

SEX OFFENSES: THE BRITISH EXPERIENCE

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INTRODUCTION

It is now widely recognized, as Sir Norwood East has remarked, that "among the flotsam of modern society sexual offenders require special consideration."¹ But certain questions concerning the way in which they should be handled by the criminal law, and whether and how far they should be regarded as amenable to treatment or fit subjects for imprisonment remain just as vexed as ever they were; and this is no less true in Britain than in the United States or anywhere else. Discussion of these questions has always been bedeviled by the strong feelings that the subject so frequently arouses. "Sexual offenders are more liable to be misjudged by prejudice and ignorance, perhaps, than the majority of criminals."²

The subject will here be examined under three main headings: (1) sexual offenses generally (including sexual offenses against young persons); (2) offenses connected with prostitution; and (3) homosexual offenses. With regard to each of these, it is proposed to show what the statistical picture has been in Britain at various times up to the present day, how the community has responded to the various problems presented to it from time to time, and what changes in the law have been suggested and/or implemented.

We have a long history of public concern and controversy about each of these three aspects of the subject in Britain. It was this that led to the appointment of the Departmental Committee on Sexual Offences against Young Persons, which reported in 1925;³ the Street Offences Committee, which reported in 1928;⁴ and the recent Wolfenden Committee on Homosexual Offences and Prostitution, which reported in 1957.⁵ Reference will also be made, among other sources, to the so-called East-Hubert Report of 1939,⁶ the so-called Cambridge Report of 1957,⁷ the Sexual

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¹ W. NORWOOD EAST, *SOCIETY AND THE CRIMINAL* 91 (1949). See also, by the same author, *Sexual Offenders*, in L. RADZINOWICZ & J. W. C. TURNER (Eds.), *MENTAL ABNORMALITY AND CRIME* ch. 9 (1944).

² W. NORWOOD EAST, *SOCIETY AND THE CRIMINAL* 92 (1949).

³ Departmental Committee on Sexual Offences against Young Persons, *Report*, CMD. No. 2561 (1925) [hereinafter cited as CMD. No. 2561].

⁴ Street Offences Committee, *Report*, CMD. No. 3231 (1928) [hereinafter cited as CMD. No. 3231].

⁵ Committee on Homosexual Offences and Prostitution, *Report*, CMND. No. 247 (1957) [hereinafter cited as CMND. No. 247].

⁶ W. NORWOOD EAST & W. H. DEB. HUBERT, *REPORT ON THE PSYCHOLOGICAL TREATMENT OF CRIME* (1939) [hereinafter cited as EAST-HUBERT REPORT].

⁷ CAMBRIDGE DEP'T OF CRIMINAL SCIENCE, *SEXUAL OFFENCES* (1957) [hereinafter cited as CAMBRIDGE REPORT].

Offences Act, 1956,⁸ and the Street Offences Act, 1959,⁹ to mention some of the main supplementary sources.

I

SEXUAL OFFENSES GENERALLY (INCLUDING SEXUAL OFFENSES AGAINST YOUNG PERSONS)

A. The Departmental Committee on Sexual Offences against Young Persons, 1925

The genesis of this Committee lay in the public concern over the undoubted rise in the number of sexual offenses against young persons immediately after World War I and the belief held in some quarters that inadequate penalties were sometimes imposed by the courts. There was also a feeling that those who committed sexual offenses against young persons were often mentally abnormal and ought more frequently to be dealt with as such. These matters were brought to a head following a debate in the House of Commons in July 1923; and in March 1924, two conferences were convened at the Home Office at which persons representing various societies and organizations interested in the subject were present, at the invitation of the Home Secretary. It was there urged that a committee should be appointed to investigate the actual prevalence of these offenses in England and Wales.¹⁰

The Committee was set up in July 1924 and reported in December 1925.¹¹ It was charged with the duty of collecting information and taking evidence about the prevalence of sexual offenses against young persons and "indicating any direction in which . . . the law or its administration might be improved."¹² Evidence was received from many witnesses, including judges, magistrates, police, doctors, and social workers, and the Committee's Report contains a comprehensive survey of this particular area of the criminal law and much that is of interest concerning sexual offenses generally.

No less than forty-three recommendations were made by the Committee, not very many of which, it would appear, were implemented. The Times described the Committee's Report as stating with admirable restraint the facts of the situation and suggesting remedies that were neither extreme nor violent.¹³ The Report shows that it is not really possible to typify these sexual offenders: offenses against young persons were committed by a wide variety of different persons, not all of whom were suffering from any kind of mental disorder. Important recommendations were made concerning the need for medical examinations after conviction, but The Times thought that the most valuable part of the Report was that devoted to the ways and means whereby trial procedure could be improved to insure a full and fair trial without doing further harm to the children concerned.¹⁴

⁸ 4 & 5 Eliz. 2, c. 69.

⁹ 7 & 8 Eliz. 2, c. 57.

¹⁰ CMD. No. 2561, para. 2, at 5.

¹¹ A separate committee was appointed for Scotland and reported in 1926. CMD. No. 2592. Except where indicated, the references and figures in this article relate to England and Wales.

¹² CMD. No. 2561, at 3.

¹³ The Times (London), Dec. 22, 1925.

¹⁴ *Ibid.*

The Committee's most controversial proposal was that the age at which the consent of a female to a sexual act should be a good defense should be raised from sixteen to seventeen years: the Committee was itself divided on this issue, some members being against any change, others urging that the age should be raised to eighteen years.¹⁵ The Committee's recommendation has never been implemented. It was also proposed that the defense of reasonable belief that a girl was above the age of sixteen years, which is available to a first offender under twenty-four years of age, by virtue of the Criminal Law Amendment Act, 1922,¹⁶ should be abolished;¹⁷ but this provision still remains part of English law.

Many other recommendations made by the Committee had to await implementation until the Children and Young Persons Act, 1933;¹⁸ but in September 1926, the Home Office issued a memorandum to magistrates and police calling attention to the sections of the Committee's Report that could be given effect without legislation.¹⁹ It seems to have been the general opinion at the time that the Report represented a distinct advance on this difficult problem.²⁰ The Times thought that the measures of prevention proposed in the Report were of greater importance than changes in the law.²¹

1. *The statistical picture*

The results of the statistical inquiry conducted by the Committee revealed that although there had been no change in regard to the number of offenses of incest and indecent exposure, and a decline in the number of offenses of rape, the number of cases of indecent assault had increased fairly sharply since the end of World War I.²² This trend was contributed to by a tendency to reduce a more serious charge to one of indecent assault in order to have the proceedings completed sooner by way of summary trial, rather than prolong the case by committing to trial at Assizes. "Various reliable sources of evidence incline us to the view," the Committee said, "that this is frequently done in the interests of the child."²³ But even when allowance was made for this contributing factor, the Committee was satisfied that there had been a distinct increase in indecent assaults on boys and girls under sixteen years of age.²⁴

One might comment here that the proportionate increase was nothing like so grave as that which occurred after World War II, details of which are provided in the Cambridge Report. The records from 1937 to 1954 are there analyzed, and it is shown that the proportionate increase in the number of indictable sexual offenses

¹⁵ CMD. No. 2561, para. 38, at 22-24, and recommendation 4, at 84. *But see* the memorandum of dissent by 3 members of the Committee against any change, *id.* at 89; and the memorandum by Miss E. H. Kelly in favor of altering the age to 18. *Id.* at 90-93.

¹⁶ 12 & 13 Geo. 5, c. 56.

¹⁷ CMD. No. 2561, para. 39, at 24-26, and recommendation 5, at 84. *But see* the memorandum of dissent by 2 members of the Committee. *Id.* at 93-94.

¹⁸ 23 & 24 Geo. 5, c. 12.

¹⁹ *Id.* Dec. 23, 1925.

²⁰ CMD. No. 2561, paras. 5-18, at 6-15, esp. para. 8, at 8-9.

²¹ *Id.* para. 9, at 9.

¹⁹ See The Times (London), Sept. 18, 1926.

²¹ *Id.* Dec. 22, 1925.

²⁴ *Id.* para. 18, at 15.

known to the police between 1937 and 1954 was 252 per cent, compared with an approximately sixty per cent increase for all categories of indictable offenses.²⁵ Again, between 1947 and 1954, the offenses of defilement of girls under thirteen years of age known to the police rose by 82.6 per cent, and the offenses of defilement of girls between thirteen and sixteen years of age rose by 98.5 per cent;²⁶ whereas the 1925 Committee was not seriously concerned about these categories.²⁷ It was the increase in the number of indecent assaults that worried the Committee; and, of course, it recognized that there were many more sexual offenses against young persons than the number actually reported.²⁸

2. *Medical examination after conviction*

The Committee recommended that in all cases of indecent exposure, and in all cases of sexual offenses against young persons where the offender has previously been found guilty of a sexual offense or where the court suspects mental disease or defect, there should be a compulsory medical examination after conviction but before sentence.²⁹ The court should take into account the report of the medical examination in its disposition of the offender.

