

## THE ATTITUDE OF THE CRIMINAL CODE TO SEXUAL CONDUCT

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WHEN our worthy Honorary Secretary communicated to me the Committee's invitation to address the members of the Society on this subject, I believe he told me the title of the address would be "The Attitude of the Courts to Sexual Conduct". Under this belief I mentioned to one of my brother Judges, who is a foundation member of this Society, that I had undertaken to do so. He at once reduced me to a state of dismay by saying simply "There isn't any". By the time I realized the full implication of this remark I had also realized the awful truth, for that was what it was. Never were the words *Quot judices tot sententiae* more apt than in considering the attitude of the judges individually to the deviations in sexual behaviour that come before them from day to day. But when I received the Society's syllabus for 1957 and found the title of my address to be "The Attitude of the Criminal Law to Sexual Conduct", I realized there was no easy escape from the task such as had been suggested by my learned brother's remark. Indeed, the title selected for the subject rather opened up such a large field that I was at once reduced to a second state of dismay more alarming than the first. This may best be illustrated by asking two questions prompted by that title: first, "the criminal law of what country?" and second, "what sort of sexual conduct?"

Many hundreds of volumes have been written which probably, in one way or another, cover this vast field. But I am sure it is not your desire to be troubled with a consideration of a subject so unwieldy, any more than it is my desire to attempt a discourse of such magnitude. I propose therefore to confine what I have to say under the following headings: (a) a brief historical survey of sexual conduct, (b) the difference between "crime" and "sin", (c) recent trends in regard to treatment of

certain homosexual offences, (d) recent trends in regard to treatment of certain heterosexual offences.

#### HISTORICAL SURVEY

At a very early date in history sex was frankly and openly worshipped. This worship, though embracing many forms in different communities, was fairly universal and not the cult of a few individuals. Figures of gods and kings with the penis erect were common on the walls of temples. Prostitution was regarded as a sacred vocation and prostitutes were consecrated to the support of the temple. They entered upon their duties in much the same way as the modern woman enters a sacred church order, and they are said to have formed a separate and rather superior class. This type of worship is said to have existed in Egypt, India, Syria, Greece, Rome and Spain as well as among some of the countries of what is now Latin America. In this era the goddess, the idol of feminine gender, was supreme.

In about 200 B.C. a cult was introduced into Rome from Assyria. It was the worship of Cybele and Attis. This ceremony consisted in bringing an effigy of the god attached to the bough of a pine tree into the temple of the goddess Cybele, where the priests, after engaging in some form of extravagant dance, leaped forth and seizing swords which were there for the purpose castrated themselves on the spot. All of this is picturesquely described by Sir James Frazer in his work entitled *The Golden Bough*. To the deity the female prostituted herself and the male presented his generative organs and both were held in high esteem and veneration.

Fire worship among the ancients was another form of sex worship. The spires, minarets and architectural perpendiculars of every description are said by Isabel Drummond in her work *The Sex Paradox* to have been symbols of the pyramidal fire, or the penis. Tree worship was yet another form of sex worship and it is said that the phallic and mystic power of the mistletoe derives from the fact that it grows on the oak, a once sacred tree. With the advance of civilization sex worship gradually disappeared. Sex came to be regarded more as a private matter and the yoni and the phallus came to be referred to as the "private parts". With the advent of Christianity the State stepped in to stop the practice of sexual perversion. Secret societies, however, continued to exist for the indulgence of

these sexual perversions. Such were the Gnostics and the Rosicrucians, secret societies of men who scorned association with women. The practice of homosexuality developed in this way to such an extent in Greece that it ultimately took root there as an accepted institution.

A long period of hatred of women seems to have followed and this is said to have persisted until the doctrine of the immaculate conception finally emerged. During that period a good example of the contempt with which women were regarded is to be found in the use of the chastity belt which was padlocked around the pelvis of the wife by the husband as a safeguard against illicit intercourse. But the doctrine of the immaculate conception appears to have changed the status of women once again. This concept of ideal womanhood which entered into family life made necessary a new social standard. Women must combine the qualities of beauty, purity and goodness in order to approximate to divine motherhood. As Drummond has put it, "Woman became the virgin, pure and undefiled before marriage, the protecting mother and the obedient, faithful wife after the knot was tied". But there still remained as man's refuge from this idealized female, the prostitute who, St. Augustine is reported to have said, was as necessary to a city as a sewer was to a palace. So in spite of the teachings of Christianity there lingered a force which was still working towards the degradation of sex life. And it seems that as Christianity progressed so, too, did the trend to sexual perversion. When Christianity began to place restrictions on these perversions and solemnized the institution of marriage, these unnatural, or non-fecundating secret practices, grew in proportion. In Rome masturbation, prostitution, incest and sodomy were rampant. In Greece sodomy was the accepted thing, and the State was not above accepting portion of the revenue resulting from the keeping of brothels for males. The early nations in which sodomy was accorded the greatest tolerance and recognition were the most refined, notably Greece, Egypt and Rome, where similar practices between women, which had their origin in Lesbos, were also tolerated. But despite man's polygamous inclinations and despite his sexual deviations, the ideal of maintaining the integrity of his family life as embodied in monogamous union has persisted throughout the ages. Naturally, therefore, adultery was regarded as the sexual sin meriting retributive punishment. Such punishment in earliest ages in-

cluded cutting off the penis, the ears and nose and putting out the adulterer's eyes in an endeavour to put him out of the way of future temptations. In early Poland torture sufficient to result in self-castration was the remedy. But the punishment and the person upon whom it was inflicted varied greatly throughout the countries of the then known world.

