subjected to special restrictions, *e.g.*, limiting such sale and dissemination of information to clinics, doctors, or pharmacies. Special effort should also be made to keep such articles, drugs, and information out of the hands of juveniles. Nevertheless, it should be a basic principle of any legislation in this matter that access to birth control information and methods of preventing conception be available to all persons above a certain age. The use of such articles and information should be a matter of individual conscience.

The following resolution on birth control was recommended to the Hague Conference:

#### RESOLUTION #3

The criminal law should not prohibit the dissemination of birth control information, nor the distribution of drugs and articles to prevent conception, unless the dissemination of such information and the distribution of such articles violates legal prohibitions against pornography and obscenity. Each country may enact appropriate measures to effectuate this purpose. Special effort should be made to keep birth control publications and articles and drugs to prevent conception out of the reach of juveniles.

#### IV

#### THE ABORTION PROBLEM—HOW SHALL THE LAW FORMULATE PROVISIONS WITH RESPECT TO THE INTERRUPTION OF PREGNANCY THROUGH ABORTION?<sup>9</sup>

The problem of how to formulate provisions with respect to abortion gave the delegates at Bellagio much more difficulty than matters dealing

<sup>9</sup> For an excellent historical and comparative analysis of the crime of abortion, see Pisapia, Paper at 63. The crime of abortion is also discussed in the following reports: Nenov, Paper at 21; Schwander, Paper at 3; Andrejew (Remarques), Paper at 2; Declercq, Paper at 3; Graven, Paper at 4; Simson, Paper at 8; Dolensky, Paper

with birth control. The delegates agreed to the basic proposition that incipient life deserved the protection of the penal law. However, the delegates differed considerably as to the nature of the protection which the criminal law should provide for incipient life as well as the circumstances under which such protection should be provided. There was widespread recognition among the delegates that traditional abortion legislation does not prevent thousands of illegal abortions from taking place in every country. Nor does it prevent the death or mutilation of innumerable women at the hands of incompetent and criminal abortionists.

On the other hand, many delegates to the Bellagio conference were influenced by Roman Catholic philosophy and doctrine which equates abortion with homicide. This Catholic concept has influenced many penal codes dealing with abortion. In such codes abortion is a very serious crime punishable by long terms of imprisonment. Even in penal codes without grounding in Roman Catholic moral philosophy, the possibility of therapeutic abortion usually is severely restricted and no provision is made for abortions in cases of rape, incest, or possible birth of deformed children.

The Bellagio delegates had before them data on legislation which takes an entirely utilitarian approach to matters of abortion. In Sweden and some Communist nations like Bulgaria, Poland, and Czechoslovakia, it is fundamentally the woman who decides whether or not to carry an incipient child to full term. Should she decide not to do so, an abortion is legally permissible so long as it is done under the clinical, medical, or hospital procedures authorized by law. If an abortion is carried out under the auspices and procedures provided by law, it is not criminal. On the other hand, an abortion may be punishable if the woman does not comply with the legal provisions regulating legitimate abortions.

The author supports a middle road, between the permissive and the restrictive, in connection with the formulation of provisions relating to abortion. I am not in favor of wholly permissive abortions at the will of the woman, which appears to be the situation in Sweden and certain Communist countries. On the other hand, much abortion legislation in America and in many European countries is so restrictive as to be unjust to the pregnant woman. Abortion in principle should continue to

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at 4; Schwander, Paper at 3; Hirano, Paper at 10. The latter notes that since World War II, doctors specially licensed to perform abortions may terminate pregnancy if continuance of the pregnancy may cause serious harm to the health of the mother on physical or economic grounds. The doctor's conscience alone controls. Hirano states that more than one million abortions are reported by such doctors.

In Israel, abortions are not prosecuted if performed by a duly qualified medical practitioner and the woman asked for and consented to the abortion. Cohn, Paper at 7.

be a criminal offense. The woman involved in the abortion should be punished as well as the abortionist himself. Procedural and substantive provisions should make it possible to deal with the woman more leniently than with the abortionist, and possibly excuse her from punishment if her testimony is necessary to convict an abortionist. I am opposed to the provisions of some laws, however, which increase penalties for abortion where the abortionist is a doctor, nurse, or licensed midwife. This simply increases the pressure on the pregnant woman to resort to the unprofessional, untrained charlatan with increasing danger to the life and health of the woman.