The difficulty in implementing this kind of recommendation is usually said to be the shortage of trained psychiatrists, but it was not for this reason that the Committee appears to have refrained from making any more general requirement for a compulsory medical examination. It is true that the Committee recognized the difficulties that some magistrate courts experienced in obtaining expert reports, and it suggested a solution.³⁰ But it seems that the Committee rather regarded psychiatry as "an obscure branch of science" not yet fully developed, and it suggested that it would be in the interest of the advancement of medical knowledge if some of the difficult borderline cases could be subjected to systematic examination.³¹

The recommendation was not implemented, and the Cambridge Report shows that apart from medical inquiries where insanity or mental deficiency was suspected, an offender was hardly ever remanded for a medical report before being sent to prison, even where repeated sentences of imprisonment were imposed.³² There is clearly room for improvement here. The Wolfenden Committee has made a limited proposal in this direction concerning young persons under twenty-one years of age convicted of a homosexual offense.³³

3. *Habitual sex offenders*

The evidence that the Committee received about habitual sexual offenders does not seem to have borne out the popular idea of the sexual offender against young persons as a hopeless recidivist. "We find that, except in cases of indecent exposure

²⁵ CAMBRIDGE REPORT 3-6.

²⁷ CMD. No. 2561, para. 8, at 9.

²⁹ *Id.* para. 80, at 58-59, and recommendation 28, at 86.

³⁰ *Id.* para. 81, at 59, and recommendation 29, at 86.

³¹ *Id.* para. 80, at 58.

²⁶ *Id.* table I, at 12.

²⁸ *Id.* para. 18, at 15.

³² CAMBRIDGE REPORT 184, 187.

³³ See *infra* p. 358, and CMD. No. 247, paras. 181-89, at 62-65.

and to a lesser extent in indecent assault, it is not common for the sexual offender to have been previously convicted of a similar offence."³⁴ But in cases of indecent exposure, gross indecency, and indecent assault, "the lists of previous convictions are sometimes very long" and no punishment appears to have acted as a deterrent.³⁵

The Committee considered that special action was called for in such cases. Where mental examination reveals that the offender is certifiable as insane or a mental defective, that should solve the problem; but³⁶

where there is no disease or disorder we believe that there would be support for the prolonged detention of men who appear quite incapable of abstaining from indecent exposure or from committing repeated indecent assaults on children.

The Committee recommended that consideration should be given to the possibilities of the prolonged detention in suitable institutions of those who repeatedly commit indecent offenses against young persons. It recognized that "the public mind is distrustful of any kind of indeterminate sentence," but it believed that a prolonged period of detention in a special institution might occasionally effect a cure; and in any case, it would protect the public more effectively than repeated short terms of imprisonment.³⁷

The East-Hubert Report has some bearing on this matter. It was the report of a comprehensive investigation carried out at Wormwood Scrubs prison during the four years commencing March 1934, in order to ascertain the value of psychological treatment in the prevention and cure of crime.³⁸ Much of it is generally relevant to our subject of sexual offenders, and part three of the Report is specifically devoted to a special consideration of sexual offenses. It is pointed out that the short sentences that are so frequently imposed for such offenses as indecent exposure are often insufficient to enable any psychotherapeutic treatment to be effective.³⁹ It was recommended that a special penal institution be set up to deal with abnormal types of criminal. The purposes to be served by such an institution would have to be carefully defined, however, otherwise it would soon be rendered useless and, in fact, unworkable by a flood of unsuitable material; for there would be a natural tendency to refer to the institution any case that presented a problem to the public conscience, judicial authorities, and others.⁴⁰ The Report outlines the four functions that its authors believed such an institution would serve. These include not only the treatment of persons likely to benefit from psychiatric treatment, but the detention of those who are not, "for whom reformative measures, however specialized, seemed useless and the severity and hardship of ordinary prison life inappropriate."⁴¹

The proposal to set up a psychiatric prison-hospital, along the lines suggested in

³⁴ CMD. No. 2561, para. 83, at 60.

³⁵ *Ibid.* at 61.

³⁶ See the letter submitting the Report to the Home Secretary, December 1938. EAST-HUBERT REPORT

ii.

³⁷ *Ibid.* para. 171, at 158.

³⁸ *Ibid.* para. 172, at 159.

³⁹ *Ibid.*

⁴⁰ *Ibid.* and recommendation 30, at 86.

⁴¹ *Ibid.* para. 163, at 155.

the East-Hubert Report, has been accepted by the Prison Commission, and work has already begun on a site at Grendon Underwood, Bucks, where about 300 beds will be made available some time in 1962. With a total prison population of over 26,000, it seems likely that those needing psychiatric treatment and likely to respond will occupy most of the accommodation there. The Wolfenden Committee on Homosexual Offences and Prostitution thought that the number of homosexual offenders who would be sent to this institution would be small.⁴²

To send them to this particular institute would presuppose that they were proper subjects both for the forms of treatment it would provide and for living together with its other members. For a few carefully selected persons this might well be the best solution; but it cannot be a general answer to the problem.

Apart from the laws dealing with habitual offenders generally, we have never enacted in Britain any special criminal law dealing with the habitual sex offender. But the new Mental Health Act, 1959, will, when it comes into force, enable the courts to order the detention of persons found guilty of criminal offenses in a mental hospital on the grounds of mental disorder or to make a guardianship order under the Act.⁴³ The court will have to be satisfied on the evidence of two medical practitioners, at least one of whom must be specially experienced in the diagnosis of mental disorders, that the offender is suffering from mental disorder (which is defined to include psychopathic disorder) and that the mental disorder is of a nature and degree that warrants the detention in a mental hospital or the making of an order for guardianship; and the court must be of the opinion "having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him," that this is the most suitable method of disposing of the case.

Under this new mental health law, psychopathic disorder is recognized for the first time by that name in English law. Section 4(4) defines "psychopathic disorder" as

a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment.

There have been some misgivings about the recognition of this new category of mental disorder, in both medical and legal circles,⁴⁴ and a distinguished sociologist has recently published a devastating attack upon the whole concept.⁴⁵ All that can be said at this stage is that some persistent sexual offenders may well be dealt with

⁴² CMND. No. 247, para. 207, at 70.

⁴³ 7 & 8 Eliz. 2, c. 72, § 60.

⁴⁴ See A. H. Edwards, *The Mental Health Bill: Summary and Legal Considerations*, 9 BRIT. J. DELINQ. 291 (1959); Scott, *The Mental Health Bill and the Psychopath*, I, *id.* at 293; Jones, *The Mental Health Bill and the Psychopath*, II, *id.* at 300. See also Norval Morris's comments on the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, *Report*, CMND. No. 169 (1957), in 21 MODERN L. REV. 63 (1958).

⁴⁵ BARBARA WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* esp. 249 *et seq.* (1959).

under this new law when it comes into effect. But it is unlikely that all sexual or other psychopaths will be so dealt with, and most of them will probably continue to find their way into our penal institutions, where they are a constant source of anxiety and embarrassment to the prison authorities.

4. *Fines*

It is of interest to recall that the 1925 Committee did not believe that fines were suitable for dealing with sexual offenses against young persons, a point of view that recognized and reflected the evidence of witnesses representing large bodies of social workers.⁴⁶ There is a strange parallel in the 1949 report of the Joint Committee on Psychiatry and the Law appointed by the British Medical Association and the Magistrates' Association, entitled *The Criminal Law and Sexual Offenders*. This Committee concluded that⁴⁷

fines should not be imposed on sexual offenders, except in cases where such offenders, after a finding of guilt, refuse to acknowledge their offence, or refuse, or are unable to co-operate in treatment.

But, as the Cambridge Report observes, the attitude of the courts seems to be different. Indeed, there is no other remedy that was more frequently used for sexual offenses in general than the fine.⁴⁸ Nevertheless, it should be noted that the 1925 Committee's recommendation against the use of fines is limited to offenses of indecent assault against young persons. An examination of table forty-four in the Cambridge Report shows that the fine is, in fact, less frequently used in the case of offenses against young males and females.⁴⁹

In the homosexual class it was found that the fine was rarely used for adult offenders who had committed offences against boys [defined as males under sixteen years of age] unless the offence had been either trivial or the offender appeared unlikely to offend again.⁵⁰

5. *Probation*

The 1925 Committee thought that probation was "sometimes suitable where a fine is not. This is especially the case with young offenders." But the opinion is expressed that "probation in cases of sexual offenders should be used with caution."⁵¹ The evidence of the Cambridge Report is that the courts used probation "for no more than 16 per cent of persons found guilty of sexual offences," and less frequently for homosexual than for heterosexual offenses.⁵² This is explained by the large percentage of homosexual offenders who are fined (sixty-six per cent).⁵³ The majority of those placed on probation were convicted of either indecent assaults or indecent exposure,⁵⁴ and a high proportion of persons who had committed offenses against boys under sixteen years of age were placed on probation (eighteen per cent).⁵⁵

⁴⁶ CMD. No. 2561, para. 85, at 62.

