

Sex Law Reform in an International Perspective: England and Wales and Canada

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Securely rooted in the capricious no man's land between crime and sin, the legal regulation of sexual conduct is remarkably resistant to change and to rational analysis. This probably explains the failure of so many attempts to achieve sex law reforms over the past hundred years. Despite the so-called sexual revolution of the 1960s, progress in bringing laws relating to sex into the Twentieth Century has been modest. This is due to a failure to identify those values that are threatened and those that are protected by attempts to amend the criminal code. In examining these issues, I hope to show that although we have a long way to go, some progress is at last being made—mainly due to the growing influence of feminism and the decline of religious authority.

The fossilized remnants of canonical teaching continue to appear in some of the most recent laws regarding sexual offenses. In Canada, sexual activity between more than two adults in private is still a criminal offense. Futile attempts of this kind to regulate human sexuality are as old as mankind. The Code of Hammurabi, dating from about 1900 B.C., contains several references to marriage, sex, and divorce in its 282 clauses. Hammurabi, King of Babylon (1955-1913 B.C.), even provided a remedy for husbands whose wives refused them sexual intercourse. Unyielding wives were threatened with drowning.

Writing on a similar theme 1,500 years later, Plato (428-348 B.C.), in the *Republic*, proposed: "A woman at twenty years of age may begin to bear children for the state, and may continue to bear them until age forty." "A man," however, "may begin at the age of five and twenty, when he has passed the point at which the pulse beats quickest, and continue to beget children until he be fifty-five."

Compared to the Greek attitude toward sex, which condoned homosexuality, the early Christian teaching was extremely punitive. In this respect it is difficult to refute Joachim Kahl's¹ conclusion that the "New Testament is the work of neurotic Philistines, who regarded human sexuality not as a source of joy, but a source of anxiety; not as a means of expressing love, but as a means of expressing sin."

Fortunately for us the attempts of the church to suppress sexuality except for the purposes of breeding failed. Then, in what has proved to be a vain attempt to maintain authority, the church fathers contrived to regulate the frequency of sexual intercourse. Accordingly, Christians were forbidden to have sex on Sundays, Wednesdays, and Fridays. Sex also was

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prohibited during the forty days of Lent, forty days before Christmas, and for three days before receiving holy communion.

In an strictly impartial way I must point out that the frequency of sexual intercourse was regulated by the Jews in a particularly undemocratic fashion. According to the Talmud, as a minimum, sex was permitted "everyday for them that are unoccupied; twice a week for labourers; once a week for ass drivers; once every thirty days for camel drivers and once every six months for sailors."

Laws Relating to Sexual Conduct

This brief and somewhat eccentric excursion into history will serve to identify two strands in the development of laws relating to sexual conduct, which can be traced for almost 4,000 years from Hammurabi's Code to the present. I refer, of course, to the almost constant suppression of women with the psychosocial concomitants of sexual exploitation and sexual repression. These themes emerge in almost all the legislation concerned with human sexuality. It will be shown, by way of a conclusion, that the acid test of reform is the extent to which the new legislation supports sexual equality and favors a decrease in the control by the state of sexual expression.

In this article, which is primarily concerned with the recent attempts to reform laws regulating sexual conduct, I examine six main topics that have been debated by the Criminal Law Revision Committee in England and Wales in 1980² and the Law Reform Commission of Canada in 1978³: (1) Rape and spousal immunity, (2) Age of consent, (3) Incest, (4) Protecting mentally retarded persons, (5) Homosexuality, and (6) Bestiality.

To avoid launching prematurely into a discussion of these topics, it is necessary to examine the views of the English and the Canadian Law Reform Commissions on the purposes to be served by the criminal law. These views are summarized in Table 1.

The consensus of the English and the Canadian Law Reform Commissions on the need to preserve public order and decency and the need to protect children and special groups from sexual exploitation should be noted.

The Canadian concern to protect the integrity of the person, whatever that means, contrasts with the more paternalistic English tendency to protect a wide variety of people from what is offensive and corrupting. Some

Table 1. Purposes of the Law

<p>England and Wales</p> <ul style="list-style-type: none"> ● Preserve public order and decency ● Protect citizens from what is offensive or injurious ● Provide safeguards against exploitation and corruption of others <p>Wolfenden Committee on Homosexual Offences and Prostitution. U.K. 1957. (Adapted)</p>	<p>Canada</p> <ul style="list-style-type: none"> ● Safeguard public decency ● Protect the integrity of the person ● Protect children and special groups <p>Law Reform Commission of Canada, 1978.</p>
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hints of what the English Criminal Law Revision Committee had in mind are revealed later. At this point, for the sake of accuracy, it is necessary to confess that the English Criminal Law Revision Committee, in the early pages of its report, decided to adopt the philosophical stand of the Wolfenden Committee.⁴

The Wolfenden Committee, which reported in 1957, was concerned only with homosexual offenses and prostitution. The work of Sir John Wolfenden's Committee is, perhaps, best remembered for its clarion statement: "It is not, in our view, the function of the law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behaviour." As a result of this and the subsequent amendments in the Sexual Offences Act, 1967, buggery and gross indecency by men are no longer punishable provided the participants are consenting adults over 21 years of age and provided their sexual acts occur in private and no other persons are present.

This, it should be noted, does little or nothing to halt the harassment of homosexuals in England and Wales whose partners are less than age 21. Since the illiberal aspects of the Wolfenden Report have been astutely analyzed by the late Dr. Jonas Robitscher,⁵ there is no need to pursue the matter here. All that needs to be done is emphasize that, in adopting the Wolfenden standards, the English Criminal Law Revision Committee has perpetuated the traditionally punitive attitudes toward public manifestations of homosexuality. This is not surprising since the Committee consisted of four judges, eight eminent lawyers (all Queen's Counsellors), and only two women, one of them a judge. All of the members appeared to accept, without question, Patrick Devlin's view that the criminal law serves to enforce traditional morality, which is "also the morality of the common man." This overriding concern with the protection of morality colors almost all of the recommendations of the English Criminal Law Reform Committee and accounts for its differences with the Canadian counterpart.