In earlier times, to quote Drummond again, ". . . all the sexual transgressions other than adultery were at first merely . . . civil wrongs whatever the punishment inflicted. They were classed as 'sins' and 'wrongs', the former being offences against God, the latter against one's neighbour. The idea of an offence against the State did not at first produce a true criminal jurisprudence, as a special law or ordinance was directed against every offender. From a very early period in Rome the pontifical or ecclesiastical edicts punished such sins as adultery, sacrilege and perhaps murder." Drummond has also pointed out that it was the Code of Justinian that furnished most of the regulations pertaining to sexual offences of all kinds embodied in modern law and that in the Pandects rape was dealt with by capital punishment. Modern laws punishing sodomy also stem from the Pandects, where by an edict in 538 A.D. Justinian said "We know from the study of Holy Scripture that God, in order to punish such persons, visited His wrath upon those who formerly inhabited the city of Sodom and caused its territory to be consumed by an inextinguishable fire and in this manner He informs us that we should abhor conduct of this description which is contrary to the laws of nature". The extreme penalty which was provided was death by hanging or burning alive. The ancient attitude towards abortion varied considerably but generally speaking it was, until recent times, considered to be culpable and deliberate homicide in most countries. But two factors seem to have remained fairly constant throughout the ages: firstly, the desire to maintain the integrity of family life; and secondly, the desire to revenge the sexual crime of violence. Mabel Agnes Elliott pointed out in her book *Conflicting Penal Theories in Statutory Criminal Law* that Jeremy Bentham classified certain sexual offences as "imaginary offences". These were "acts which produce no real evil but which prejudice, mistake or the ascetic principle have caused to be regarded as offences". "They vary with time and place," he said; "they rise and they decay with the false opinions which serve as their foundation"; and he classified them generally as

sexual offences in which there is neither violence, fraud, nor interference with the rights of others.

Having looked briefly at the history of the sexual conduct of *Homo sapiens* let us now turn to consider for ourselves what we in this late twentieth century regard as criminal in sexual behaviour.

#### "CRIME" AS DISTINGUISHED FROM "SIN"

We may begin by conceding, with Bentham, that all sexual offences involving violence, fraud or interference with the rights of others are sexual crimes properly so called and proper to be dealt with as such. These include such things as sex-motivated murder, rape, adult contribution to juvenile sexual delinquency, as for example offences on young girls and boys, and all offences of an obscene or indecent nature committed publicly. For the rest we must begin by understanding clearly the essential difference between "sin" and "crime" because every human sexual act may in itself be the one or the other. As Carrara pointed out in his *Programma*, "Crime is not a being in fact but a juridical being". The question therefore arises "Are acts which are common to a whole species reasonably to be pronounced criminal?" Should not a deed to be criminal be exceptional in a species and provoke an unfavourable social reaction? Of course crimes which adversely affect the person of the individual who is the object matter of the offence give rise to the greatest resentment. And such crimes are wont to call for punishment of a vindictive character. But modern ideas have relegated the vindictive element in punishment to a very minor role. Reformation and deterrence loom much more largely in the picture. There are, however, many forms of sexual conduct which, although immoral in a high degree, are still not criminal. It may also be that there are many forms of sexual conduct which now come under the operation of the criminal law of many countries but which should not do so. Without descending to particulars to explain the basis for the statement, Drummond expressed the view that in the United States alone 95 per cent. of the male population could be incarcerated if caught in the act in their various illegal sexual practices. I should hesitate long before accepting such a percentage as even remotely applicable to the male population of this country. But all this only serves to illustrate how questionable may be our practice of regarding some forms of sexual behaviour as criminal.

A crime is defined as an unlawful act which is an offence against the public and renders the person guilty of that act liable to punishment. Acts become unlawful in this sense either because they have been held to be so in the development of our common law or because they have been declared to be so by statutory enactment. In some places what has been understood to be the common law relating to criminal wrongdoing has been declared in statutory form in what are called Criminal Codes. Among the Australian States, Queensland, Tasmania and Western Australia have such codes. In Victoria our criminal law is a mixture of common law and statutory enactments. A striking reminder of the fact was provided recently, when a matter came before our Court of Criminal Appeal of which I was a member. The question raised was an important one and involved considerable discussion as to whether a man who had intercourse with a woman who consented to it under the false and fraudulent belief induced by him that they had been lawfully married was guilty of the crime of rape. On that occasion I found myself to be the dissenting minority because I was of opinion that such conduct though cruel, callous and deceitful was nevertheless not the crime of rape. The majority, however, held that such conduct amounted to the crime of rape, and so rape it is in Victoria from now on unless some higher tribunal says otherwise. I mention that case only for the purpose of illustrating the growth of the common law because the statute law of this State provides no definition of the crime of rape but only lays down the law for its punishment. In passing I may add that by statute that punishment was altered about seven or eight years ago from the sentence of death to one of a maximum term of twenty years' imprisonment.