⁴⁸ CAMBRIDGE REPORT 218.

⁵⁰ *Id.* at 219.

⁵² CAMBRIDGE REPORT 236.

⁵⁴ *Id.* at 238.

⁴⁷ Para. 63, at 22.

⁴⁹ *Id.* at 220.

⁵¹ CMD. No. 2561, para. 86, at 62.

⁵³ *Ibid.*

⁵⁵ See *id.* table 47, at 237.

6. *Imprisonment*

On imprisonment, the 1925 Committee found evidence of very inadequate sentences in certain cases, having regard to the nature of the offense.⁵⁶ The Committee gave instances of specific cases where the sentences (of from one to four months) were regarded as inadequate. No recommendation was made on this subject, save that the courts should pay heed to the following general considerations when dealing with a man who has committed a sexual offense against a young person:

- a. The contrast between very light sentences given for sexual offenses against young persons and the far heavier ones given for offenses against property "not only shocks all right-minded people but also tends to instil in the community a false sense of values, and to lower the public tone on moral questions."
- b. It may be desirable in some cases in the interests of the child to remove the offender from the neighborhood for a long period.
- c. In all cases of sexual assault, the public mind is reassured to some extent if it knows that the offender is shut off from society for some considerable time, and prevented from doing further harm.⁵⁷

The Cambridge Report reveals that more than half of those who had committed sexual offenses against children were sent to prison, compared with twenty-five per cent of all offenders brought to justice.⁵⁸ Two-thirds of the total number of sexual offenders were detained for short periods not exceeding six months.⁵⁹ But the conclusions drawn in 1957 from these findings are rather different from those reached in 1925. The preponderance of short sentences is said to indicate that the attention of the court was not directed towards reformatory treatment, but towards punishment and the possible deterrence of others.⁶⁰ For it is now widely held that no effective training can be achieved during a short sentence, which is not, therefore, interpreted as having been imposed for that purpose.⁶¹ Moreover, the Cambridge Report says that⁶²

it often appeared that the courts regarded the mentality of [offenders] as not fundamentally different from those who had, for instance, committed offences against property.

But surely, if this is the case, it could be regarded as the very result that the 1925 Committee felt was desirable. It is clear that different interpretations can be placed upon the evidence. In 1925, short sentences were condemned for different reasons than those advanced in 1957 as a basis of criticism. The courts, however, continue to impose them, and the law still allows this to be done.

One of the more interesting findings of the Cambridge Report is the frequency with which sexual offenders have a record of offenses that are not sexual, but include

⁵⁶ CMD. No. 2561, para. 88, at 63.

⁵⁷ *Id.* at 64.

⁵⁸ Compare CAMBRIDGE REPORT 215, with *id.* at 183.

⁵⁹ *Id.* at 215.

⁶⁰ *Id.* at 191.

⁶¹ See the views of the Howard League for Penal Reform summarized in ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS, ALTERNATIVES TO SHORT TERMS OF IMPRISONMENT para. 4 (1957).

⁶² CAMBRIDGE REPORT 191.

such crimes as breaking and entering, and stealing. Nearly one in five of those convicted of sexual offenses for the first time had previous convictions of nonsexual offenses.⁶³ This curious fact is explicable in many different ways. It may be that it is the institutional experience as a result of prior imprisonment that has altered the sexual pattern of behavior. Or it may be that these property crimes are capable of being regarded a part of the syndrome of sexual deviance. As Sir Norwood East has emphasized, the psychiatrist may well see in offenses that are not strictly speaking sexual evidence that points to the crime having been committed for sexual reasons. Although sexual offenders are usually thought of only in connection with the recognized sexual offenses,

the medical conception is wider and includes cases of theft, housebreaking, burglary, common assault and murder if the offence has for its purpose the immediate or delayed gratification of normal or abnormal sexuality.⁶⁴

B. The Sexual Offences Act, 1956 and Law Reform

A complete consolidation of the English law relating to sexual offenses generally took place under the authority of the Consolidation of Enactments (Procedure) Act, 1949,⁶⁵ and was embodied in the Sexual Offences Act, 1956, which came into effect on January 1, 1957. The Act does not effect any substantial change in the law relating to sexual offenses, but simply brings it together in a convenient form within the confines of a single Act of Parliament. The penalties remain substantially unrevised, and the legal definitions of the different offenses are substantially the same.

That there are some deficiencies in the way the law defines offenses in this field has been amply demonstrated by the courts in recent years, and when the Criminal Law Revision Committee was set up in February 1959, one of the first subjects referred to it for consideration was the law relating to indecency with children.⁶⁶ Cases had shown that where a person, without committing an assault, invites a child to handle him indecently, no offense of indecent assault is committed.⁶⁷ The Committee's First Report, published in August 1959,⁶⁸ recommends that the law be changed in such a way as to stop up this gap in the law that the decisions of the courts have revealed; and the proposals have been generally welcomed.⁶⁹

Whether any further changes are needed in the English criminal law relating to sexual offenses, other than a review of the penalties provided, it is difficult to say. On the subject of the legal penalties, a comprehensive review of the whole structure of the English law has been recommended by a committee appointed by JUSTICE (the British Section of the International Commission of Jurists) on which the present

⁶³ *Id.* at 155.

⁶⁴ W. NORWOOD EAST, *SOCIETY AND THE CRIMINAL* 94 (1949).

⁶⁵ 12, 13 & 14 Geo. 6, c. 33.

⁶⁶ For the Committee's terms of reference, see the White Paper entitled *Penal Practice in a Changing Society, Aspects of Future Development*, CMND. No. 645, para. 15 (1959) (England and Wales).

⁶⁷ See, e.g., *Fairclough v. Whipp*, [1951] 2 All E.R. 834 (D.C.); *D.P.P. v. Rogers*, [1953] 1 Weekly L.R. 1017 (D.C.); and *Williams v. Gibbs*, [1958] Crim. C. & C. 138 (D.C.)

⁶⁸ Criminal Law Revision Committee, *First Report (Indecency with Children)*, CMND. No. 835 (1959).

⁶⁹ See editorial comment, 1959 CRIM. L. REV. 682-83 (1959).

writer was privileged to serve.⁷⁰ Certain anomalies were observed by the Wolfenden Committee in connection with homosexual offenses and prostitution.⁷¹ In the wake of each sensational sexual crime or series of crimes, there arises a demand for heavier penalties (including capital punishment for sexual murder) or for providing better protection for the community in some way.⁷² One idea canvassed recently, after the murder of a little girl of four by a known sexual pervert, was for the creation of a register of sexual offenders and their addresses, similar to the California register. Another suggestion was for the provision of a special institution for sex offenders against young children. The Home Office has not given any encouragement to these extreme solutions, and the official hope is that we can get by without resort to them.⁷³

II

OFFENSES CONNECTED WITH PROSTITUTION

Much of the early concern with prostitution was connected with the suppression of the white slave traffic, in which international organizations have taken a prominent part.⁷⁴ But the more general problems created by the streetwalker have also been the concern of women's organizations in Britain, and there is a long history of attempts to change the law.⁷⁵ Prior to the Report of the Wolfenden Committee on Homosexual Offences and Prostitution, in 1957, the most comprehensive examination of the problem of street offenses was that carried out by the Street Offences Committee, a departmental committee that reported in 1928.

A. The Report of the Street Offences Committee, 1928

Set up in October 1927, this Committee, presided over by Rt. Hon. Hugh Macmillan, K.C., issued its Report in November 1928. It was charged with the duty of inquiring into⁷⁶

the law and practice regarding offences against the criminal law in connection with prostitution and solicitation for immoral purposes in streets and public places and other offences against decency and good order, and to report what changes, if any, are . . . desirable.

Again, as with the 1925 Committee, a wide variety of evidence was collected from civil servants, magistrates, probation officers, and other social workers connected with

⁷⁰ JUSTICE, LEGAL PENALTIES, THE NEED FOR REVALUATION (1959).

⁷¹ See, e.g., CMND. No. 247, para. 100, at 37, which refers to the fact that the maximum penalty for indecent assaults on males is ten years' imprisonment, compared with two years' for indecent assault on a female.

⁷² See the question asked by Mr. Osborne in the House of Commons, April 16, 1959. 603 H.C. DEB. (5th ser.) 1124 (1959).