The sexual revolution was late in reaching Canada,⁶ so there was much catching up to be done. Until 1969, the dissemination of birth control information, abortion, and prostitution and homosexual acts between consenting adults in private were all criminal offenses subject to imprisonment. At the same time, sexual sterilization of mental defectives was permitted by law in Alberta until 1971, and in British Columbia until 1973.

Prime Minister Trudeau's quixotic injunction in 1969, "There is no place for the State in the bedrooms of the nation," opened up a new era for sex law reform. Up to that time, it was said that every type of sexual activity was permitted by law in Canada, providing it took place in private, in the dark, and preferably alone.

Although abortion is now permitted by law in Canada, it is still illegal except when performed by a qualified medical practitioner in an accredited or approved hospital. But even qualified medical specialists are not permitted to operate without first receiving a certificate from the hospital's Therapeutic Abortion Committee, stating that the continuation of the patient's pregnancy "would or would be likely to endanger her life or health."

The catch is that Canadian hospitals, which are all tax supported, are not obliged to set up Therapeutic Abortion Committees. This means that, although sanctioned by law, abortion for health reasons is still not available to women, especially to poor women, in many parts of Canada.

This paradoxical attitude toward abortion is not the only anomaly in Canadian law. Although there has been an increase in the number of unsolved brutal rapes, the police continue to harass relatively inoffensive homosexuals and to confiscate so-called pornographic publications. These and related inequities were considered in the report of the Canadian Law Reform Commission published in November 1978. Some of the Commission's recommendations, to be reviewed later, have been incorporated into law. One of the most contentious issues, the law relating to rape, will be considered from English and Canadian perspectives.

Rape and Spousal Immunity

An unusual opportunity to examine the politics of sex law reform was provided by the passing by Parliament of Bill C-27, an Act to amend the Criminal Code in relation to sexual offenses, on August 4, 1982.⁷ This Act, described as one of the most crucial pieces of social and legal legislation to be dealt with for a long time, was passed (with great difficulty) a few hours before the Parliament of Canada adjourned for its summer recess. The passage of this legislation, which took about four years to achieve, was the result of strenuous lobbying and painful back-room compromises.

As in many other jurisdictions, the number of reported rape cases in Canada falls below the actual number of offenses. This is largely due to the stigma that attaches itself to the rape victim who was likely to have her past sexual history used, by defense lawyers, as evidence against her. The conviction rate for rape has traditionally been much lower than the conviction rate for other serious assaults—52 percent compared with 82 percent.

The high probability of a rapist being acquitted or given a noncustodial

Table 2. Rape

England and Wales

- The offence of rape should remain substantially in its present form and punishable with a maximum of life imprisonment
- The offence of rape should be extended to include marital rape

Provisional. Criminal Law Revision Committee, 1980. (Adapted)

Canada

- The offence of rape, attempt to commit rape, and indecent assault should be repealed and replaced by offences of Sexual Interference and Sexual Aggression
 - Spousal immunity to the charge of rape should be abolished
 - Bill C-127 (C-53) (House of Commons, 4/8/82)
- Sexual offences:
1. Touching etc. minimum of violence
 2. Sexual assault with a weapon, threats or causing bodily harm
 3. Aggravated sexual assault, wounding or endangering life

Law Reform Commission of Canada, 1978. (Adapted)

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sentence has, for many years, been condemned by women's groups across Canada. The Government's tardy response, by no means perfect, probably provides women with greater protection against sexual assault. The ancient crime of rape has been abolished and replaced with an offense called sexual assault, which applies equally to men and women. The new law removes all references to penetration as a condition for sexual assault to have occurred. Sexual assault, a hybrid offense, is a matter of degree. The first level, covering everything from touching to forced sexual intercourse with a minimum of violence, carries a maximum prison sentence of ten years. The second level, sexual assault with a weapon, or with threats to a third party, or causing bodily harm to the complainant, calls for a sentence of up to 14 years. The third level, aggravated sexual assault, involving wounding, maiming, disfiguring, or endangering life, carries a maximum of life imprisonment.

The new legislation, which abolishes spousal immunity, also provides additional protection for complainants. Consent will not be assumed in cases where there is submission or lack of resistance because force is used or threatened. This includes fraud and the exercise of authority, such as in an employer/employee relationship. Corroboration of the complainant's testimony, such as in providing third party evidence of torn clothing and blood stains, is no longer required. The doctrine of "recent complaint," based on the old idea that in order to prove rape, the victim must immediately raise a hue and cry against her assailant, is also eliminated.

Although this new legislation was generally supported by the Opposition parties and by women's groups, there is a feeling that the change of name, from rape to sexual assault, is little more than a semantic exercise. Except in the most obvious and brutal cases, the judicial system will, it is suggested, continue to trivialize coercive sexual acts and penalize the victims. This opinion is strengthened by the Supreme Court decision in the case of Pappajohn,⁸ 1980, which ruled that it is a legitimate defense when a man accused of rape honestly believes that the victim consented to his actions. The defense, known as "mistaken belief," is to some extent incorporated in the new legislation. A jury is required to determine whether any reasonable person, placed in the position of the accused rapist at the time of the incident, would have believed that the victim was consenting.

Although far from perfect, there is little doubt that the new Canadian legislation represents a major advance over the old. If nothing else, it endorses the feminist view that sexual assault is primarily an act of violence, not of passion. It is an assault with sex as the weapon. However, since these arguments apply equally to the United Kingdom as well as to Canada, it is difficult to understand the obvious preference of England's Criminal Law Revision Committee for the *status quo*. In searching for an answer to this question, it was learned that the 15-member committee had a combined age of 878 years, with a range of 51 to 72 years. Five of the members, including its distinguished chairman, The Right Honourable Lord Justice Lawton, having already advanced to the ripe age of 70, are certainly eligible for

membership in the Grey Panthers. The British Government's decision to appoint them to recommend sex law reforms is obviously designed to strike fear in the hearts of the enemies of progress.