So sexual crimes are those acts which are offences against the public either by common law or statute and which are punishable. Sin, on the other hand, consists in free transgression of the law of God by thought, word, deed, or neglect to do what is enjoined therein. So that whilst it may be that an act is both criminal and sinful it should not be forgotten that crime does not necessarily imply moral wrongdoing, and that sin is not (and indeed cannot be) always punishable by the State. This is well illustrated by the fact that whilst homosexual acts committed in private between males amount to criminal conduct, the same class of acts committed in private between females do not. Yet both clearly would be regarded as sinful. This some-

what illogical result is indicative of a lack of cohesion in thought concerning sexual conduct of a private nature and the public attitude towards it. Of course it is unnecessary to say that criminology has not yet reached the dignity of a science and, as Sir Norwood East has pointed out, the ordinary citizen is tempted to appraise sexual misconduct in accordance with the manner in which it personally affronts him rather than by the measure of its social importance or its significance as an individual shortcoming.

Kenny has pointed out that the English law regarding sexual offences does not inflict criminal penalties upon all those acts which ecclesiastical law prohibits and used to punish, and which the law of contract still visits with the sanction of nullity, but it selects for criminal prohibition only those in which there is also present some further element—whether of abnormality or violence or fraud or widespread combination—that provokes such a general popular disgust as will make it certain that prosecutors and witnesses and jurymen will be content to see the prohibition actually enforced.

And so in substance the result is that sexual conduct amounting to crime falls today into three classes, heterosexual, homosexual and exhibitionist offences, included in which last class are offences of indecency which are dealt with under local government bye-laws and the like. There are certain elements common to these three classes. These have been conveniently set out in the Report of the Cambridge Department of Criminal Science, published under the title *Sexual Offences* (Macmillan, London, 1957) which contains a most instructive preface by Professor Radzinowicz. I quote from p. 363 of the Report:

“First, there are acts of violence or physical interference with a victim against his or her will which are common law offences against the person quite independently of the indecency or sexual motive involved. Under this heading fall, from the heterosexual class: rape, attempted rape, assault with intent to rape, procuring sexual intercourse by threats and indecent assaults on unwilling females, and, from the homosexual class: sodomy, attempted sodomy, assault with intent to commit sodomy, and indecent assaults on unwilling males. Quite apart from their sexual aspect these offences are infringements of the right of the victims to the immunity of their persons.

“Secondly, there are offences of sexual intercourse consented to in fact by the girls or women involved but made criminal by

the legislature as part of a policy of protecting the young, the mentally unsound, and the closely related, and of avoiding the unhappy results of intercourse with them. Under this heading fall offences of sexual intercourse with girls under 13 years of age, girls aged 13 to 16 years, female idiots and imbeciles, and mental defectives, and of course the crime of incest.

"Thirdly, there are offences of indecent conduct with girls or boys under 16 years of age which although effected with the *de facto* consent of the victim are punished as indecent assaults under the same principle of protection of those of tender years.

"Fourthly, there are certain offences which are punishable, despite the consent of the other persons involved to their commission, because of the attitude of the law to the conduct which takes place. Under this heading fall sodomy and attempted sodomy between willing parties whether male with male or male with female, and acts of gross indecency between consenting adult males. Bestiality is also within this principle.

"Fifthly, there are offences which involve no physical contact with the victim but which are prohibited in part as nuisances offensive to the public and in part because of their danger as preliminaries to other offences. These are the offences of solicitation by men for immoral purposes, indecent exposure and some indecencies under local acts and bye-laws, though the latter are frequently wide enough to cover homosexual conduct amounting to the offence of gross indecency between males."

It is necessary to point out in connection with the second class of offences dealt with in the foregoing summary that the age groups in which offences against girls are dealt with in Victoria differ somewhat from those in England. Here by our Crimes Act such offences are dealt with in groups in which the age limits of the girls concerned are fixed at 10, 16 and 18 years.

I have already adverted to the anomaly of regarding homosexuality between consenting adult males as criminal whilst similar conduct between consenting adult females is not so regarded. Looking back now at the summary of sexual offences recognized by law it is suggested that a similar anomaly is seen in the distinction made by the law between heterosexual and homosexual acts. Of course the purpose of attempting to regulate sexual conduct is not to prevent sin as such. Even if it were, it would be difficult to justify the selection of some only of the sexual sins for punishment. It must be assumed that deterrence is the fundamental element in making certain sexual

conduct punishable as criminal. This being so, it is curious that the criminal law takes no account of such antisocial conduct as adultery, seduction of a husband or wife, and illegitimate parenthood, but nevertheless regards as criminal homosexual sins between consenting adult males. In so doing the State would seem to have departed from the principle of not legislating to shield mature citizens from private wrongdoing. Earlier in this paper I referred to the punishment provided in early times for those guilty of adultery. The changed attitude towards adultery was made manifest in England in 1858 when at the time of the passing of the Divorce Act the suggestion that it should be treated as a criminal offence was decisively rejected.

No doubt it is because of these anomalies to which I have referred that there is a growing conviction that some degree of reform of the law is desirable. Definite trends are to be seen in relation to certain types of sexual conduct, both homosexual and heterosexual, which are at present regarded as criminal and it is to these trends that I now propose to turn. I take first the matter of homosexuality between consenting adult males.