⁷³ See the adjournment debate on the motion by Mr. Frederic Harris, M.P., on the protection of children (sexual offenses). 578 H.C. DEB. (5th ser.) 165 *et seq.* (1957). The Home Office reply was given by the Joint Under-Secretary of State for the Home Department (Mr. J. E. S. Simon). *Id.* at 169 *et seq.*

⁷⁴ See a brief account in CMND. No. 247, paras. 342-43, at 111-12.

⁷⁵ See CMD. No. 3231, paras. 26-32, at 14-16.

⁷⁶ *Id.* para. 2, at 5.

the courts, prison officers, and police, as well as from members of the public and representatives of the many organizations interested in the subject.

The Committee began its work by surveying the existing laws and discussing some general considerations of policy. It is pointed out that⁷⁷

in the region of sexual offences, the common law has never taken upon itself the prohibition by criminal sanctions of voluntary illicit intercourse between the sexes, but has confined its intervention to the grosser breaches of sexual morality, such as those which are of unnatural form or aggravated by violence. Neither prostitution nor solicitation are words in themselves descriptive of any offence at common law,

and the penal law on this subject is founded upon special legislation, rather than on any general principle of the common law.

The statute law, moreover, has not been found in any one general enactment or series of enactments, but has been located both in England and Wales and in Scotland in a series of more or less miscellaneous provisions.⁷⁸ The position is further complicated by the existence of local by-laws, whereby local government authorities have power to control public parks and places of recreation; and harbor, dock, and railway authorities have similar powers over their premises. A collection of these statutory enactments is printed in appendix three of the Committee's Report.⁷⁹

1. *Law and morals*

The first observation made by the Committee in its discussion of general considerations of policy is that the subject matter of their terms of reference lay on the borderline between law and morals, and "there is no frontier more controversial."⁸⁰ It pointed out that in general, the law is not concerned with private morals or with ethical sanctions, but it is concerned with the outward conduct of citizens in so far as that conduct injuriously affects the rights of other citizens. It has always been thought right to bring certain forms of conduct within the scope of the criminal law on account of the injury that they occasion to the public in general. It is within this category of offenses, if anywhere, that public solicitation for immoral purposes belongs.

But it should be realized, the Report continues, that the law is concerned with such immorality as gives rise to indecency not because of its immorality, but because of its offensiveness. Certain citizens may so abuse the general rights to use the streets as to amount to an interference with the enjoyment of that right by other citizens. "While immoral relations between sexes may be no concern of the law, solicitations to immorality may be so conducted as to be offensive to the public." The criterion here is what offends "the average sensibility of the man or woman in the street."⁸¹

Two alternative courses were advocated before this Committee. On the one

⁷⁷ *Id.* para. 8, at 8.

⁷⁸ *Id.* para. 10, at 8; see also para. 10-15, at 8-10.

⁷⁹ *Id.* at 38-49.

⁸⁰ *Id.* para. 16, at 10.

⁸¹ *Id.* para. 18, at 11-12.

hand, it was proposed that all legislation specifically dealing with solicitation for immoral purposes should be abolished, as had been proposed in 1926.⁸² According to this school of thought, ably expounded by many women's organizations, instead of such discriminatory legislation against soliciting by women, in future there should be in its place a general offense, applicable to both sexes, involving wilfully causing annoyance to any person by words or behavior in any street or public place. The other argument was that the law of England and Wales should be brought into line with that in Scotland by abolishing the requirement of annoyance, so that soliciting in the streets should henceforth become an offense per se, as an abuse of the public right to use the streets and an affront to public decency.⁸³

2. *The solution proposed*

The Committee did not find itself in agreement with either of these extreme views. It did not think it was expedient to abolish altogether the provisions of the criminal law dealing with solicitation for immoral purposes. "The law has always singled out various types of conduct in the streets for special treatment."⁸⁴ With regard to the requirement of proof of annoyance, the Committee noted that despite a long history of attempts to persuade Parliament to deal with this difficult problem, going back as far as 1882, no progress had been made, but it recognized that the requirement did create real difficulty where it had to be proved, arising from the reluctance of the person or persons solicited to give evidence. To overcome this difficulty, the courts have accepted the evidence of police officers that annoyance was caused—evidence which is often perfunctory.⁸⁵

The Committee preferred that an objective criterion be applied to the conduct in question, so that police evidence would be directed to the nature of the conduct itself rather than to its mental effect upon the persons towards whom it is exhibited.⁸⁶ It suggested that the word "importune" should be employed to express the kind and degree of solicitation of which the law should take cognizance. By this, it understood conduct which is insistent and harassing. Evidence of an observer, such as the police officer making the arrest, could properly be directed to the objective question of importuning.⁸⁷ The Committee proposed a single enactment to replace the existing multifarious provisions of the law in England, Wales, and Scotland, directed against solicitation in the streets and aimed at every person who in any street or public place importunes any person of the opposite sex for immoral purposes.⁸⁸

One consequence of the Committee's solution was that the accused person would no longer be charged as a "common prostitute" and thereby have revealed to the court, before the main issue of guilt had been decided, the damaging fact of her previously having a record of prostitution. This requirement of the law had been strenuously opposed by the women's organizations for the reason already explained,

⁸² Public Places (Order) Bill, 1926.

⁸⁴ *Id.* para. 25, at 14.

⁸⁶ *Id.* para. 35, at 17.

⁸⁸ *Id.* para. 37, at 17.

⁸³ *Id.* para. 22, at 13.

⁸⁵ *Id.* para. 33, at 16.

⁸⁷ *Id.* para. 36, at 17.

and also because the retention of the term "common prostitute" tended to brand convicted women and render their rehabilitation more difficult.⁸⁰ Equally strong objections were raised against any change on the ground that the present law constitutes a valuable protection to innocent women.⁸⁰ The Committee received very little evidence to show that women who were not prostitutes had been charged; and it concluded that the expression "common prostitute" should be omitted from any redefinition of the offense of importuning along the lines that it proposed, and that the law should be drafted in general terms applicable to persons of either sex.⁸¹

The Committee also favored the substitution of a new offense dealing with persons frequenting a street or public place for the purposes of prostitution or solicitation so as to cause a nuisance, in place of the existing legislation dealing with prostitutes loitering, as distinct from actively importuning, for immoral purposes. The evidence of one or more persons aggrieved should be essential to secure a conviction.⁸² There were also a number of minor recommendations that it is unnecessary to discuss in this paper.

3. *Cautions and penalties*

It is important to record that the Committee favored the practice that it found was already followed in some places—in particular, the city of Edinburgh—whereby warnings or cautions were given to offenders the first time they were caught soliciting, instead of an immediate arrest. It thought this should be prescribed in all police orders as a general rule of procedure,⁸³ but it was not until thirty years later, after a further recommendation by the Wolfenden Committee, that this was actually done.⁸⁴

On the subject of penalties, the Committee recommended that the maximum penalties be revised. For a first offense, the maximum penalty should be unchanged, a fine of forty shillings being the usual maximum penalty available. But for second and subsequent offenses, it recommended that increased penalties be imposed, with a power of imprisonment without the option of a fine in the case of repeated offenses. The latter was recommended "with a view especially to enforcing conditions of probation and facilitating reformatory methods of treatment."⁸⁵ The close similarity in the recommendations of the Wolfenden Committee is not without interest.⁸⁶

⁸⁰ *Id.* para. 39, at 18-19.

⁸⁰ *Id.* para. 40, at 19.

⁸¹ *Id.* para. 41, at 19.

⁸² *Id.* para. 38, at 18. See the summary of recommendations. *Id.* at 28. Sir L. Dunning thought this proposal would be a dead letter from the start because it required the evidence of aggrieved persons. THE CHURCH OF ENGLAND MORAL WELFARE COUNCIL, *THE STREET OFFENSES BILL*, para. 21, at 12 (1959), recognized this difficulty and tried to avoid it.

⁸³ CMD. No. 3231, para. 55, at 24.

⁸⁴ See *infra* p. 349.

⁸⁵ CMD. No. 3231, para. 61, at 26-27.

⁸⁶ See *infra* p. 349.

B. The Report of the Wolfenden Committee on Homosexual Offences
and Prostitution, 1957

The Wolfenden Committee was set up in August 1954 as a departmental committee to consider the law and practice relating to homosexual offenses and offenses against the criminal law in connection with prostitution and solicitation for immoral purposes, and to report what changes, if any, were desirable. It reported in September 1957, and as a result of the recommendations concerning prostitution and solicitation, the Street Offences Act, 1959, was passed and is now in force.