Another and perhaps a more compelling reason for its decision to retain the existing rape laws, except in relation to marital rape, was the passing of the Sexual Offences (Amendment) Act as recently as 1976. This followed from the Report of the Advisory Group on the Law of Rape,⁹ chaired by Mrs. Justice Heilbron. The current law, in England and Wales, states that a man commits rape if: "(a) he has unlawful (that is, extra-marital) sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it."

The Criminal Law Revision Committee did not, unfortunately see any reason for improving on this obviously unsatisfactory definition of rape, which applies only to women and to vaginal penetration. But they wisely indicated that this was only a provisional recommendation and invited comments on their decision.

The Criminal Law Revision Committee then proceeded to examine the complex issue of consent. The question they considered most in need of answer was posed in a characteristically dry fashion. To illustrate this issue, they could have used the rape by King Uther of Queen Igraine, who promptly conceived the future King Arthur (of the Round Table).¹⁰ Instead, the Committee asked: "If a woman consents to sexual intercourse with X, thinking that he is Y, and X knows that she thinks he is Y, has she consented to sexual intercourse?" One advantage of this algebraic formulation is that it avoids having to determine if Merlin, the magician, whose spell made it possible for Uther to deceive Igraine, was an accessory to rape.

A question of more immediate concern to women is the extent to which threats may be used to obtain consent or at least compliance. The Committee asked whether the use of threats of dismissal from a job or false promises of employment to induce a woman to permit sexual intercourse constituted consent. The majority of the Committee members concluded that the offense of rape should not apply when a woman has knowingly consented to the defendant putting his penis into her vagina. They also concluded that mistakes as to the identity of the man or the purpose for which penetration was made—for example, as a form of medical treatment—do not amount to rape.

This was not the unanimous opinion of the Committee. A minority view was that "while there may be sound arguments for not extending the law of rape so as to include all, or some other forms of fraud, threats or intimidation, there can be none, other than a desire for legal tidiness, for excluding from the law of rape, conduct which is now rape." "The crucial question to be asked in rape cases, for the past hundred years," they said, "has not been whether the act was against the woman's will but whether it was without her consent."

With this extremely important distinction in mind we can now consider

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the question of age in relation to consent. In this context, consent is only obtained when the participants freely, but not necessarily equally, engage in a mutually agreed upon activity. The question becomes controversial when one has to decide at what age children or other dependent persons are capable of giving consent for a particular purpose.

Age of Consent

In its Report on the Age of Consent in Relation to Sexual Offences,¹¹ the British Committee points out that for 700 years the criminal law has by statute prohibited men from having sexual intercourse with girls below a certain age. Originally 12 in 1275, the age was raised to 13 in 1875 and to 16 in 1885. From the Middle Ages to 1929 in England and Wales, the legal age for marriage was 12 for girls and 14 for boys. The marriage of persons over the age of 16 but under 18 is still subject to parental consent. The legal systems in England and Wales and in Canada are reluctant to accept the fact that substantial numbers of under-age boys and girls are sexually active. In 1977 more than 5,000 pregnancies were recorded in Britain among girls below the age of 16. In the same period, only 3,681 offenses came to the notice of the police. Comparable Canadian data for 1977 shows that 323 girls under age 15 gave birth to live infants and 665 abortions were performed on girls in this age group.

It is commonly assumed that the partners in such sexual relationships are close in age. This comforting assumption is not supported by the available statistics. The study of sexual offenses in England and Wales, by Walmsley and White,¹² compared the ages of victims and offenders charged with Unlawful Sexual Intercourse with girls aged 13-15. The consensual nature of the act can be inferred from the absence of criminal charges in these cases. Among 589 such offenses in 1973, involving girls under 16, only 42 percent of the offenders were under the age of 20. Of the remainder, 39 percent were under 30; 14 percent were under 40, and 4 percent under 60 years of age. Comparable but unpublished data from Metropolitan Toronto, showing a very similar trend, confirm that sexually active young girls do not invariably choose partners of a similar age.

Table 3. Age of Consent

England and Wales

- The age of consent for sexual intercourse with a girl should remain at 16
- The minimum age for homosexual relations between males should be reduced to 18 (Minority report suggests 16)

Provisional. Criminal Law Revision Committee, 1980. (Adapted)

Canada

- Everyone who, for sexual purposes, . . . touches a person with or without consent is guilty of an indictable offence
- This should apply to both sexes and not be limited to sexual intercourse
- Everyone who, for sexual purposes, . . . touches a person 14 years of age but under 18, whose consent was obtained by the exercise of authority or exploitation is guilty of an indictable offence

Law Reform Commission of Canada, 1978. (Adapted)

The practice of police discretion, in relation to under-age sex, indicates that many young people are cautioned and diverted from the criminal justice system. The study, "Policing the Age of Consent," by Mawby,¹³ indicates that the offender is much more likely to be cautioned if it is discovered that the girl enticed the man to have sex with her. The fact that the young girl was willing and experienced justified cautioning rather than charging the man in 13 (36 percent) of Mawby's cases. This seems to contradict West's observation: "However willing or even importunate the female, her contribution is not recognized in law; only the male is the offender."

In accepting that it was rare for juveniles, under the age of 17, to be prosecuted for having unlawful sex, the English Advisory Committee and the Criminal Law Revision Committee rejected the idea of establishing some fixed age difference between the parties. The maximum penalty for sexual intercourse with a girl under 16 should, they proposed, be two years imprisonment. Where a girl is under 13, it should remain at imprisonment for life. The Committee was satisfied that the continued and wise exercise of police discretion would be sufficient to protect from the wrath of the law young men seduced by precocious Lolitas.

Mawby's study of police cautioning in Sheffield raises a number of disturbing questions that appear to have been ignored by the Law Revision Committee. For example, he notes that in some cases the sexual offense was discovered by the police who were interrogating the girls in whom they had no prior grounds for suspecting intercourse. In one case, the girl was questioned by the police who were called to deal with a noisy party. Mawby asks: "The extent to which the police cause harm in these cases is one issue. However, a perhaps more disturbing question is whether this is just the tip of the iceberg—how many other girls, who have not had sexual intercourse, are intimately questioned by the police; how do they react to this?" In supporting the need to change the law, Mawby suggests that one needs to look even more closely at the operation of the law, "to see whether much of it is unnecessary or even harmful."