#### RECENT TRENDS IN REGARD TO CERTAIN HOMOSEXUAL OFFENCES

As you are no doubt aware the Home Office is that part of the British Government Ministry that controls the police and the prosecution of crime. A Departmental Committee of this office is at present conducting an investigation under the chairmanship of Sir John Wolfenden concerning the rise in homosexuality and prostitution in Britain since the end of World War II. Certain groups of clergymen, lawyers, doctors and sociologists have been assisting the Home Office in this investigation and it is to the Reports of two such groups that I now propose to direct your attention. They are the Reports of the Church of England Moral Welfare Council, and the Report of a Catholic Committee which was also established for that purpose. But before discussing those Reports I should, I think, tell you something of the findings of the Cambridge Department of Criminal Science resulting from an enquiry conducted by that Department between the years 1950 and 1955. It was found that in 1937-38 indictable sexual offences represented only 1·6 per cent of the total number of crimes recorded by the police, and in 1953-54 in spite of a large increase in these offences the proportion was no more than 3·5 per cent of the total. That Report says (p. 4), "It may, at first sight, be thought that this group of

sexual offences, which over the last twenty years has accounted for less than 4 per cent of the indictable offences annually recorded by the police, is too small to cause much concern. It must, however, be remembered that, to the community, the increase in the various offences against the person, including those involving sexual misconduct, inevitably causes greater anxiety than the rise in offences against property such as larceny and breaking and entering. Little comfort is gained from the knowledge that there has been, in comparison with the nineteen-thirties, a substantial increase in offences against property and that the proportion of sexual offences continued to represent but a small fraction of the total number of offences recorded by the police." Later (p. 7) the Report proceeds:

"The annual number of indictable heterosexual offences has always been greater than the annual number of homosexual offences recorded by the police. But the rate of increase in the number of crimes recorded in the homosexual class has, in recent years, been far greater than the rate of increase in the heterosexual class, so that while in 1937-38 the total of 4,448 indictable sexual crimes was made up of 73 per cent heterosexual and 27 per cent homosexual offences, by 1954, when the total had increased to 15,636, the respective proportions were 59 and 41 per cent.

"The increase in the number of homosexual offences recorded by the police has been very high indeed and since 1947 it has been markedly higher than the increase in heterosexual offences. For every 100 homosexual crimes recorded by the police in 1937-38, 232 were recorded in 1947, as many as 407 in 1951 and no fewer than 530 in 1954. This represents an increase of more than four hundred per cent over the pre-war figures. The increase in heterosexual offences during the same period has been in the neighbourhood of two hundred per cent." Doubtless it was the publication of those figures that galvanized the Home Office into action.

The Report of the Church of England Moral Welfare Committee has now been published under the editorship of Dr. Sherwin Bailey, the Study Secretary of the Council, and this publication carries a foreword contributed by the Lord Bishop of St. Albans which begins with these words: "There are certain problems in our civilization which seem almost insoluble, so that their consideration is repugnant to many thinking people. So for many years much-needed reforms in the laws relating to

homosexual offences and prostitution have been postponed, and even open discussion has been shelved. Yet each generation contains a very few men and women who are equipped—and are called by God—to deal with the causes and treatment of sex difficulties, not only in a pastoral and individual way, but from a much more controversial and general viewpoint.” This further passage from that foreword is also worth quoting:

“With prostitution, on the one hand, we see the law administered so mechanically and the fines and publicity accepted so lightly, that justice is brought into contempt; while on the other hand, with homosexual offences, the law seems sometimes to reach to the other extreme, and men pay the price of blackmail or even suicide to avoid conviction and a heavy prison sentence. In any question of penal reform, those who advocate change must appear to many others to be minimizing offences. The public is apt to feel its emotions outraged and its security threatened by any ‘new deal’ for law breakers. This pattern has been repeated constantly during the last one hundred and fifty years, since the days when children were hanged for minor thefts. Christians have a grave responsibility for their share in laws which need to be framed both to protect the young and society, and yet give clear and open justice to all offenders.

“These questions are not easy, but the issues are so important that we would ask all thoughtful people to read and re-read the conclusions of those who have spent much time and have given costly effort to their investigation.”

This Report is to my mind a most convincing document. I commend it to those of you who are interested to follow up this matter. For our present purposes I think it will suffice for me to read to you what I regard as a useful summary of the Report from the introduction contributed by Dr. Sherwin Bailey. Having considered the moral aspect of homosexual practices he proceeded: “The Church, however, is not concerned simply and solely with moral judgments; it has a pastoral responsibility towards all homosexuals, male and female, practising and non-practising. To counsel the invert, to assist him to attain a satisfactory adjustment to life and to fulfil a useful role in society, and to offer to those who have sinned the Church’s ministry of reconciliation—this, for most parish priests, is a new task and opportunity requiring a knowledge and skill not imparted by the average manual on pastoralia. As yet, sufficient time has not elapsed and enough experience has not been gained

to permit the development of a pastoral technique for handling the problems of the homosexual, which very frequently involve psychological and medical as well as spiritual factors. But we have received so many requests for guidance that we have ventured to set out in Appendix II a few notes which we hope will assist that growing number of priests to whom inverts come for help.