1. *The statistical picture*

The Committee's task with regard to the second part of its terms of reference undoubtedly stemmed from the recognition that the visible and obvious presence of large numbers of prostitutes in the streets of some parts of London and of a few provincial towns was a matter of grave public concern.⁹⁷ Whether, in fact, there has been an increase in the actual number of prostitutes the Committee was unable to find out,⁹⁸ but there certainly had been a sharp rise in the number of prosecutions. The statistical picture presented in table twelve of appendix two of the Wolfenden Report, an extract of which follows, is not a pretty one, showing as it does that the number of prosecutions has risen sharply in recent years:⁹⁹

Year	<i>Street Offenses (England and Wales)</i>	
	<i>Number of prosecutions</i>	<i>Number of convictions</i>
1938	3,280	3,192
1946	4,423	4,393
1952	10,319	10,291
1955	11,916	11,878

This picture is even more alarming when supplemented by the 1958 figures, as follows:¹⁰⁰

1958	19,663	19,536
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Of course, the Committee recognized that the increases in these figures might simply reflect an increase in police activity in this direction, which, in turn, might well depend on public opinion.¹⁰¹

2. *The main defects in the law and their solution*

The Committee reviewed the law in much the same way as its predecessor had done, but it came to slightly different conclusions. It also found that there were two main defects in the way in which the law defined solicitation. The first was the element of annoyance, which, although not part of the law of Scotland, had to be

⁹⁷ CMND. No. 247, para. 229, at 81.

⁹⁸ *Id.* para. 232, at 82.

⁹⁹ *Id.* at 143.

¹⁰⁰ Extracted from Great Britain Home Office *Criminal Statistics (England and Wales)*, CMND. No. 803, table D, at 14, and table 2, at 27 (1958) [hereinafter cited as CMND. No. 803].

¹⁰¹ CMND. No. 247, para. 231, at 81.

proved in every contested case in England and Wales. The second was the use of the term "common prostitute" as part of the definition of the offense.¹⁰²

With regard to the requirement of annoyance, as we have seen, there had been a long history of complaint. The Street Offences Committee had found it objectionable, as did many witnesses before the Wolfenden Committee. The main objection was that proof of annoyance was usually based on a police officer's estimate of the state of mind of the person accosted, who was not himself called to give evidence. The Wolfenden Committee recommended that this requirement be eliminated;¹⁰³ and this has now been done by virtue of the Street Offences Act, 1959, which repeals the multifarious laws on this subject and substitutes a more simple general offense.¹⁰⁴

With regard to the use of the description "common prostitute," it was argued very strongly before the Wolfenden Committee, as before its predecessor, that this was unjust, in that it selects a special class of women and subjects them to penalties without seeking to punish their customers; and "if there were no customers there would be no prostitutes." Not only this, but they are penalized by having this designation affixed to them from the start of the proceedings, which introduces a wholly unfair presumption of guilt. Moreover, having this label attached to them tends to make their reformation more difficult.¹⁰⁵

The Committee did not accept these contentions about the label "common prostitute," saying that it received neither evidence that prostitutes themselves felt a grievance or feared injustice on this score nor evidence that it had interfered with their reformation.¹⁰⁶ The Committee tried to arrive at some alternative formula that would safeguard innocent persons from arrest by using the notion of habitual or persistent conduct; but in the end, it concluded that this was impracticable and that on balance, it was better to retain the words "common prostitute" in the definition of the offense.¹⁰⁷

This conclusion has been criticized and attacked, though without success, by bodies such as the Church of England Moral Welfare Council and in the parliamentary debates on the Street Offences Bill,¹⁰⁸ but the new Act retains the phrase "common prostitute" as part of the definition of the offense. This seems regrettable, and in face of the introduction of the system of informal warnings or cautions, it is really quite unnecessary in order to preserve innocent persons from arrest.¹⁰⁹ In fact, the Act provides in section two a procedure whereby a person who has been cautioned by a police officer in respect of her conduct in a street or public place may apply to the magistrates' court within fourteen days for an order to have the record

¹⁰² *Id.* para. 250, at 85.

¹⁰³ *Id.* paras. 251-56, at 86-87, and recommendations (xix) and (xx), at 116.

¹⁰⁴ 7 & 8 Eliz. 2, c. 57, § 1(1): "It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."

¹⁰⁵ CMND. No. 247, paras. 257-65.

¹⁰⁶ *Id.* para. 259, at 88.

¹⁰⁷ *Id.* paras. 260-62, at 88-89.

¹⁰⁸ H.C. DEB. (5th ser.) 1267 *et seq.* (1959) (House of Commons Second Reading); 216 H.L. DEB. (5th ser.) 72 *et seq.* (1959) (House of Lords Second Reading).

¹⁰⁹ See *infra* note 111 for a description of the "caution" system.

or entry of the caution at the police station expunged, these proceedings to be conducted in camera, unless the woman desires that they be conducted in public. The case for the retention of this derogatory label "common prostitute" has by now worn very thin.

The Wolfenden Committee's failure to deal with curb-crawling by motorists—that is, driving slowly along the streets in the hope of making a pick-up—has also been severely criticized, and it is rather a feeble excuse that the Committee advanced for making no recommendation. It would require the creation of a new offense, it said, and there would be difficulties in proving that a driver was dawdling for the purposes of immoral solicitation; and the possibility of a very damaging charge being leveled against an innocent person was again mentioned.¹¹⁰ But surely the warning system would also be capable of extension to such offenses. The fact is that quite a number of prostitutes and even more of their clients use motor-cars in the course of solicitation.

3. *The new law of prostitution*

The new law of prostitution follows closely the Committee's recommendations for the introduction of heavier penalties for solicitation, coupled with the extension to all areas of the system of cautions as practiced in Edinburgh and Glasgow.¹¹¹ In London, imprisonment was not normally available formerly and the maximum fine was forty shillings. Outside London, the maximum fine was similar, but the courts had power to order imprisonment for not more than fourteen days. In addition, some magistrates made use of their powers to bind over prostitutes to be of good behavior in sums of up to seventy-five pounds; and if the prostitute failed to comply with the order, she forfeited the recognizance, and if she failed to pay the sum of money estreated, she was imprisoned.¹¹²

The Committee proposed a new law that would be of general application, applying alike to London and the provinces, and to both urban and rural areas; and this is what has been enacted. The new penalties are a fine of up to ten pounds for a first offense, twenty-five pounds for a second or subsequent offense, and an alternative or additional penalty of a sentence of imprisonment for a third or subsequent offense, the period of imprisonment not to exceed three months.¹¹³ These are, it is stressed, the maximum penalties, and the courts are at liberty to impose some lesser penalty.

The Committee was well aware that the cost of the higher fines would be passed on to the consumer in the form of increased charges to the prostitute's client, and even that some prostitutes might be forced to become more active on the streets to

¹¹⁰ CMND. No. 247, para. 267, at 90.

¹¹¹ The Lord Chancellor described the system that the Commissioner of Police for the Metropolis is to adopt for giving two cautions before making an arrest in the Second Reading debate on the Street Offences Bill. See *supra* note 108, at 74, 75. The Home Secretary has commended the provincial police to follow the same procedure.

¹¹² See letter by Mr. Alec Grant, *The Observer*, Aug. 23, 1959.

¹¹³ Street Offences Act, 1959, 7 & 8 Eliz. 2, c. 57, § 1(2).

enable them to pay the increased fines.¹¹⁴ But the sanction of imprisonment, it was felt, would act as a deterrent to some degree, and more important, it would act as an incentive in the direction of reform. "We believe that the presence of imprisonment as a possible punishment may make the courts anxious to try, and the individual prostitutes more willing to accept, the use of probation in suitable cases." Since probation requires the consent of the probationer over fourteen years old, and the alternatives in the past were simply small fines, few prostitutes accepted probation even when it was offered to them. It is thought that under the new conditions, some even of the most persistent offenders might accept probation, and the Committee was particularly anxious to encourage the young prostitute to accept probation.¹¹⁵

In this connection, it was thought desirable to give the courts power to remand, in custody if need be, for not more than three weeks, any prostitute convicted for the first or second time of a street offense, in order that a social or medical report might be furnished. This power was thought necessary so that a young prostitute should be given every chance to benefit fully from the kind of help with personal problems that the probation service and the other social services connected with the courts are able to provide. The courts already have power to remand a convicted person, in custody if necessary, for up to three weeks, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, but it was thought by the Committee to be desirable to provide expressly for this in the case of prostitutes.¹¹⁶ The Street Offences Act, 1959, does not contain any provision implementing this recommendation.