At the risk of sounding chauvinistic, I must confess to being more favorably impressed with the Canadian Law Reform Commission's treatment of this contentious issue than with the English Advisory Committee's treatment. The former reasoned that, when two adolescents engage in sexual acts, it is perhaps inappropriate to treat the matter with great severity, since in many cases it is the natural outcome of normal sexual development. "The consequences of such conduct," they stated, "will usually be far more effectively dealt with by family or child welfare law, in family or juvenile courts." This position appears to have been accepted by the Government, which proposed that there can be no offense if both parties are under 14. When the young person is between 14 and 16, no crime is committed if the accused: (a) is not more than three years older; (b) believed the complainant to be over 16; or, (c) the accused is less responsible than the complainant.¹⁵

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Two other issues need to be mentioned before leaving the matter of age of consent. The age of consent in special relationships is considered first. This is not as controversial as the age of consent in relation to homosexuality, which has proved to be an extremely contentious issue.

An unusual opportunity to examine the practices in various jurisdictions concerning the age of consent in relation to hetero- and homosexual acts and in special relationships, appears in the Policy Advisory Committee's report. By way of background, it should be noted that under the Canadian Criminal Code it is an offense for a man to have sexual intercourse with a female, of previously chaste character under the age of 21, who is in his employment or is under his control or direction or receives her wages from him. The Dutch penal code, containing similar provisions, includes other power relationships, such as in the case of teachers, physicians, and officials in charge of prisons and hospitals. In Holland as well as in Canada, protection is provided for women in special relationships under the age of 21. The comparable age in Sweden and Denmark is 18 years.

The Canadian Law Reform Commission was generally in favor of abolishing these special forms of protection for persons over the age of 16 because there are more effective forms of redress for persons who are dismissed from employment for refusing to submit to their employer's importunities. However, the Commission was in favor of protecting dependent persons from sexual exploitation, up to the age of 18. The English Policy Advisory Committee was, surprisingly, much less concerned about the need to protect dependent persons and concluded: "we do not think that young women age 16 or 17 need the protection of the criminal law against their teachers, employers, youth club leaders, or those to whom their supervision or care is entrusted."

Turning now to the issue of consent in relation to homosexual acts, it may be useful to examine Table 4 (next page).

This shows that in Denmark, France, Holland, Italy, Norway, Poland, and Sweden no distinction is made between hetero- and homosexual acts. West Germany sets the age of consent at 18 for homosexual acts. The comparable age in Canada and Scotland is (currently) 21. There are intriguing philosophical differences between England and Wales and Canada in relation to homosexual acts.

Unlike the Canadian Law Reform Commission, which opted to "degenderize" sexual offenses and treat both sexes equally before the law, the Policy Advisory Committee in England and Wales decided that, in relation to homosexuality, boys need more protection than girls. Accordingly, they proposed that the minimum age of consent for heterosexual acts should be 16 and 18 for homosexual relations between males. Except for girls under 16, English law does not prohibit consensual lesbian activity. The Criminal Law Review Committee saw no reason to change this long-standing arrangement.

This view was, however, opposed by five of the eight women members

Table 4.

SHOWING AGES OF CONSENT FOR HETEROSEXUAL, HOMOSEXUAL AND SPECIAL RELATIONSHIPS IN SELECTED COUNTRIES																		
SELECTED COUNTRIES	AGES: Heterosexual					AGES: Homosexual					AGES: Special Relationships							
	14	15	16	17	18	15	16	17	18	19	20	21	18	19	20	21		
USSR																	Criminal Offence	?
CANADA																		
ENGLAND & WALES																		?
NEW ZEALAND																	Criminal Offence	?
NORWAY																		?
HOLLAND																		
ITALY																		?
SCOTLAND																		?
DENMARK																		?
POLAND																		?
SWEDEN																		?
FRANCE																		?
WEST GERMANY																		?
YUGOSLAVIA																		?

of the Policy Advisory Committee. They accepted the views of the Wolfendon Committee, the Dutch Speijer Committee,¹⁶ and the evidence presented by the Royal College of Psychiatrists that a person's primary sexual orientation is fixed early in life and definitely before the age of 16. On this basis they proposed

law should not discriminate between male and female unless there are strong reasons for doing so. A minimum age of 16 would put young men engaging in homosexual relations on par with young women engaging in either homosexual or heterosexual relations.

And they concluded: "By 16 the individual should be free to make his own decisions on these matters, as far as the law is concerned." A very similar position was taken by Canada's National Action Committee on the Status of Women.¹⁷

Although such views are generally accepted as progressive and reflective of a much more open attitude toward sex, they have been condemned as repressive by various groups of homosexuals who are, or at least were, in favor of the complete abolition of the age of consent for all consensual sexual relationships. This view was promoted in the late 1960s by a San Francisco group reputed to be concerned with extending the sexual rights of children. These, they said, included the right to have sexual relationships with parents and other loving adults. Similar views were expressed in Britain by the Pedophile Information Exchange, which in 1974 campaigned for the legal and social acceptance of pedophilia. In the face of intense public

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hostility, the PIE changed its tactics. Under the broad banner of Children's Rights they campaigned for the right of children to have sex with adults.¹⁸

Unpopular though it may be, a strong case may still be made for the complete abolition of the age of consent for hetero- and homosexual relationships. This does not mean encouraging or even condoning sexual contacts between children and adults. Instead, one needs to consider whether the criminal law is the best available instrument for regulating sexual conduct. This question is carefully examined by West.¹⁴ He points out, supporting the abolition of an age of consent, that all forms of unwelcome, exploitive, or violent sexual contact with children would still remain criminal offenses. Parents and guardians who are concerned about the consensual relationships between their children and adults would still have access to Child Welfare legislation specifically designed to protect children from all forms of abuse, neglect, and moral danger. The protection provided by the criminal law, says West, may be much more damaging to the child than the initial offense. In support of this view, he quotes with approval the work of Mohr¹⁹ and Gibbens.²⁰ The latter's research, published in 1963, confirmed that "molested children made to appear in court are more likely to show emotional disturbance subsequently than similar children dealt with informally by social workers." "This is," adds West, "a powerful reason for trying to decriminalise such incidents."