"We must now return to the first criticism mentioned—namely, that the interim report and the Evidence display an excessive leniency towards the homosexual offender. A candid and careful reading of these documents will show that such criticism is quite unfounded. Granted, they are not disfigured by any studious display or 'moral indignation', or any rhetorical outbursts against the so-called 'sin of Sodom'; but neither are they weakened by special pleading or sentimental extenuation. We would reiterate that the attitude of the Church to homosexual practices is well known; our task in submitting Evidence, however, was neither to condemn nor to condone, but to afford such assistance as our experience and researches made possible to a Government enquiry into a question of great difficulty and delicacy.

"In compiling both the Evidence and the Memorandum, and especially the former, two considerations took precedence over all others. First, it seemed to be of paramount importance that the question of homosexual offences should be approached in a strictly impartial and dispassionate spirit. By their handling of the subject, certain sections of the Press had already embarrassed those who were anxious for a sane discussion by inflaming public opinion to a point at which rational judgment had become difficult for the uninformed. In any case, there are few topics in regard to which emotions are more prone to sway reason. In such circumstances, the Church's prime responsibility, both to Christians and to the nation as a whole, was to secure as far as possible an intelligent, unbiased, and calm discussion such as might lead eventually to a solution of the whole problem consistent with the well-being of society and the demands of equity. These ends could hardly have been promoted had the Council issued any statement which deviated from strict objectivity. And it is proper to record that while there is no evidence that this course has been misunderstood by the public, the Council's correspondence files contain abundant proof of the favourable impression created in the country at large by this

refusal to exploit or abuse the occasion. Those few who have complained have evidently confused leniency with objectivity.

"Secondly, due regard had to be paid to the fact that an enquiry into the law and practice in regard to homosexual offences involved considerations of justice no less than of morality. It is unnecessary to emphasize that no solution to a grave social and moral problem can ultimately prove satisfactory if it creates or perpetuates injustice; in the words of the well-known maxim, not only must justice be done, but it must be seen to be done. Examination of the present law as it affects both homosexual practices and prostitution reveals features which cannot but be regarded as inequitable. Such features appear sometimes in the statutes themselves, and sometimes in the mode of administering the law; but wherever they are found, they represent an element of injustice which is foreign to the spirit of British jurisprudence, abhorrent to right-thinking people, and calculated to bring the law into contempt. Since it seemed impossible that the ends of justice could be served by new and harsher impositions, it was inevitable that our submission should recommend revision of the existing law so as to remove its inequalities and its discriminatory clauses.

"Moreover, in urging the repeal of that part of section 11 of the Criminal Law Amendment Act, 1885, which relates to the *private* homosexual practices of consenting males, we were not unmindful of the dangers attendant upon an admission of the law's competence to interfere in the private and personal doings of the citizen. In other countries there has lately been much to remind us of the sinister consequences which can ensue when personal liberty and privacy are not duly respected. To sanction the invasion of that liberty and privacy in the case of one arbitrarily selected kind of sexual immorality would seem to establish a principle capable of dangerous extension and application in unscrupulous hands. To safeguard the personal freedom of the individual in regard to its private conduct, however—even if that freedom be abused (as it is daily by adulterers and fornicators, without punishment) in the commission of immorality—would seem to be inseparable from our witness against those detestable systems which endanger the proper liberty of the subject. In making the private homosexual acts of consenting males cognizable by the law, it would appear that the Act of 1885 inadvertently exceeded the limits of accepted legal practice in the matter of sexual offences, since it sanctioned

such an invasion of that proper liberty as would in other circumstances of a like kind be considered indefensible.

"We would reiterate emphatically that this plea for justice and legal consistency in no way involves the slightest mitigation of the Church's condemnation of sin and of moral evil. Nor does it imply an indifference to the welfare of society. Nevertheless we have kept in mind the Church's duty to see, insofar as may lie in its power, that all men and women receive equal and impartial treatment at the hands of the law, and that individual freedom is not unduly threatened. We do not believe that the ends of morality can ever be served by connivance at injustice. In framing our recommendations, therefore, we have tried fairly and without prejudice to suggest such improvements as would seem to make for juster laws, more justly administered—and in so doing we have endeavoured to consult the interests of society as a whole.

"We hope that this explanation will remove once for all any misunderstanding concerning our Evidence and recommendations, and the views and policy of the Moral Welfare Council."

The substance of the Catholic Report has been outlined in the press though as yet no official copy of it is available here. It states that the purpose of the Catholic group is to make clear to the national legislators what is the Church's viewpoint on the subject. The Committee agreed that the distinction between personal sin and public crime is not always easy to define but that it is "certainly ignored" in existing British legislation in that penal sanctions are imposed for "acts of gross indecency done by consenting adult males in private". The conclusions of the Committee include the fact that imprisonment is largely ineffective for re-orientating persons with homosexual tendencies and usually has a deleterious effect. The Report, whilst pointing out that the homosexual, though entitled to sympathy, must never be allowed to think he is doing no wrong, concludes in these terms: "Morally evil things so far as they do not affect the common good, are not the concern of the legislator. Attempts by the State to enlarge its authority and invade the individual conscience, however high-minded, always fail and frequently do positive harm. It should accordingly be stated that penal sanctions are not justified for the purpose of attempting to restrain sins against sexual morality committed in private by responsible adults."