The author would permit pregnancies to be interrupted for therapeutic reasons. Any serious threat to the life or health of the woman should make possible a legal abortion. The concept of "serious threat to health" as a basis for a legalized abortion should include the mental health and stability of the woman. In formulating this provision, the legislator should take into account the experience of such countries as Switzerland. In Switzerland the certification of two doctors must be had before a therapeutic abortion can take place.<sup>10</sup> This is one means of checking widespread resort to therapeutic abortions for nontherapeutic reasons.

Penal law provisions should also make possible legal abortion where the incipient child is the offspring of rape or incest. Similarly an abortion should be legally permissible if there is a substantial possibility of the birth of a severely deformed child. No woman or girl should be compelled to give birth to an offspring that she will detest because of its origin. Nor should a woman be compelled to bear a child that will be severely crippled in body and mind. The recent case of the American mother who had to travel to Sweden for a legal abortion of a thalidomide deformed baby was no credit to American law.

The following resolution was submitted for the consideration of the Hague Conference:

#### RESOLUTION #4

The penal law should in principle prohibit abortion since it recognizes that incipient life deserves the protection of the law. However, abortions should be legally permissible under certain specific circumstances defined by law. Among the circumstances which would permit an abortion to be legally performed are the following:

- a. Where the abortion is necessary to preserve the life, health or mental health or stability of the woman.
- b. Where the incipient child is the offspring of rape, or incest, or there is the probability of the birth of a severely deformed child.

The penal law can require as a prerequisite to a legally permissible abortion, the certificate of two doctors or some other procedure which will

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<sup>10</sup> See Schwander, Paper at 5.

assure the appropriate authorities, that the prospective abortion is within the legally permissible exceptions to the general rule prohibiting abortion.

## V

### THE ARTIFICIAL INSEMINATION PROBLEM—WHAT PROVISIONS SHALL THE LAW MAKE FOR THE OFFSPRING OF NONMARITAL SEXUAL INTERCOURSE AND HOW SHALL THE LAW TREAT THE PROBLEM OF ARTIFICIAL INSEMINATION?

No matter how the law formulates provisions regarding the dissemination of birth control information or how the law regulates abortions, children will always be born who are not the fruit of lawful wedlock. There are countries like the United States where the problem of illegitimacy appears to have seriously increased since the end of World War II. In the United States and in many European countries the illegitimate child is under serious legal handicaps with respect to support and inheritance, even where paternity is legally established. To what extent legislation should go in removing the handicaps and disabilities of the illegitimate child is primarily a problem for the civil and not the criminal lawyer. Progressive legislation in many countries eliminates the legal disabilities heretofore imposed on illegitimate children and tends to place such children on a par with any other children of their natural parents.

There is however one problem concerning children which requires special legal treatment; namely children born of artificial insemination. The criminal lawyer is concerned with this problem because of the proposals which have been made to prohibit artificial insemination. This problem was discussed at the Bellagio conference and it was noted that an increasing number of children are being born each year through the use of the techniques of artificial insemination.<sup>11</sup>

In discussing artificial insemination, one must distinguish between artificial insemination of a wife with the semen of her husband and artificial insemination of a wife with the semen of a stranger. The first type of artificial insemination is made necessary where the husband and wife desire a child, yet the husband is impotent, though fertile. Semen is obtained from the husband by surgical procedures and the wife is inseminated therewith. This kind of artificial insemination raises no special legal problems, civil or criminal, however distasteful it may be to the moral views of certain religious communities. When a wife is inseminated with the semen of her husband, this obviously is done with the consent of the husband. The child conceived as a result of such artificial insemina-

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<sup>11</sup> Pisapia, Paper at 43, has a detailed analysis of problems of artificial insemination. See also Blau, Paper at 9; Sturm, Paper at 22.

tion must necessarily be the child of the husband. The artificial insemination procedure is simply a surgical device in aid of legitimate procreation.

The second type of artificial insemination, namely with the semen of a third person donor, raises many serious legal questions. This procedure is used in cases where the husband may be potent for sexual intercourse yet his semen may not be fertile. If the wife is to have a child of her own, she obviously cannot have it from her husband. The normal way to have such a child is through an act of adultery. In that event, the child born to the wife may be demonstrated to be an adulterine bastard with all the inherent disabilities of that status. If the wife does not wish to commit adultery in order to have a child, she may be inseminated artificially with the semen of a third person donor. If she does this without the consent of her husband, serious legal questions can arise. The child is obviously not the child of the husband, and is illegitimate. To pass such a child off as the child of the husband is to commit a fraud upon legal status. Such a fraud may bring criminal liability to the wife and to an accomplice doctor.