The Committee rejected the idea of providing a special system of punishment for prostitutes, including a period of residence in a special establishment. They did not think it would be desirable, practicable, or equitable; and they gave two reasons for this view. First, it would be undesirable to segregate prostitutes in a residential establishment. Secondly, it would be inequitable, because it would involve a breach of the principle that the punishment must bear some relation to the gravity of the offense. Prostitution is not per se a criminal offense, and it is for the act of soliciting that the prostitute is punished. To submit her to a prolonged period of compulsory detention merely because she has committed such an offense would be wrong.¹¹⁷

The Committee, in discussing the possible consequences of its recommendations, reasserted that it was not its aim to make prostitution illegal or to abolish it, but simply to insure that the streets of London and the big provincial cities should be freed from what is offensive or injurious and made tolerable for the ordinary citizen.¹¹⁸ It was recognized that driving prostitution underground in the way proposed may have several serious consequences. It may encourage closer organization of the trade, the development of new classes of middlemen—*e.g.*, taxi-drivers and hotel-porters who will supply addresses—and an extension of the "call-girl" system

¹¹⁴ CMND. No. 247, para. 276, at 93.

¹¹⁶ *Id.* para. 280, at 94.

¹¹⁸ *Id.* para. 285, at 95.

¹¹⁵ *Id.* paras. 277-78, at 93.

¹¹⁷ *Id.* paras. 282-83, at 94-95.

and perhaps the activities of touts. Another possible consequence is an increase in the number of small advertisements placed in shops and local newspapers, offering the services of "masseuses," "models," or "companions." One member of the Committee thought there should be some form of public control over such advertisements.¹¹⁹ The Committee admitted the danger, but thought that such developments would be less injurious than the presence of large numbers of prostitutes on the streets.¹²⁰

It must be recorded as a matter of personal impression that these developments foreseen by the Committee have already taken place or are taking place. There has been talk of the offer for sale on the streets of a "Lady's Directory," giving names and addresses. The small advertisements in the shops have multiplied. But at the same time, the amount of open solicitation in the streets has almost certainly declined. It seems to be generally agreed that the attempt to drive the women off the streets has been remarkably successful.

Some figures have just become available concerning the number of prosecutions under the Street Offences Act, 1959. In the Metropolitan Police Area of London, in the first three months of the Act's operation, the number of prosecutions for offenses against section one of the Act was 464; in the corresponding three-month period in 1958, the number of prosecutions for similar offenses was 4,318.¹²¹ In the first six months of the Act's operation, arrests and summonses for solicitation dropped by 90% in London and by roughly the same proportion in the provinces; and there was a corresponding decline in the number of men arrested for living on immoral earnings.^{121a}

The other figures relate to the number of women sentenced to terms of imprisonment. Between August 16, 1959, when the Act came into force, and October 21, 1959, the number of women sentenced to terms of imprisonment on conviction for offenses under the Act was thirty-three; in addition, fifty-three women served terms of imprisonment in default of payment of a fine.¹²² From these figures, it would appear that only a very small percentage of the women convicted have been imprisoned so far. It should be remarked that the figures for imprisonment relate to the whole country for two months, whereas the figures for prosecutions relate only to the Metropolitan Police Area, but they are for three months. This figure should be compared with the number of women imprisoned in the year 1958 for offenses of prostitution, which was 138.¹²³ It looks as if this number is going to be increased up to 500 receptions per annum, if the present rate of committals is sustained.

¹¹⁹ Mr. James Adair, O.B.E., in his reservations. *Id.* at 122.

¹²⁰ *Id.* paras. 289-90, at 96-97.

¹²¹ Earl Bathurst gave this reply to a question asked by Earl Winterton in the House of Lords, Nov. 25, 1959. 219 H.L. DEB. (5th ser.) 918 (1959).

^{121a} The Observer, April 3, 1960. See also the articles by Mrs. Rosalind Wilkinson in The Sunday Times (London), Dec. 6, 13, and 20, 1959.

¹²² Mr. Vosper gave this reply to a question asked by Mr. Fitch in the House of Commons, Nov. 5, 1959. 612 H.C. DEB. (5th Ser.) 1194 (1959).

¹²³ CMND. No. 803, table 7, at 48-49.

4. *All-night cafes, living on immoral earnings, and the prostitute's client*

It is not proposed to discuss all the many detailed recommendations of the Wolfenden Committee dealing with the use of premises for the purpose of prostitution.¹²⁴ In any case, the new powers proposed for magistrates courts have not, so far, been implemented. But the Street Offences Act, 1959, did go further than the Committee was prepared to go in one direction, viz. in tightening up the law relating to all-night cafes (which the English law insists on calling "refreshment houses").¹²⁵ These are frequently used as places of resort by prostitutes. Another direction in which the Act makes the law more severe is with regard to the penalties for living on immoral earnings, where the maximum penalty was previously two years' imprisonment. The women members of the Wolfenden Committee wanted this increased to five years,¹²⁶ but the majority of the members of the Committee felt the two-year maximum was adequate for this offense.¹²⁷ The Street Offences Act, 1959, raises it to seven years, which seems unnecessarily severe.¹²⁸

Considerable interest attaches to the question whether it is possible to deal with the prostitute's client under the existing law, and whether there should be a new offense to deal with the customer. On the first question, there is a section dealing with a male person who persistently solicits or importunes in a public place for immoral purposes;¹²⁹ and in some places, the police have used this section to deal with males seeking prostitutes on foot and in motor-cars. But recently, a metropolitan magistrate refused to convict under this section, on the ground that this was not the type of conduct that the section was aimed at and that it was customary to associate with the section. The heavy penalties provided—two years' imprisonment is the maximum on conviction on indictment, as distinct from a summary conviction, where the maximum is six months' imprisonment—suggest that the offense is inappropriately invoked in the case of the prostitute's client. It belongs among the homosexual offenses. The Wolfenden Committee recognized that there was nothing in the words to prevent it applying to the solicitation of a female by a male,¹³⁰ but made no recommendation for any change of the law in the direction of the male customer. There are those who believe that the customer should be dealt with either under this section or by creating some new offense. There would be considerable difficulty in framing a new offense.¹³¹

¹²⁴ CMND. No. 247, ch. 11, at 101 *et seq.*

¹²⁵ 7 & 8 Eliz. 2, c. 57, § 3.

¹²⁶ See reservation by Mrs. Cohen, Mrs. Lovibond, and Lady Stopford. CMND. No. 247, at 128.

¹²⁷ *Id.* para. 307, at 101. See generally *id.* ch. 10, at 98 *et seq.*

¹²⁸ The Street Offences Bill § 4 proposed a penalty of 5 years, but this was altered by Parliament to 7 years.

¹²⁹ 4 & 5 Eliz. 2, c. 69, § 32.

¹³⁰ CMND. No. 247, para. 238, at 83.

¹³¹ See the Lord Chancellor's comment in the House of Lords debate on the Second Reading, *supra* note 108, at 76: "What is offensive is the public offer of the prostitute's wares," and the customer is not creating a nuisance. *Sed quaere.*

5. *Licensed brothels*

The Committee very firmly rejected the notion of licensed brothels, which is hardly surprising considering the experience of other countries that have tried this system and the general policy of the nations of the world, which are now nearly all against such a system. All but two European countries have now abolished licensed brothels, and there are now, according to the Committee's Report, 119 "abolitionist" countries as against nineteen countries that still retain tolerated brothels. In the Committee's view, the toleration of brothels by the state would be a retrograde step.¹³²

6. *Research*

The strong support given by the Committee to the need for more research on the etiology of prostitution is very welcome.¹³³ Some interesting studies have recently been undertaken in the hope of providing fuller information not only about the prostitute, but also about her client, and some important papers have appeared since the publication of the Committee's Report.¹³⁴

III

HOMOSEXUAL OFFENSES

The other part of the Wolfenden Committee's terms of reference required it to examine the law and practice relating to homosexual offenses and the treatment of persons convicted of such offenses by the courts. Its principal recommendation, that in favor of legalizing homosexual acts between consenting adults in private, has attracted widespread attention and provoked considerable controversy in Britain; but because of this, perhaps, some of the other recommendations have tended to be overlooked and have been lost sight of. We shall not discuss the main recommendation in detail, but shall say something about the philosophical and moral debate that has arisen out of this recommendation; then, we shall go on to describe the less important recommendations that are worthy of comment.

1. *The main recommendation on consensual relations between adults in private, and the moral debate centered around it*

The overlapping province of law and morals is recognized by everyone in connection with the difficult problem of homosexual offenses, as with offenses connected with prostitution. The Wolfenden Committee saw the sphere of operation of the criminal law in regard to these problems in much the same way as the Street Offences Committee of 1928 perceived it. It believed it was not part of the business of the criminal law to interfere with the private lives of citizens, except in so far as

¹³² CMND. No. 247, paras. 291-96, at 97.

¹³³ *Id.* para. 297, at 98.