To complete the picture of the present trends in regard to homosexuality I now refer to the opinion expressed by the Joint Committee on Psychiatry and the Law appointed by the British Medical Association and the Magistrates' Association in 1949 on the subject of whether homosexual practices in private between consenting adults should cease to be criminal. That Committee said: "At present the consent of the other party is under no circumstances a defence to a criminal prosecution. In this respect English law differs from that of most European countries, where the law does not concern itself with homosexual conduct in private among consenting adults. The Committee would like to see an early official inquiry into the advisability of the English law being brought into line with Continental law in respect of the private conduct of consenting adults.

"The corruption, or attempted corruption, of youth, or of those who are immature, must in any case remain punishable. So must homosexual conduct committed in places that are frequented by the public. But it should be realized that any laws penalizing homosexual conduct in private between consenting adults must inevitably be difficult to enforce, since it is unlikely that the police will learn of the offence. But the very fact that abnormal conduct of this kind can be severely punished offers opportunities for a most undesirable form of blackmail. The Committee understands that prosecutions arising out of such blackmail occur from time to time.

"On the other hand, the Committee recognizes that there may be some force in the argument that the fact that homosexual conduct between consenting adults in private is illegal may have a deterrent effect and encourage those addicted to this kind of conduct to control their abnormal desires. This view has been put forward by Sir William Norwood East, late medical member of the Prison Commission.

"It is far from the purpose of this report to recommend any course which would be likely to encourage homosexual conduct. Psychiatrists are as conscious as others that homosexual conduct is both undesirable and dangerous, although they regard it with greater understanding. Therefore, if the law ceased to penalize conduct of this kind in private between consenting adults, strict conditions would have to be laid down. Consent to such conduct should only be accepted if it is genuine and given by those who are self-responsible and adult in fact as well as in age. Further,

if any building were used as a resort for those practising homosexual conduct it should be regarded as a brothel, with all the consequent penalties now existing."

I expect that the views of this Society on this matter will be adumbrated by the discussion which I hope will ensue upon the conclusion of my reading of this paper. The view of one English writer is perhaps worth mentioning. Writing in *The Tablet* of 1st December 1956 concerning the Report of the Catholic Committee, Mr. Leo Gradwell said: "No one will quarrel with the conclusion of the Committee as to abolishing this offence [homosexuality] as between adult males. Indeed, in most cases, unless the offence causes public scandal it is already a dead letter. But many will feel that, although the section of the Act creating it should never have been passed, it is unfortunate that the open step of repeal should have to be taken. It will, I fear, be regarded as a homosexual's charter. I think it was Maurice Baring who said of Paris at the time of the Dreyfus affair, that while it was impossible not to be in favour of Dreyfus, it was terrible to be ranged with a gang who used such methods as the Dreyfusards. Perhaps this is not a bad summing up of the present situation as regards law reform and the law reformers."

#### RECENT TRENDS IN REGARD TO THE TREATMENT OF CERTAIN HETEROSEXUAL OFFENCES

Turning now to the recent trends in regard to heterosexual offences I think time will only admit of some discussion regarding "prostitution". Before coming to that, however, I would mention two other aspects of heterosexual offences merely in passing, though they do seem to me to be of importance. The first is that by reason of the recent decision of the Full Court to which I have already referred the field covered by the offence of rape has probably been considerably extended. Whether this will prove to be a good thing or not I do not know. The word "rape" comes from the Latin "rapio—I seize". To continue to call sexual intercourse procured by fraud "rape" may not in the end prove to be a good thing. It may be that the Legislature should introduce into our Crimes Act in Victoria legislation along the lines of Section 3 of the English Sexual Offences Act 1956 and Section 66 of the Crimes Act of New South Wales, both of which enactments make it an offence to procure unlawful sexual intercourse by false pretences.

The second matter concerns the belief of the accused person as to the age of the girl concerned. In Victoria no belief that an accused person entertains, however reasonably, that the female is of the age to consent can afford any defence. In England it is provided by the Sexual Offences Act 1956 Section 6 as follows: *Sub-section (3)* "A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of 24 and has not previously been charged with a like offence, and he believes her to be of the age of sixteen or over and has reasonable cause for the belief".

My own view based on a long experience in these matters is that the English enactment should be copied in Victoria. I am sure most of us in the law have seen many precocious and sophisticated young misses who although just under 16, the age at which most of our grandmothers were married, have looked to be much more than a match for the gawky youths of ages 17 to 24 who have stood on trial because of them.