The legal complications are not eliminated if the wife is artificially inseminated with the consent of the husband. The child is still not biologically the child of the husband. Technically the child is still a bastard even though the husband may have consented to the artificial insemination. There is also the question of whether the act of artificial insemination, with or without the husband's consent, is adultery. This question has been raised in a number of decided cases. I do not believe that artificial insemination is adultery since no coition is involved and in our view penetration and coition are a *sine qua non* of adultery.

In view of the legal problems raised by artificial insemination, the new draft penal code for Germany seeks to prohibit artificial insemination using the semen of a third person, but not using the husband's semen.<sup>12</sup>

The delegates at Bellagio adopted a resolution against making the act of artificial insemination a penal offense. However, they recognize that criminal sanctions may be invoked in cases where the consent of the husband is not obtained. The delegates also recognize that it would be desirable for the law to regulate the status of children procreated by artificial insemination in an equitable manner so as to guarantee equality with other children and to protect the rights of the child as well as to define corresponding parental obligations.

The following resolution was submitted for the consideration of the Hague Conference on the subject of artificial insemination:

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<sup>12</sup> See Blau, Paper at 19.

## RESOLUTION #5

The criminal law should not prohibit the practice of artificial insemination unless such artificial insemination is to take place without the consent of the husband. Where artificial insemination is to take place with the semen of a third person, appropriate administrative procedures should regulate the manner of obtaining the consent of the husband to the artificial insemination. The civil law should make special provision for children conceived by artificial insemination. Where the husband has consented to the insemination of the wife, the civil law should also regulate the responsibility of the husband toward such an artificially inseminated child.

## VI

THE PROBLEM OF HOMOSEXUAL BEHAVIOR—UNDER WHAT CIRCUMSTANCES SHOULD THE CRIMINAL LAW PROHIBIT DEVIANT AND ABNORMAL FORMS OF SEXUAL BEHAVIOR SUCH AS HOMOSEXUALITY OR LESBIANISM?

There can be little doubt that large numbers of men and women have had homosexual contacts during the course of their lifetime. Kinsey notes that 37 per cent of the men<sup>13</sup> and 25 per cent of the females<sup>14</sup> studied by him had such experiences. This does not mean that over one-third of men and one-fourth of women are homosexual. Individuals vary in the degree of their homosexuality. Many have had only sporadic or occasional homosexual contacts. Others are equally receptive to both homosexual and heterosexual contacts. There is, however, an appreciable percentage of men and women whose sexual contacts and erotic responses are exclusively homosexual.

Homosexual behavior takes many different forms. Mouth-genital contacts, fellatio and cunnilingus, pederasty (penal-anal contact), and mutual masturbation, are some of the techniques of homosexual satisfaction. Such sexual acts are almost universally prohibited in the United States and in many European countries. Penal statutes prohibiting abnormal sexual behavior are basically intended to deal with homosexuals, but are frequently so drawn that they include the aberrant sexual acts of heterosexual individuals. Many American statutes, moreover, apply even to the aberrant sexual acts of married persons. Many statutes also do not make any distinction between male homosexual behavior and female homosexual behavior. However, as Kinsey notes "practically no females seem to have been prosecuted or convicted anywhere in the United States under these laws."<sup>15</sup>

<sup>13</sup> Kinsey, Pomeroy & Martin, *Sexual Behavior of the Human Male* 623 (1953).

<sup>14</sup> Kinsey, Pomeroy & Martin, *Sexual Behavior of the Human Female* 433 (1953).

<sup>15</sup> *Id.* at 484.

There can be little doubt that if the penal law of any country contains broad prohibitions against homosexual or deviant sexual behavior, there will be an enormous disparity between offenses committed and offenses which come to official attention. Such widespread violation of penal prohibitions is rightly undesirable. The delegates at Bellagio considered the question of what changes should be made in the penal prohibitions with respect to deviant and aberrant sexual behavior.