Since I strongly support his view, it seems appropriate to conclude this section with another of Professor West's penetrating observations. He writes:

It might be further objected that, without an official prosecution, positions of trust in schools and children's homes might become more readily open to men with pedophilic tendencies. In practice, such abuses are best prevented by a careful staff recruitment policy, the dismissal of anyone found misbehaving, and the reporting of incidents to the bodies which regulate or discipline professional workers. The occasional criminal prosecution is not a particularly effective means of general control, and has the great disadvantage of exposing the individual children concerned to an unnecessarily harrowing experience.

Incest

Since the incest taboo is ancient and still very powerful, it is surprising to note that it only became a criminal offense in England and Wales as recently as 1908. Up to that time it was essentially a matter for the ecclesiastical courts. In Scotland, however, incest has been a criminal offense since 1567.

The English law is stated in the Sexual Offences Act, 1956:

Sec. 10 (1) "It is an offence for a man to have sexual intercourse with a woman whom he knows to be his grand-daughter, daughter, sister or mother."

Sec. 11 (1) "It is an offence for a woman of the age of 16 or over to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by consent."

Where the female is under 13, the maximum penalty is life imprisonment. In all other cases the maximum is seven years.

Unlike in England and Wales, incest in Canada includes homosexual acts. The Criminal Code, 150 (1) states:

Every one commits incest who, knowing that another person is by blood relationship his or her parent, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

Half-brothers and half-sisters are included. The maximum penalty is 14 years imprisonment, but if the female did not consent, the punishment need not be imposed on her.

Major philosophical differences between the English and the Canadian law reformers are revealed in the proposals concerning incest.

In recommending that incest should be removed from the criminal code, the Canadian Law Reform Commission realized it was inviting harsh criticism. There was no surprise when Parliament rejected their advice. But they were, I suspect, quite unprepared for the hostility directed against them by the public. This should be a lesson for those of us who are inclined, in the course of professional work, to take a somewhat nonchalant attitude toward consensual sexual relations between adult family members.

Although confusing and not entirely logical, the proposals of the English Criminal Law Revision Committee seem to reflect more accurately the sharp and deep differences of opinion about how the criminal law should deal with incest. Part of the problem is that most people in society have fixed notions about the meaning of incest. In discussing this topic with students over the years, I discovered that, for many of them, the paradigm of incest is the rape of a defenseless child by a father or older brother. They are, for example, astonished to learn that in Canada a 70-year-old man was imprisoned for consensual sexual intercourse with his 43-year-old unmarried daughter. They had been living together, as man and wife, for many years. The absence of objective data on the incidence and character of incest

Table 5. Incest

England and Wales

- The maximum penalty for incest, life imprisonment, should apply to a man who commits incest with a girl under 13 years. Seven years imprisonment should apply in all other cases
- Incest between mother and son and grandfather and granddaughter should remain an offence
- Except for incest between brother and sister—a party to incest below an age to be specified—18? should be exempted from criminal liability
- Should incest remain an offence at all ages or only when the female is below 18 or 21?

Provisional. Criminal Law Revision Committee, 1980. (Adapted)

Canada

- Decriminalize consensual sexual intercourse between related adults

Law Reform Commission of Canada, 1978.

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behavior compounds the problem and makes it virtually impossible to take an entirely rational approach to incest, even if this were permitted by our individual or collective unconscious.

Despite the spate of articles, books, and tracts published in the past few years, most of what we know about incest comes from criminal trials, clinical records, or autobiographies of incest victims. The pioneer clinical research by Cormier,²¹ Cooper,²² and their colleagues from McGill University have been enormously influential in shaping professional attitudes, including those of judges and lawyers.

The socioclinical study of incest undertaken by Gigeroff²³ and his colleagues from the Clarke Institute of Psychiatry, Forensic Clinic, appears to have provided a foundation for the Canadian Law Reform Committee's recommendations. Gigeroff's data show the range of relationships involved in incest on the basis of an examination of 33 incest and 66 incest behavior cases referred to the Forensic Clinic between 1956 and 1973. The most frequent relationship was father/daughter, 26 (78 percent); the next most frequent was brother/sister, 4 (12 percent). The rest were single cases of nephew/aunt, brother/brother, father/son.

The incest behavior cases involved sexual acts but not intercourse. Father/daughter cases, 4 (74 percent), were again the most frequent. There were 16 (24 percent) father/step-daughter cases and one involving an uncle and niece. The ages of the victims in the incest and incest behavior cases ranged from 9 years to the 20s.

An unexpected finding was that in the 26 father/daughter cases, only 21 were charged with incest. This resulted in four convictions. The majority of incest charges were dropped or changed to a lesser offense such as gross indecency or contributing to juvenile delinquency. As a result of this study, Gigeroff and his colleagues concluded that:

1. There is no indication that the existing (criminal) code either identifies the problem or acts as a deterrent.
2. The present code does not take into account age differentiation and the tolerance of society for consenting adults.
3. The code does not take into account incestuous relationships, that is, sexual acts other than sexual intercourse between family members who are not blood relations (such as step-daughter or, as in one case, an adopted child).
4. Present sentencing includes procedures that are frequently useless and sometimes antitherapeutic when all family members are considered.
5. The climate of the criminal court is not an appropriate one to deal with these family issues and recommendations.
6. It is recommended that cases involving incest and incestuous behavior be adjudicated in the Juvenile and Family Court.

These recommendations, which in essence endorse the finding of Cormier and his colleagues, were adopted by the Canadian Law Reform Commission. However, on the basis of very similar statistical data, the English Criminal Law Revision Committee reached almost opposite conclusions.