¹³⁴ Dr. Trevor Gibbens is conducting some research into the clients of prostitutes. Several articles on prostitution appeared in 9 BRIT. J. DELINQ. no. 3 (1959). See also Gibbens, *Juvenile Prostitution*, 8 *id.* at 3 (1957).

there was an overriding public interest that made it necessary to do so. In this field, the function of the criminal law is "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others."¹³⁵ The Committee mentioned in particular those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence.¹³⁶ It did not regard it as the function of the criminal law to intervene in order to enforce any particular pattern of behavior further than is necessary to carry out these purposes; nor did it believe that the criminal law should try to cover all fields of sexual misbehavior. Indeed, the law does not seek to do so at the present time, for in Britain, adultery and fornication are not criminal offenses; neither is prostitution as distinct from solicitation.¹³⁷ The Committee's view was that while the province of sin and that of crime necessarily overlap, they need not coincide.¹³⁸

This analysis of the relations between law and morals, with particular reference to the proper scope and function of the criminal law, has provoked some criticism, but the approach is not novel. Sir James Fitzjames Stephen said much the same thing in the nineteenth century,¹³⁹ and so did the Street Offences Committee in 1928. The trouble has arisen from trying to apply the analysis to subjects where ignorance and prejudice frequently obscure reason, and where deep feelings are aroused on either side. The Committee admitted that opinion will differ concerning what is offensive, injurious, or inimical to the common good, and also as to what constitutes exploitation or corruption,¹⁴⁰ and Mr. Justice Devlin has observed that this is where its analysis breaks down.¹⁴¹ His own analysis is equally controversial, as we shall see; but let us first see how the Wolfenden Committee formed its estimate of what is offensive or injurious.

The Committee was guided, it tells us, by its estimate of the standards of the community in general, recognizing that not all citizens would agree with this estimate. It thought that the law should not fall too much out of line with public opinion, either by being too much in advance of it or by falling behind. But on this subject, it had not succeeded in discovering an unequivocal public opinion. The Committee was, therefore, forced back upon its own opinion of what was required in the way of the criminal law's intervention.¹⁴²

To this, there would appear to be two answers. The first is that on balance, opinion in Britain now seems to be definitely against the legalization of consensual relations between adult males conducted in private. A Gallup poll taken shortly after the publication of the Wolfenden Committee Report showed that in the public's estimation, the problem of homosexuality did not rank as high in order of importance

¹³⁵ CMND. No. 247, para. 13, at 9-10.

¹³⁶ *Id.* paras. 12-14, at 9-10.

¹³⁷ *Id.* para. 14, at 10.

¹³⁸ See generally, *id.*, paras. 48-61, at 20-24, esp. paras. 49, 52, 61.

¹³⁹ 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND ch. 17 (1883).

¹⁴⁰ CMND. No. 247, para. 15, at 10.

¹⁴¹ PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1959).

¹⁴² CMND. No. 247, paras. 15 and 16, at 10.

as the problem of prostitution, and that only thirty-eight per cent were in favor of private homosexual acts between consenting parties being legalized; forty-seven per cent thought these should still be punished; and fifteen per cent were uncertain.¹⁴³ In a poll of adult education classes conducted at Leeds, almost exactly opposite results were shown, but this is probably a reflection of the composition of the adult student group as compared with the public at large¹⁴⁴—it is obvious that such a group cannot be regarded as representative of the public as a whole. Nor can the Church Assembly, which voted by a narrow majority—155 to 138—in favor of abolition. The national press was quite evenly divided when the Committee's recommendations were published, and the Lord Chancellor gave the divided state of public opinion as the Government's reason for not implementing this part of the Committee's recommendations: the general sense of the community was against any such change.¹⁴⁵ But, of course, as Dicey has so shrewdly observed, circumstances may change, and a change of belief may well come about as a result—even on such a matter as this; for the changed circumstances may incline the majority to hear with favor theories that are not acceptable at the present day.¹⁴⁶

The second answer is that advanced by Mr. Justice Devlin in his lecture to the British Academy in March 1960, in which he accused the Committee of an error of reasoning. It had failed to distinguish between public and private morality: while being prepared to allow private homosexual behavior between consenting adults, it had condemned corruption of the young and living on immoral earnings of a homosexual prostitute; so, in fact, it had assumed and accepted the existence of a public morality by recognizing that in certain circumstances, society does pass a moral judgment and asserts moral standards even in regard to what takes place in private.¹⁴⁷ The learned judge argued that the Committee's approach breaks down because, in requiring special circumstances to be shown in order to justify the intervention of the criminal law, it has defined those special circumstances in terms wide enough to cover the behavior under discussion in this controversy.¹⁴⁸

Mr. Justice Devlin claimed that it is not possible to set theoretical limits to the power of the state to legislate against immorality and to define inflexibly areas of morality into which the law is in no circumstances allowed to enter.¹⁴⁹ In answer to the question, how are the moral judgments of society to be ascertained, the learned judge invoked the standard of the reasonable man, well known to lawyers, which he said is interpreted by the twelve men and women in the jury box in any particular

¹⁴³ Letter by Mr. Henry Durant, of Social Surveys (Gallup Poll) Ltd., to *The Times* (London), Sept. 18, 1958.

¹⁴⁴ See Jepson, *Homosexuality, Capital Punishment, and the Law: Two Questionnaires*, 9 *BRIT. J. DELINQ.* 246 (1959).

¹⁴⁵ House of Lords debate, Dec. 4, 1957, 206 *H.L. DEB.* (5th ser.) 733, 773 (1959).

¹⁴⁶ A. V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 23 (2d ed. 1914).

¹⁴⁷ DEVLIN, *op. cit. supra* note 141, at 10.

¹⁴⁸ *Id.* at 13.

¹⁴⁹ *Id.* at 14.

instance.¹⁵⁰ He preferred to place reliance on what Pollock once called "the practical morality" of juries, which will give expression to the feelings of intolerance, indignation, and disgust that, the judge maintains, are the true forces behind the moral law.¹⁵¹

On this view, it would seem that the legislature should not change the criminal law where it touches upon morals until it has become unworkable by the refusal of juries to convict or has fallen into desuetude by the failure to bring prosecutions. It may well be that it is in this way that we shall be given the green light to go ahead and change the laws relating to homosexual offenses, for Mr. Justice Devlin himself admits that the limits of tolerance shift in the matter of morals.¹⁵² But it might not be necessary to wait so long if a clear lead were given by leaders of opinion in the country.

The learned judge's penetrating criticism of the Wolfenden Committee's "error of jurisprudence"¹⁵³ called forth a spirited reply from the Professor of Jurisprudence of the University of Oxford, Professor H. L. A. Hart.¹⁵⁴ He argued that before turning general moral feeling into criminal legislation, the legislator should pause to consider whether it is not based upon ignorance, misunderstanding, and superstition about the matter, however much indignation and disgust is felt about it. He should consider whether there is a false assumption about the dangers to society that the conduct involves and whether other equally relevant factors have not been overlooked. He stressed a need for a critical scrutiny of our laws that in the judge's view seemed hardly necessary or appropriate. One might simply add that when the Times leader, which received the judge's lecture favorably, remarked that there was a moving and welcome humility in the conception that society should not be asked to give its reasons for refusing to tolerate what, in its heart, it feels intolerable,¹⁵⁵ this comment drew the retort from a correspondent that he feared we were less humble than we used to be: time was when we burned old women because, without giving reasons, we felt in our hearts that witchcraft was intolerable.¹⁵⁶ In other words, this argument based on public morality, like arguments based on the rule of law, involves riding rather an unruly horse.

It will be seen that this debate concerning the main recommendation of the Wolfenden Committee relating to homosexual offenses has been conducted on a somewhat lofty plane—on a rather philosophical level—at least in academic circles, and more practical questions concerning the dangers of blackmail and the effectiveness of criminal prohibitions that the police can only enforce in a small minority of the cases that actually occur have been neglected. Again, the question how far the consent of the other party should be capable of modifying the legal responsibility for

¹⁵⁰ *Id.* at 16.

¹⁵¹ *Id.* at 17.

¹⁵² *Id.* at 18.

¹⁵³ *Id.* at 23.

¹⁵⁴ Hart, *Immorality and Treason*, 62 LISTENER 162 (1959).

¹⁵⁵ The Times (London), March 19, 1959.