The delegates were in accord that homosexual and deviant sexual activity should continue to be punishable offenses under the following circumstances:

- a. Where force or violence is used to compel the deviant or homosexual behavior.
- b. Where a minor has been involved in homosexual or deviant behavior with an adult.
- c. Where an adult such as a parent, teacher, guardian, boy scout leader, camp leader, etc., abuses his position of trust and involves his ward or the person entrusted to his care in a homosexual or deviant sex act.
- d. Where the deviant or homosexual behavior occurs openly, creating public scandal.
- e. Where the person charged with deviant or homosexual behavior is guilty of homosexual prostitution.

The delegates at Bellagio were divided as to whether deviant and homosexual behavior between consenting adults where none of the aforementioned elements were present should continue to be made criminal. It was pointed out that homosexual behavior between consenting adults in private is not a criminal offense in many countries including Italy, France, Sweden, Poland, and Czechoslovakia.<sup>16</sup> On the other hand, it is deemed

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<sup>16</sup> See Pisapia, Paper at 95:

In some European countries (such as Italy, France, Belgium, Spain and Portugal) homosexuality and sodomy in general are not treated as offences in themselves but are punished when identified with any of the offences against public morals and decency (obscene acts in public places, physical violence, violent acts of lust, etc.).

In a few countries (e.g., Yugoslavia, Germany, Norway) only male homosexuality is punished, while in others (e.g., Greece, Poland, Switzerland and Iceland) no distinction is drawn with regard to the sex; however, the vice must have a venal object. This provision would seem to associate itself more with the punishment of male prostitution than with that of the actual phenomenon.

Homosexuality is punished unconditionally and without distinction of sex in Finland, Denmark, Austria and Bulgaria.

Russian legislation is worth special mention, both because it is among the most recent (Oct. 27, 1960) and for the position given in it to the offense in question. Art. 121 of the Russian Penal Code envisages male homosexuality only, which it punishes with up to five years imprisonment, and up to eight in cases where the offense is committed with violence or threat, or against a minor, or in abuse of authority.

See also Simson, Paper at 6; Dolensky, Paper at 7; Hirano Paper at 4.

a criminal offense in England (despite the Wolfenden Report which recommended change in the law), West Germany,<sup>17</sup> the Soviet Union, and in many other countries.<sup>18</sup> In the United States, homosexual behavior between consenting adults is almost unanimously prohibited.<sup>19</sup> The penalties imposed vary greatly from state to state. The Model Penal Code formulated by the American Law Institute for the United States, after considerable debate, took the position that homosexual behavior in private, between consenting adults, should not be deemed a punishable offense.

I am aware of the fact that the proposal to eliminate criminal sanctions and penalties against homosexual and deviant sex acts in private between consenting adults, has resulted in considerable debate in countries that still retain this offense. However, I believe that the position of the Model Penal Code of the American Law Institute, of the Wolfenden Report and of those countries which have eliminated this offense from the penal law, is sound.

The arguments in favor of this position are well known. Where homosexual behavior between consenting adults is prohibited innumerable homosexuals violate these provisions, every night in the week. Only a very small percentage of homosexuals are ever detected or prosecuted for violation of the penal law. A homosexual who behaves discreetly, who does not seduce minors or solicit others publicly for homosexual acts, or who does not use force, is basically immune from prosecution. The law concerning adult homosexuality and deviant sex behavior in private is largely a dead letter. It only benefits the blackmailer who preys upon homosexuals because of their fear of exposure.

Against the repeal of the penal prohibitions with respect to homosexual behavior is the fundamental argument that such repeal gives sanction to sexual behavior which violates traditional and deep-rooted concepts of sexual morality. It is also feared that the nonpenalization of homosexual behavior will aid the spread of this type of aberration and tend to increase the number of sexual deviates.

In my view the advantages of eliminating the prohibition against deviant and homosexual behavior in private where consenting adults are involved, outweigh the disadvantages.<sup>20</sup> The author urged the Hague

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<sup>17</sup> See Sturm, Paper at 25; Blau, Paper at 1.

<sup>18</sup> See Graven, Paper at 9; Damaska Paper at 1.

<sup>19</sup> See Foster & Freed, Paper at pt. 2, at 11.

<sup>20</sup> Simson, Paper at 10, summarizes changed Swedish attitudes towards the incrimination of adult homosexual behavior:

En 1954 le caractere delictueux des actes homosexuels entre adultes a disparu. Cette modification legislative est intervenue apres beaucoup d'hesitations et a la suite de travaux preparatoires etendus, main on peut considerer qu'elle est aujourd'hui generalement acceptee. Lors de la preparation du nouveau code personne n'a demande la reintroduction de dispositions penales en la matiere.