The Walmsley and White study examined the cases of 129 persons, including 5 females, who were convicted of incest or attempted incest in England and Wales in 1973. Although the sources were different, the proportion of paternal and sibling incest cases was similar to the Gigeroff's Forensic Clinic cohort. Almost three-quarters of the English cases had committed father/daughter incest, and almost one-quarter involved brother/sister incest. There were also 4 cases of maternal incest and one involving a grandfather and granddaughter. The females convicted included 2 daughters, 2 mothers, and 1 sister. About one-quarter of the paternal and three-quarters of the sibling incest cases involved consensual behavior.

Before leaving this topic it may be useful to note, briefly, the Walmsley and White data on sentencing. Incest by a father with a daughter under the age of 13 was regarded as the most serious offense. Of these offenders, 88 percent were sent to prison. Incest with older daughters was somewhat less likely to provoke custodial sentences. Of fathers involved with daughters over 16, 74 percent were imprisoned. In all, about three-quarters of fathers received custodial sentences compared with one-fifth of brothers. Consensual incest resulted in much less severe sentences than the nonconsensual offenses. Only 34 percent of persons convicted of consensual incest were imprisoned. None of the five women offenders was sent to prison.

Protecting Mentally Retarded Persons

In recent years, mainly due to the Normalization movement,²⁴ there has been an increasing interest in the rights of retarded people to enjoy a sexual life and to marry—should they wish. The U.S. President's Panel on Mental Retardation in 1963²⁵ was one of the first influential bodies to emphasize that the mentally retarded should not categorically be denied the right to marry. This view has now been accepted by the law reform agencies in the U.K. and Canada.

The law in England and Wales (Sec. 7 of the Sexual Offences Act, 1959) makes it an offense for a man to have sexual intercourse with a woman who is a mental defective. Section 1 (3) of the same act makes it an offense for a man to commit buggery or gross indecency with a male defective. It is also an offense, under the Mental Health Act (Sec. 128), for a man who is a staff member or a manager to have unlawful sexual intercourse with a mentally disordered patient.

Table 6. Mentally Handicapped Persons

England and Wales

- A civil procedure should be devised to protect defectives from molestation
- Provisional. Criminal Law Revision Committee, 1980. (Adapted)

Canada

- The mentally handicapped, like other persons, have a right to sexuality. The law ought not to protect them except insofar as their handicap prevents them giving valid consent and from realizing the consequences of their act

Law Reform Commission of Canada, 1978. (Adapted)

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Accepting the advice of its Law Reform Commission, shown in Table 6, the Canadian Parliament has now repealed Section 148 and 149 of the Criminal Code. This enables a retarded woman to have sexual intercourse without placing her male partner in danger of committing a criminal offense. However in Ontario, as in the other provinces, The Marriage Act, 1969, still prohibits the marriage of persons who are mentally defective or mentally ill.

Homosexuality

Since the topic of age of consent has been dealt with, this section will be concerned mainly with the discrimination in the criminal law between hetero- and homosexual acts between adults in private.

It is difficult to believe that the law in England and Wales permits anal intercourse between adult males in private but punishes such intercourse between persons of the opposite sex. In 1973, there were 22 convictions for buggery on a female. Five of these offenses were committed by three husbands, one common-law, and a co-habitee.

Under the Sexual Offences Act of 1967, buggery and gross indecency by male couples in private are no longer punishable provided the participants are consenting persons over the age of 21 and provided no third party is present. This privilege, it must be noted, has not been extended to members of the armed forces or crews of merchant ships. The Canadian Criminal Code also prohibits buggery or acts of gross indecency except between a husband and wife or consenting adults in private providing there are no more than two persons present.

Such matters have been explored in considerable detail by the Criminal Law Revision Committee in England and by the Canadian Law Reform Commission. Canada, it seems, is much more prepared than England and Wales to recommend that the discrimination in the criminal law against homosexuality be abandoned.

Although the Canadian Law Reform Commission has chosen to abolish or at least reduce the discrimination between hetero- and homosexual acts, its recommendations have not been accepted by Parliament. This may seem surprising since the Government of Canada is now committed to an ambitious Charter of Rights and Freedoms.²⁶ In theory, at least, the Charter guarantees freedom of expression and, in 1985, equality of every individual

Table 7. Homosexuality

England and Wales

- The minimum age for homosexual relations between males should be reduced to 18 years. A minority report suggests 16
- Consensual homosexual conduct between adult women in private should continue to be lawful

Provisional. Criminal Law Revision Committee, 1980. Policy Advisory Committee on the Age of Consent in relation to sexual offences, 1981. (Adapted)

Canada

- In regard to sexual offences males and females should be treated equally under the law
- Law Reform Commission of Canada, 1978. (Adapted)

under the law. The chasm between what is preached and what is practiced by the Government can only be understood in terms of the degree of public support it can muster around moral issues such as homosexual behavior.

Democratically elected governments are pragmatically aware that a large body of the electorate is deeply disturbed by homosexuality. This is not surprising since the topic has been the subject of neurotic concern since about the twelfth century. In 1102, for instance, a Church council's edict specified that priests shall be degraded for sodomy and anathematized for "obstinate sodomy." The widespread practice of homosexuality among the clergy at that time reinforced the rule of celibacy. Today, in countries such as Libya and Iran, male homosexuality is a capital offense. It is a criminal offense in Algeria, most of Australia, Cuba, Egypt, Eire, Israel, Morocco, New Zealand, Pakistan, Puerto Rico, the Soviet Union, and all except 21 states in the U.S.A.