But to return to the question of prostitution I should begin by reminding you of what I pointed out concerning this matter in my brief historical survey at the beginning of this paper. It is unnecessary of course to say that St. Augustine's observation was no more than a grudging assent to the proposition that without prostitution you may expect, and will probably get, something far worse. In his *Summa Theologia* he said: "What can be called more sordid, more void of modesty, more full of shame than prostitutes, brothels and every other evil of this kind? Yet remove prostitutes from human affairs and you will pollute all things with lust; set them among honest matrons and you will dishonour all things with disgrace and turpitude." Somewhat similar views were held by later great moral theologians in the persons of Thomas Aquinas and Alfonso di'Liguori. The moral theology involved in the question has been searchingly examined by the Church of England Committee and many extracts from all three of these theologians are to be found in the Report. Substantially the conclusion of the Committee was that prostitution is less of a female than a male problem. I quote from page 58 of the Report: "It is remarkable that in the extensive study which has been lavished upon almost every aspect of prostitution, one alone should have been virtually ignored—namely, the part played therein by the men themselves who resort to prostitutes. Yet on any view of the

matter, this is a question of central and critical importance. When all else has been said, the fact remains that prostitution exists and flourishes mainly because there are men—some of them morally unprincipled and lascivious, others devoid or contemptuous of self-discipline, and others still apparently unaware that fornication is a sin and a double moral standard ethically indefensible—who are willing to purchase (often at an exorbitant price) a momentary sexual entertainment and relief indiscriminately in the embraces of a woman who, in Lecky's words, 'counterfeits with a cold heart the transports of affection, and submits herself as the passive instrument of lust'.

"It is true that the real nature of these squalid transactions is rarely stated in such plain and discrediting terms—no doubt because most students of the subject have been themselves men, and therefore disinclined to advertise the depravity and stupidity of their own sex. Instead, they have romanticized prostitution; they have pleaded the impossibility or the danger of continence; and, above all, they have elaborated the specious but quite unsupportable theory that the prostitute is necessary as 'the guardian of virginal modesty, the channel to carry off adulterous desire, the protector of matrons who fear late maternity: it is her part to act as the shield of the family'. Yet all the time their attitude to this so-called 'guardian of virtue' has betrayed the hollowness of these arguments. In heaping scorn and abuse upon the prostitute, men have simply sought to relieve their own corporate sense of guilt as a sex by an unconvincing display of moral and social indignation against the women whom they have made their accomplices in wrongdoing—just as society has attempted to make the male homosexual offender a scapegoat for the general corruption of its sexual life. In each case there is an evasion of ultimate moral responsibility which has encouraged, not only injustice, but much confusion of thought.

"While it is necessary to emphasize that prostitution is in no small measure a male problem, care must be taken not to minimize or extenuate the part which women also play therein. Often they show themselves ready enough to exploit the lustful propensities of men for pecuniary gain, and are sometimes impelled to this life by their own inordinate sexual desires, which they find it difficult to satisfy so easily in any other way. Moreover, a few wives have always been willing to secure immunity

from their husbands' attentions by condoning or ignoring occasional infidelities. After taking account of these and other factors, however, it still remains true that in prostitution, as in other trades, the laws of supply and demand operate—and that men are active at both ends of the business, as procurers, brothel keepers, and customers.

"What attitude, then, should the Christian adopt towards prostitution? In the first place, regulation (which means, to state it plainly, official provision of facilities for committing the sin of fornication) must be condemned unreservedly as a principle of public policy. This, however, does not imply that the opposite course of repression by legislation should be advocated or encouraged. The law may rightly punish procurement, the keeping of brothels, and offences against order and decency—and it must protect the young; but long experience has shown that it is futile to attempt to crush sexual immorality by statutory measures and police action—and there is no reason to suppose that success is now likely to refute the history of failures in the past."

This branch of the Report concludes with the following recommendations:

1. That there should be a uniform law throughout the country for dealing with accosting and solicitation of one sex by the other.
2. That no special legislation should apply only to "prostitutes" or "common prostitutes", and that these terms should be excised from the laws.
3. That the phrase, "for the purpose of prostitution", should be omitted from the laws, as implying an unprovable assumption and tending to prejudice court proceedings, contrary to the principles of British justice.
4. That there should be no departure in specific instances from the generally accepted principle that the British law does not concern itself with the private irregular or immoral sexual relationships of consenting men and women.
5. That the action of the State should therefore be limited to the protection of the citizen from annoyance or obstruction in the lawful use of the streets and public places.
6. That in all cases where annoyance or obstruction has been alleged, there shall be no conviction except on the corroborated evidence of the person stated to have been annoyed or obstructed.

The Catholic Committee's Report points out that the same principles apply to prostitution as to homosexuality from the point of view of moral theology. It is concerned, however, to insist that the State has a duty to protect women from exploitation and to preserve public order. In substance I think it may fairly be said that both Committees' reports agree in essence. So let me turn finally to the way in which Dr. Sherwin Bailey sums up the position in regard to these matters. He says:

"But to plead for justice is not to condone vice—though we hardly think that the candid reader, bearing our principles in mind, will attribute the Council's attitude to moral indifference. As with homosexual offences, so with prostitution—we unreservedly condemn as sinful all infractions of the Christian teaching on sexual chastity; but we do not consider that what is sinful can always appropriately be treated by the law as criminal, particularly in the realm of venereal behaviour. This, in general, appears to be the view of society and the conclusion of jurisprudence, according to which private sexual immorality freely indulged in by adults may be reprobated by public opinion, but is not made penal. To this rule there are a few notable exceptions, and the appointment of the present Government Committee affords an opportunity to remove these in the interests of justice.