Conference to take some affirmative action toward eliminating criminal prohibitions against homosexual behavior in private between consenting adults.

The following resolution was presented for the evaluation of the Hague Conference:

#### RESOLUTION #6

The criminal law should prohibit deviant and homosexual behavior under the following circumstances:

- a. Where force or violence is used to compel deviant or homosexual behavior.
- b. Where a minor is involved in homosexual or deviant behavior by an adult.
- c. Where an individual in a position of trust and confidence abuses his position and involves his ward or the person entrusted to his care in deviant or homosexual behavior.
- d. Where the homosexual or deviant behavior occurs openly causing a public scandal or disturbance.
- e. Where the homosexual or deviant behavior involves prostitution or commercialization.

Homosexual behavior either male or female between consenting adults which does not violate any of the aforementioned elements should not be prohibited by the criminal law.

## VII

### THE PROBLEM OF NONSUPPORT—TO WHAT EXTENT SHALL THE CRIMINAL LAW BE USED TO COMPEL RECALCITRANT HUSBANDS AND FATHERS TO SUPPORT THEIR WIVES AND CHILDREN?

One of the major problems in the area of family law and crimes against the family is how to compel recalcitrant husbands and fathers to support their wives and children.<sup>21</sup> This problem arises in different contexts. When families are broken by divorce or legal separation, court orders may be issued compelling the husband and father to continue to support his wife and family. Only too frequently such orders are flouted. In countries like the United States which provide legal techniques for the establishment of paternity, support orders may also be issued against the putative father to compel him to support his illegitimate children. Fathers usually make support payments unwillingly. In innumerable cases husbands and fathers

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Hirano, Paper at 4, makes the following comment on Japanese law:

In the present penal code, a homosexual act is an offense, only when it is done against the will of another by the use of force or threat. If the victim is under 13, his actual consent is immaterial, as in the case of rape. Some cities have ordinances, which prohibit solicitation in a public place to commit homosexual acts. But the homosexual act itself has never been an offense, except in the period of *Kaiteiritsurei*.

<sup>21</sup> The problem of how to compel recalcitrant husbands and fathers to support wives and children is discussed in the following reports: Andrejew, Paper at 21; Nenov, Paper at 18; Sturm, Paper at 18. See also el Marsafawi, Paper, who has devoted his entire paper to "Le delit d'abandon de famille."

simply desert their wives and children and fail or refuse to provide any support for them even where they may be working. Sometimes the husband and father refuses to support his family although he continues to live in the same household.

The problem of nonsupport is difficult enough where the husband and father remain in the same community as his wife and children. However, because of the increasing mobility of workers both within and without a particular country, innumerable men obtain employment outside the communities in which their families live, frequently in other countries. In many instances workers living outside their own communities establish new liasons and completely ignore the needs of their wives and children. This may occur even though they may be earning relatively high wages.

Obviously effective legal means are necessary to compel men to live up to their legal obligations to support their wives and children. Unless they do so, the burden of support falls upon the taxpayer through welfare and relief payments or upon private charitable organizations. The criminal law has struggled with this problem of nonsupport of wives and children for many years in every country. In addition, many countries have made provision for the garnishment of workers' wages for the benefit of wives and children where the worker does not support them.

Considerable pessimism was expressed at the Bellagio conference concerning the effectiveness of the criminal law in dealing with problems of nonsupport of wives and children. Merely sending a defaulting husband and father to prison for refusing to support his family is no way to raise money for them. Similarly, the civil remedy of garuishment has not proven too effective in raising money for wives and children. A man can simply change his job or refuse to work and the garnishment order will not produce the money necessary for his family. The criminal law or the civil law, moreover, has not yet formulated any effective techniques for reaching the worker who is making money outside the country where his family lives, yet who fails to support his family.

In many countries, resort is being had more and more to social service techniques to deal with problems of nonsupport. This is particularly true of the United States where problems of nonsupport are being dealt with to a considerable degree in specialized family and domestic relations courts. In countries which still use the criminal law extensively to deal with nonsupport problems there is increasing use of probation and suspended sentences rather than jail or imprisonment. Such sentences make possible the use of social service procedures to compel compliance with court orders and legal obligations.