¹⁵⁶ Letter from Rev. H. A. Williams, *id.* March 24, 1959. See also letters from Sir Henry Slessor, *ibid.*; Mr. P. J. Noble, *id.* March 25, 1959.

a person's behavior towards him is another aspect of the matter that has scarcely been explored, though it is true that Mr. Justice Devlin touched upon it,¹⁵⁷ and it has been discussed by Lord Denning, both in the House of Lords and elsewhere.¹⁵⁸

2. *The other findings and recommendations*

Turning briefly to the other findings and recommendations concerning homosexual offenses, on the medical side, it should be noted that the Committee's analysis of the homosexual condition¹⁵⁹ and the treatment prospects,¹⁶⁰ while it is sober and realistic and accepts the need for more research and rejects the notion of disease, has been severely castigated by Dr. Peter Scott for its clinical inadequacy,¹⁶¹ and by Drs. Curran and Whitby, themselves members of the Committee, for oversimplifying the clinical picture.¹⁶²

The principal minor recommendations concern the reclassification of the homosexual offenses, the reform of penalties, and the procedure for instituting proceedings, etc. It is recommended that buggery be reclassified as a misdemeanor instead of a felony¹⁶³ and that the maximum penalties available be revised.¹⁶⁴ The main revision is with regard to consensual acts between an adult person and a person over sixteen and under twenty-one years of age, where it is proposed that the penalty be revised upwards from two to five years' imprisonment; but some members of the Committee favored a more drastic downwards revision, including abolition of the distinction between buggery and other homosexual offenses where there is no consent.¹⁶⁵ The most extreme liberal view is represented by Dr. Curran, who would make the maximum penalty for indecent assault the same as for gross indecency (two years),¹⁶⁶ which is going further than Dr. Whitby was prepared to go.¹⁶⁷ There seems to be a good case for looking again at the question of maximum penalties for homosexual offenses, now that it seems unlikely that Parliament will proceed immediately to alter the legal definitions of the offenses.

There is also a case for implementing recommendation four, to the effect that no proceedings be taken in respect of a homosexual act (other than indecent assault) committed in private by a person under twenty-one years of age without the sanction of the Attorney General, unless taken by the Director of Public Prosecutions.¹⁶⁸ Indeed, it is not clear why the same consent should not be required before pro-

¹⁵⁷ DEVLIN, *op. cit. supra* note 141, at 8.

¹⁵⁸ House of Lords debate, note 145 *supra*, at 806 *et seq.*; *Bravery v. Bravery*, [1954] 1 Weekly L. R. 1169, 1180 (C.A.). See also Hall Williams, *The Wolfenden Report—An Appraisal*, 29 POL. Q. 132, 136-37 (1958).

¹⁵⁹ CMND. No. 247, paras. 17-36, at 11-17.

¹⁶⁰ *Id.* paras. 191-212, at 66-72.

¹⁶¹ Scott, *Psychiatric Aspects of the Wolfenden Report*, 9 BRIT. J. DELINQ. 20 (1958).

¹⁶² In a note appended to the treatment section of the Report. CMND. No. 247, at 72-76.

¹⁶³ *Id.* para. 94, at 36, and recommendation (viii), at 115.

¹⁶⁴ *Id.* paras. 90-91, at 34-35, and recommendation (vii), at 115.

¹⁶⁵ See the reservation by Drs. Whitby and Curran, Lady Stopford, and Mrs. Cohen. *Id.* at 123-24.

¹⁶⁶ Further reservation by Dr. Curran. *Id.* at 126-28.

¹⁶⁷ Further reservation by Dr. Whitby. *Id.* at 125-26.

¹⁶⁸ *Id.* para. 72, at 27-28, and recommendation (iv), at 115.

ceedings against consenting adults are launched. The Committee also recommended that homosexual offenses revealed incidentally in the course of investigating allegations of blackmail should not normally be made the subject of criminal proceedings.¹⁶⁹

3. *Medical reports and imprisonment*

On the subject of medical reports, the Committee considered the argument in favor of every person found guilty of a homosexual offense being remanded for a medical report prior to sentence, and rejected it on the following grounds:

- a. It did not seem right to single out homosexual offenders from the general body of sexual offenders: if homosexual offenders were to be examined, why not others?
- b. The court's responsibility for sentence should not be undermined. Courts already have power to remand for medical reports and frequently exercise that power (but, according to the Cambridge Report, not frequently enough).
- c. The availability of sufficient experts is doubted.¹⁷⁰

Even the more limited suggestion that before sending a person found guilty of a homosexual offense to prison for the first time, the courts should be required to obtain a medical report, was not accepted.¹⁷¹ Instead, the Committee was content to recommend that the courts be required to obtain a medical report in respect of every person under twenty-one years of age convicted for the first time of a homosexual offense.¹⁷² So far, nothing has been done to implement this recommendation.

It still seems likely, therefore, that the majority of serious homosexual offenders will be sent to prison for fairly long terms, while large numbers of the offenders guilty of the less serious offenses will simply be fined. The Committee suggested that there is room for the more extensive use of probation, coupled with a condition for medical treatment.¹⁷³ Within the prisons, considerable efforts are being made in the treatment of psychologically disturbed offenders, especially by group methods, but there is considerable room for improvement: very little is done for the homosexual offender.

Estrogen treatment is forbidden in the prisons of England and Wales, but not, it seems, in Scotland; and the Committee recommended that it be made available.¹⁷⁴ Castration was discussed very briefly (seven and one-half lines), and dismissed on the ground that there is no guarantee that this operation removes either the desires or the ability to fulfil them.¹⁷⁵ Recently a man who had been convicted of a serious sexual attack and sentenced to four years' imprisonment appealed to the Court of

¹⁶⁹ *Id.* para. 112, at 40-41, and recommendation (ix), at 115.

¹⁷⁰ *Id.* paras. 181-85, at 62-64.

¹⁷¹ *Id.* para. 186, at 64-65.

¹⁷² *Id.* para. 187, at 65, and recommendation (xvi), at 116.

¹⁷³ *Id.* paras. 198-200, at 68-69.

¹⁷⁴ *Id.* paras. 209-11, at 71-72, and recommendation (xvii), at 116.

¹⁷⁵ *Id.* para. 212, at 72.

Criminal Appeal against his sentence, and the question of castration was raised in a novel form: Would the Court give its blessing to such an operation being carried out in prison? The Court held that it was not part of its function to give any such direction. The prisoner offered to undergo hormone treatment on release, if put on probation; but the Court held that it was impossible to supervise such a condition of probation, and the appeal was dismissed.¹⁷⁶

4. *The Statistical picture*

The statistical picture presented in the Wolfenden Committee Report shows that the number of homosexual offenses known to the police has increased considerably in recent years; but, as in the case of prostitution, it is difficult to say how far these figures are conditioned by the efficiency and intensity of police activity.¹⁷⁷ The Committee cautiously concluded that whatever the truth about the increase in the number of offenses, the fact is that homosexual behavior is practiced by a small minority of the population, and the position should be seen in its proper perspective.¹⁷⁸ The following is an extract of the figures in table one of appendix two of the Report:¹⁷⁹

Number of Homosexual Offenses Known to the Police (England and Wales)

<i>Year</i>	<i>Buggery</i>	<i>Indecent assault etc.</i>	<i>Gross indecency</i>	<i>Total</i>
1938	134	822	320	1276
1946	247	1523	561	2331
1952	670	3087	1686	5443
1955	766	3556	2322	6644

The figures for 1958, which can be compared, are as follows:¹⁸⁰

1958	625	2969	1877	5471
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It will be observed that in the first full year since the publication of the Wolfenden Committee Report for which figures are available, there has been a decline in the number of offenses known to the police. There has been a corresponding decline in the number of prosecutions and convictions. It will be interesting to see whether this continues.

CONCLUSION

We have described the British experience in dealing with sexual offenders generally—including sexual offenses against young persons, about which there has been special concern—offenses connected with prostitution, and homosexual offenses. There has been constant concern about these matters in Britain, and many problems

¹⁷⁶ *Regina v. Cowburn*, Court of Criminal Appeal, May 11, 1959, reported in *The Times* (London), May 12, 1959; [1959] CRIM. L. REV. 590; see also Havard, *R. v. Cowburn*, *id.* at 554. See also *Castration for Sexual Offenders: A Commentary on a Recent Case*, 27 MEDICO-LEGAL J. 136 (1959); Binney, *Legal Aspects of Sterilisation*, 25 MEDICO-LEGAL J. 111 (1957).

¹⁷⁷ CMND. No. 247, para. 43, at 19.

¹⁷⁸ *Id.* para. 47, at 20.

¹⁷⁹ *Id.* at 130.

¹⁸⁰ CMND. No. 803, table A, at 2.

have been raised with regard to each group of offenders. For example, the question of compulsory medical examinations, detention of persistent offenders in special institutions, the length of imprisonment, the use of probation and fines, and the question how far the law should interfere with the private lives of citizens in this area of sexual conduct. Although we have flirted with the idea of special institutions, no sexual offender laws have been passed in Britain similar to those existing in some jurisdictions, but the recent Mental Health Act, 1959, may be invoked with regard to some sexual offenders. No dramatic remedies appear likely to be adopted, but we shall look to the patient evolution of our institutions and laws from generation to generation, profiting all the time from the experience of our predecessors, and maybe learning some things from our own experience and that of other countries.