"Finally, the fact that public attention has in this way been directed to homosexual offences and to prostitution allows us to call attention to the continuing need for sound education in matters of sex, marriage, and family life. We would submit that the following questions, among others, demand very careful consideration:

1. Whatever other causes they may have, there is general agreement that both the homosexual condition (which may lead to homosexual practices) and a disposition towards the life of prostitution are often due to failures in marriage and in parental care. If any diminution of these evils is to be secured in this country, men and women must be taught to take more seriously the responsibilities of marriage and parenthood. Nothing is better calculated to promote this end than the approbation by society of the Christian standard of permanent marriage; hence we would plead that the fullest recognition and support should be given to all Church or public organizations

- concerned with education for marriage and family life, and that the question of divorce should be treated with a new sense of responsibility by the community as a whole.
2. In regard to homosexuality, it is evident that there is need for much research into the condition and its causes, and we hope that measures will be taken to facilitate this. Furthermore, education alone can remove the irrational prejudice which persists in some quarters against those handicapped by inversion, and can ensure that offenders are given reasonable opportunity to re-establish themselves as useful members of society. Here, too, much might be achieved by the dispelling of ignorance.
  3. Perhaps prostitution shows up most clearly the need for education. Study of the subject in both its historical and its contemporary aspects leaves one in no doubt that nothing less than a revolution in our ideas of 'sex' is required before the problem can be handled with any success. In the memorandum we draw attention to the fact that prostitution is largely a male problem; and it is likely to remain so as long as false notions of the nature and relation of man and woman persist. There are welcome signs of a movement in the direction of reformation and, in particular, of a new theological approach; but the greatest single obstacle to the re-education of the public is the modern cheapening and commercialization of sex, for which certain sections of the Press, and the cinema and advertising industries, must bear a large and very grave responsibility. Not only have they a debasing influence, but they contrive to maintain upon the male sex a constant yet often imperceptible pressure of venereal stimulation which cannot but conduce to an unhealthy sexual life in the nation."

#### *Discussion*

JUDGE NORRIS, in opening the subject for discussion, said that the common law had never identified private sin with public crime. Many of the proposals now being put forward for abolishing various sexual crimes in fact involved the repeal of nineteenth century legislation which had the effect of identifying sin and crime. For instance, the offence of gross indecency between two male persons became a statutory offence in 1885.

He further observed that incest was made a crime in Victoria in 1908, and in certain degrees of consanguinity in 1949 at a time when the tendency of thought was to reduce rather than increase the statutory categories of criminal sexual acts.

DR. JOHN WILLIAMS said that American research among persons convicted of paederasty indicated that about 70 per cent of those convicted were regarded as schizophrenic. This prompted the thought that the problem possibly fell to be dealt with under the Mental Hygiene Act rather than under the Crimes Act.

DR. GUY SPRINGTHORPE said that he had read the results of the research to which Dr. Williams had referred. The 70 per cent of convicted persons described in that report were not suffering fully from schizophrenia, but were using schizophrenic mechanisms in regard to their sexual behaviour, a circumstance which made the application of the law to their cases more difficult.

Mr. Justice Monahan had dealt with the legal aspect of the problem which is concerned with dealing with abnormal persons in so far as they conflict with society and have to be brought within the scope of legal procedures. On the medical side, he wished to make two comments. In the first place, though many of the people concerned were psychiatrically abnormal, it was a rare experience to find one of them coming voluntarily for treatment before the shadow of the law fell upon them. The second point was that it was only recently that the medical profession had begun to give the problem serious consideration. He had recently seen a man who had served fifteen years in another State for sexual crime. When this man was asked what medical attention he had had, he replied that he had had a short interview with the doctor on being received into gaol and on leaving fifteen years later had had a short talk with him as to what he was going to do in civil life.

In the United States there was a beginning of psychiatric study of offenders directed towards ascertaining whether the offenders were likely to respond to treatment and, for this purpose, in California two institutions existed at which convicted persons were kept for observation for ninety days, after which a report was made to the judge as to whether treatment was likely to produce any beneficial result.

DR. C. H. FITTS said that neither law nor medicine had produced a solution. To condemn homosexuals to gaols in which

homosexuality was said to be rife was to perpetuate the evil. Medical treatment could not provide a solution because a high proportion of the people concerned were not amenable to medical treatment. They did not desire to be treated and were militantly hostile to the idea that they were social outcasts. There were people who felt that sexual aberrations were now too leniently regarded.

MR. P. D. PHILLIPS said that the paper which had been read represented an exception to the general reluctance of judges in English speaking countries to make pronouncements as to what the law ought to be. The suggestions made for alterations in the law regarding sexual offences did not amount to condoning the conduct involved. It was a recognition of the fact that the law was not the proper instrument to deal with the conduct. It was recognized that these laws made unequal impact upon the various persons who might be affected by them, and in fact provided a paradise for the blackmailer.

PROFESSOR NORVAL MORRIS said that he doubted whether it could really be inferred from the statistics of the Church of England Marriage and Welfare Council that there had been an increase in the incidence of homosexual conduct. He suspected that the rise in the figures reflected only an increased attention by the police to this particular branch of the criminal law. In his view very little was known about the prevalence of homosexual conduct in the community. Punishment for this offence was probably extremely fortuitous as only an extremely small percentage of persons were prosecuted.