The fact that police forces are disinclined to take action against consensual homosexual acts between adults in private places (such as gay bars, clubs, and steambaths) only indicates a temporary truce rather than increased tolerance or respect for so-called Gay Rights. Persistent attacks by the Attorney General of Ontario against the Canadian homosexual publication, *The Body Politic*,²⁷ had their equivalent in the U.K. In dismissing an appeal against a conviction for "conspiracy to corrupt public morals" (concerning the publication of advertisements for homosexual partners), Lord Reid said: "there is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense. Prostitution and gaming afford examples of this difference." "I find nothing in the (Sexual Offences, 1967) Act to indicate that Parliament thought or intended to lay down that indulgence in these practices is not corrupting. I read the Act as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way that is their affair and the law will not interfere. But no licence is given to others to encourage the practice."²⁸

In sharp contrast to this very negative approach to homosexuality, the position taken by the Parliamentary Assembly of the Council of Europe,²⁹ in July 1982, is worth noting. After accepting that all individuals, male and female, having attained the legal age of consent provided by the law of the country they live in, and who are capable of valid personal consent, should enjoy the right to sexual self-determination, the Council of Ministers agreed to transmit the following recommendations, as advice to member governments:

7. Recommends that the Committee of Ministers:
 - i. urge those member states where homosexual acts, even between consenting adults, are liable to criminal prosecutions, to abolish those laws and practices;
 - ii. modify Article 14 of the European Convention on Human Rights by adding to it the notion of "sexual preference";

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- iii. call on the member governments of member states:
 - a. to order the destruction of existing special records on homosexuals, and to abolish the practice of keeping records on homosexuals by the police or any other authority;
 - b. to assure equality of treatment, no more, no less, for homosexuals with regard to employment, pay and job security, particularly in the public sector;
 - c. to ask for the cessation of all compulsory medical action or research designed to alter the sexual orientation of adults;
 - d. to ensure that custody, visiting rights and accommodation of children by their parents should not be restricted on the sole grounds of the homosexual tendencies of one of them;
 - e. to ask prison and other public authorities to be vigilant against the risk of rape and violence against homosexuals in prisons

Bestiality

This penultimate section, dealing with bestiality, will be mercifully brief. In terms of actual harm to society, bestiality is surely the least offensive of sex crimes. Yet it is surprising to note that in England and Wales the maximum penalty for bestiality is the same as for rape and for incest with a young child—that is, life imprisonment. This very severe penalty was, of course, intended to placate the Church, which for centuries has regarded sexual intercourse with an animal as a form of copulation with the devil and an expression of witchcraft. In this context, Westermarck³⁰ in his study, *Christianity and Morals*, points out that the early Christian church regarded copulation with a Jew as a form of bestiality that incurred the same penance. Rattray Taylor³¹ says this is ironic since it was from the Jews that the Christians derived their laws against bestiality. In modern times, psychiatry, having replaced the priesthood, has promoted bestiality from a venial sin to a form of sexual deviation requiring treatment instead of punishment.

Under the Sexual Offences Act (England and Wales), 1956, Sec. 12, the offense of bestiality consists of intercourse per anum or per vaginam by a

Table 8. Bestiality

England and Wales

- Buggery with an animal should be retained as an offence
- A maximum of 5 years imprisonment should be provided where a person:
 1. arranges for others to perform acts of bestiality;
 2. compels another person to commit bestiality;
 3. encourages a child to perform acts of bestiality

Provisional. Criminal Law Revision Committee, 1980. (Adapted)

Canada

- Bestiality would be covered by laws for the protection of animals
- Regulations concerned with public decency would prohibit bestiality in public places or in the public view

Law Reform Commission of Canada, 1978. (Adapted)

man or woman with an animal. It is called bestiality to distinguish it from other forms of buggery. In 1973, there were five convictions for this offense, all men. Their ages ranged from 17 to 60 years. Three of them were placed on probation; one was given a suspended sentence, and another was imprisoned for two years. The Criminal Code of Canada, Section 155, lumps buggery and bestiality together. This indictable offense carries a maximum penalty of 14 years imprisonment. The Criminal Law Revision Committee in England and Wales was divided over the question of bestiality and invited comments on its recommendations. The Canadian Law Reform Commission had no such doubts.

In support of its recommendation to retain the offense of bestiality, the Criminal Law Revision Committee considered the view that total abolition would be unacceptable to public opinion and that nothing should be done to condone bestiality or encourage its increased use in magazines, films, and indecent exhibitions. The Committee also considered the merit of retaining this offense in order to ensure that offenders who needed psychiatric treatment would be able to receive it under a hospital order.

Although it is difficult to take this last concern seriously, some thought needs to be given to the question of bestiality in relation to live sex shows. Assuming that this could be adequately dealt with under the laws that serve to protect public decency, the laws would not protect persons who may be compelled, by force or threats, to commit bestiality in private. In this respect it seems the English Criminal Law Revision Committee might well be advised to adopt the Canadian solution. This involves the generic crime of sexual assault, applying equally to men and women and to all nonconsensual acts.

Conclusions

In examining the proposals for sex law reform in Canada and in England and Wales, it becomes clear that governments find it useful to impose on the long-suffering public essentially ritualistic exercises. They encourage the motions of reform without actually allowing substantive changes to occur. This, it seems to me, is the political equivalent of Karezza, an old-fashioned form of contraception that permits sexual intercourse but prohibits ejaculation. In order to avoid, or at least reduce, the baleful consequences of frustration, I propose by way of a conclusion to answer two key questions.

- Why is sex law reform so difficult to achieve?
- Who benefits from the *status quo*?

Why is sex law reform so difficult to achieve? The material presented here indicates that the gap between what was proposed and what was achieved by way of sex law reform is much greater in Canada than in England and Wales. In retrospect, at least, this is not surprising, since the Canadian Law Reform Commissioners, appointed by the Federal Minister of Justice in 1970, were described as "young tigers, between 35 and 45; young enough to have some juice, old enough to have made their mark."

Twelve years later—alas, no longer young or so full of juice—these paper-trained tigers seem content to bask in the glory of past performances. This comfortable arrangement enables our legislators virtually to ignore the Commission's existence. Thus, after more than four years of Parliamentary activity, all that has been achieved is some long-overdue changes in the obsolete laws concerning rape and the protection of retarded women.

Turning now to the situation in England and Wales, I must confess that my disparaging references to the feeble efforts of the Criminal Law Revision Committee were only in part provoked by the matronly demeanor of its members. I also take exception to the title of its report. In the sense that it implies active consumer participation, the title *Working Paper* is presumptuous and misleading. While undoubtedly learned in the laws, the Committee members, perhaps with one exception, could not be accused of having a vested interest in the practice of sex. As a result, they could only propose that the laws should be tidied up for the benefit of lawyers, but not changed in essence for the benefit of the public.