Nonsupport may be due to the personality problems of the husband and father which inhibit his holding a job and meeting his obligations to support his family. In many countries one of the most serious of these problems is alcoholism. Where a man is an alcoholic, or where he cannot or will not work because of some other psychological or personality difficulty, treatment and rehabilitation measures must be available to restore the individual's capacity for work. Unfortunately, even where treatment and rehabilitation measures are available, they may not be effective. The problem of nonsupport remains.

The United States has evolved a procedure which may help resolve the problems of nonsupport where the husband and father is working in another state from that in which his wife and children live. Under the Uniform Support of Dependents' Act, a complaint for nonsupport may be made in the family or domestic relations court of the state in which the woman and children are living. If the husband and father is working in another state, the deposition of the mother and her witnesses is transmitted to the appropriate court of the state where the husband and father is working. The latter is compelled to answer the complaint, and the court in the state where the husband-father is living is empowered to enter an order of support which it can enforce through its own techniques, and procedures. The Uniform Support of Dependents' Act procedure eliminates the necessity for a woman to travel long distances to secure her legal rights for her support and the support of her children.

It was apparent from the Bellagio discussion that none of the delegates was completely satisfied with present methods of dealing with problems of nonsupport of wives and children by men who were legally obligated to furnish support. It was also apparent that a study of the best procedures used in various countries to deal with this problem might be useful in helping to formulate an overall plan to deal effectively with the nonsupport of wives and children. Such a study was also deemed desirable so that the international problems of nonsupport could be resolved.

The Bellagio conference adopted the following resolution which was submitted to the delegates of the Hague Conference for their consideration:

#### RESOLUTION #7

It is recognized that, regardless of economic conditions, the problem of non-support is a serious social problem, which has increased with the increasing mobility of modern society.

In view of the fact that various nations have had quite divergent experiences with the employment of penal, administrative and social measures in dealing with the problem of non-support, it is recommended that an International Committee of the Association Internationale de Droit Penal,

of experts in family law, criminal law and international law, be created for the purpose of making a social-legal investigation of the problem. The existing U. N. Convention of 1958 on this topic and the work of other associations like the Société Internationale des Defense Sociale and the Société Nationale de Criminologie should be studied in the future efforts directed at finding an effective remedy for dealing with the non-support of wives and children which may be adopted on a worldwide basis.

#### APPENDIX

#### *Resolutions Adopted by the Hague Congress*

##### *Resolution I*

1. Fornication should not be made a criminal offence.
2. Adultery should not be made a criminal offence.

##### *Resolution II*

Where incest is punishable, the crime should be limited to sexual relations between ascendants and descendants and between brothers and sisters.

The procedure, particularly in criminal cases of incest, should include studies of the defendant and his social and familial environment.

##### *Resolution III*

The distribution of birth control information and means of preventing conception should only be deemed infractions of the penal law if it violates legal prohibitions against pornography or obscenity, or is contrary to the necessities of protecting youth.

##### *Resolution IV*

In countries which prohibit abortion it is necessary to enlarge the possibility of obtaining legal abortions. In all cases in which the law authorizes a woman to interrupt her pregnancy, such interruption of pregnancy should be carefully regulated by law.

##### *Resolution V*

The criminal law should not prohibit the practice of artificial insemination except in the single case where the insemination takes place without the consent of the woman.

##### *Resolution VI*

The criminal law should prohibit homosexual behavior under the following circumstances:

- a) where force or violence is used to compel deviant or homosexual behavior.
- b) where a minor is involved in homosexual behavior by an adult.
- c) where an individual in a position of trust and confidence abuses his position and involves his ward or the person entrusted to his care in homosexual behavior.
- d) where the homosexual behavior occurs openly or in such a way as to instigate others to perversion.
- e) where it instigates homosexual proxenetism.

Homosexual behavior either male or female between consenting adults which does not violate any of the aforementioned elements should not be prohibited by the criminal law.

*Resolution VII*

The problem of nonsupport of wives and children is a serious social problem, which has increased with the increasing mobility of modern society.

It is recommended that an International Committee of the Association Internationale de Droit Pénal, of experts in family law, criminal law and international law, be created for the purpose of making social-legal investigation of the problem. The existing U.N. Convention of 1958 on this topic and the work of other associations like the Société Internationale de Defense Sociale and the Société Internationale de Criminologie should be studied in future efforts directed at finding effective remedies for dealing with the non-support of wives and children which may be adopted on a worldwide basis.