The result of all this tinkering is that we continue to live with what Rattray Taylor described as "a muddled and arbitrary system of sexual morality." "In fact," he wrote, "it is not in any consistent ethical sense a morality at all. It is essentially a hodge-podge of attitudes derived from the past, upon which is erected a shaky and inconsistent system of laws and social prohibitions."

As a bridge to the next question, it should be noted that astute politicians avoid being associated with attempts to liberalize laws relating to sex. Those who do so risk being attacked by religious groups, excoriated by political opponents, and accused by both of promoting sexual promiscuity and contributing to the moral decline of the nation. A recent example of this occurred at a Liberal Party conference where legislation concerning group sex was debated.³² One person, who was worried about the potential political advantage that the debate could give to the Conservatives, said, "I already have to carry (Prime Minister Pierre) Trudeau on my back . . . (and) if we pass this motion, the Conservatives are going to chop us into bits." Faced with this calamity, the Liberals refused to support the resolution concerned with liberalizing the laws relating to sex between more than two persons.

Who benefits from the *status quo*? I have indicated that insecure politicians, whose primary objective is survival, and leaders of religious sects, which thrive on sin and sexual repression, can always be counted on to oppose even modest attempts to reform laws relating to sexual conduct.³³ But although they are the most vocal and censorious, politicians and zealots are by no means alone in supporting the *status quo*. I propose to argue that lawyers and forensic psychiatrists, and others among us who in more modest ways profit from crime, also have a vested interest in preserving the ancient regime.

This emphasis on personal gain does less than justice to the argument so eloquently developed by the late Dr. Jonas Robitscher.⁵ He argued "that

traditional morality represents a distillation of man's experience and that, if incest or homosexuality has been condemned over thousands of years in a variety of cultures, perhaps those views represent a series of cultural conclusions that those who violated these standards did not usually benefit either themselves or their societies." He concluded, "Perhaps traditional standards do not represent ignorance that should give way before enlightenment of our new era but experience accumulated the hard way that can be ignored only at great cost."

Although he dismissed the argument that, without laws concerning sexual offenses, therapists would be deprived of offenders to treat, Robitscher allowed that changes that undercut our notions of crime could lead to a definition of normality that would provide an umbrella for most offenses. Playing on our primal fears, Robitscher quoted with approval Rollo May who said that the departure from traditional norms was modern man's attempt to appease his feeling of emptiness. To make us feel guilty May asks, "Does the effort to make respectable all new forms of behavior represent an effort to deal with emptiness that cannot succeed and eventually move towards destructiveness?" To add brimstone to the fire to which sex law reformers are apparently doomed, Robitscher quoted with relish Ralph Slovenko's finding, circa 1967, that two out of three Americans regarded the homosexual with disgust and hatred. The fact that similar statements could, in the bad old days, be applied to blacks and other minorities does not appear to have occurred to him.

Since it is impossible here to provide a well-reasoned criticism of his paper, I have perhaps caricatured Robitscher's conclusions. Simply stated, my aim is to argue that the power elites, who have a major investment in preserving the *status quo*, are well supported by distinguished judges, lawyers, and psychiatrists. They serve to provide the rhetoric and the *raison d'être* for the continuation of practices that are clearly inhumane as well as inequitable. It would, however, be unjust to pretend that humanitarians such as Jonas Robitscher were unaware of these dangers. His solution was not to advocate changes that threatened traditional values but to rely instead on attrition through the selective nonenforcement of existing statutes. This convenient arrangement enables lawyers and psychiatrists to make good in both worlds.

Rather than conclude on a discordant note, let me explain my own position vis-à-vis sex law reform. With Foucault,³⁴ I believe the religious, legal, medical, and political concern about sexuality is primarily a means of power and an instrument of dominance. Those who dispute the close connection between political control and the decline of sexual freedom should examine the puritanical attitudes of revolutionary societies such as Albania, China, Cuba, Iran, and the U.S.S.R. Demagogues of all persuasions, from Torquemada onward, know that once you have a people by the balls, their hearts and minds will soon follow. Vestiges of these punitive attitudes toward sex also may be seen in our own democratic societies. Sexual reformers such as Margaret Sanger, Havelock Ellis, and Marie Stopes were

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often branded as subversives whose only purpose in life was to erode the moral foundations of society.

In response to such accusations, I would say that societies such as ours—which perpetuate racial, sexual, and social class inequalities and promote sexual exploitation on a vast scale—need to be changed. I see education and social enlightenment, rather than the blundering machinery of the law, as being the primary mechanism for changing moral values and social attitudes. The implacable opposition of the self-styled “moral majority” to sex education in schools confirms this view.

It is mainly for this reason I believe the criminalization of sexual conduct between consenting adults in private is never justified. This is particularly so since the social and personal damage is usually greater than the harm the law was designed to prevent.

Although it is often very difficult, we must strive to remember the lessons of history. In this respect, I can do no better than commend to you a quotation from Rattray Taylor’s scholarly study, *Sex in History*: “whenever society attempts to restrict expression of the sexual drive more severely than the human constitution will stand, one or more of three things must occur. Either men will defy the taboos, or they will turn to perverted forms of sex, or they will develop psychoneurotic symptoms, such as psychologically caused illness, delusions, hallucinations and hysterical manifestations of various kinds. The stronger ones defy the taboos: the weaker ones turn to indirect forms of expression.”

These perceptive observations will, no doubt, be familiar to forensic psychiatrists and clinical criminologists. Now, because of the omnipresent concern about the virtual epidemic of sexual and other forms of criminal violence, we can no longer avoid examining the socioeconomic and legal contexts in which violence is promoted in our society.

As mental health professionals, I believe we are well qualified by training and experience not only to study these issues but also to provide leadership in the search for a safer and saner society. The extension of human rights and civil liberties is the most effective antidote to violence. This involves the maximum legal protection against all forms of coercion and exploitation and the minimum interference by the state in the private affairs of citizens. In essence, this is what sex law reform is all about.

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