SEXUAL OFFENCES AND HUMAN RIGHTS

A CRITICAL REVIEW OF THE SEXUAL OFFENCES ACT 2003

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Declarations

I, Kishore Julian Thampy, confirm that the material contained in this dissertation has not been used in any other submission for an academic award and that there is full attribution of the work of any other authors.

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The thesis has been supervised by Dr Lynne Foxcroft

Summary

Over the course of human history all societies have struggled with defining what constitute sexual crimes and how they should be punished. Almost all societies have based their laws on moral and conventional grounds rather than on rational or scientific evidence. It is for this reason that laws on what constituted sexual offences have fluctuated dramatically over the centuries. What was an acceptable behaviour in one century became a reprehensible crime in the next. It is no wonder, therefore, that despite the monumental progress mankind has made since the beginning of history we continue to struggle with defining sexual crimes and to deal with them effectively. The extreme views on sexuality held by western societies today are no different from the views held by societies we consider in other respects as intolerant and fundamentalist.

This thesis examines how laws on sexuality have evolved over the centuries, and attempts to establish the argument that enacting laws on questionable moral grounds or unstable social conventions is wrong. It argues instead for basing laws on principles based on science and reason. In presenting these arguments the thesis focuses on a critical review of the newly enacted Sexual Offences Act.

The law stated is at 30 April, 2004

CHAPTER 1

INTRODUCTION

The Sexual Offences Act[1] received the Royal Assent on 20, November 2003 and the Government proposes to implement it on 1, May 2004.[2] To understand how this Act came into being requires that one recall the events that set into motion the Home Office undertaking a comprehensive review in 1998 of sexual crimes in its "Setting the Boundaries" Report.[3] It was that report that set the stage for the introduction of the Sexual Offences Bill.

In August 2000 the then leader of the Opposition, William Hague, was famously quoted[4] as demanding life sentences for paedophiles. This underscored the public's punitive attitude towards sexual offenders, an attitude in large measure due to the panic sowed by a media with a seemingly perverse interest in crimes of indecency. The attention given to this subject by the media is evident from the interest aroused by the arrest of the then Home Secretary's brother, William Straw, on charges of indecent assault of a minor girl and his subsequent placement on the Sex Offenders

[1] Sexual Offences Act 2003
[2] Home Office News 6 April, 2004. www. homeoffice.gov.uk/crimes/sexualoffemces
[3] Setting the Boundaries: Reforming The Law on Sexual Offences", Home Office . July 2000
[4] Sunday Times, August 14, 2000

Register for 5 years. [5]Mr. Hague decried the apparent "powerlessness of our society to protect an eight year old girl"[6] referring to Sarah Payne who had been sexually assaulted and murdered. He insisted that there should be mandatory life sentences for the "worst first-time sexual offenders against children so that they are released only on license and can be forced to accept supervision."[7] He also demanded laws to restrict offenders from making contact or living near their victims, tagging offenders for an indefinite period, extending their supervision beyond the current 10 year maximum, and forcing British paedophiles who commit offences abroad to register on their return to the UK.

Arrayed against the formidable forces of a hysterical public baying for blood and politicians only too willing to pander to the most vile of public sentiments, do sexual offenders, especially those who are mentally ill, stand a chance of a fair trial, protection against double jeopardy, *ex post facto* imposition of punishment or incapacitation, or any right to privacy after serving their sentences in full? Can they turn to the Human Rights Act, 1998 for justice? This law has only recently been implemented and so far no sexual offences cases have reached the House of Lords. The incumbent Home Secretary, David Blunkett, had certified that the Sexual Offences Bill,

[5] Quadrant Magazine, 1 November 2002

on its introduction, did not violate the Human Rights Act but that certification may not stand the test of time.

What appears to be at issue here is a tinkering with what used to be a fine balance between the rights of the victims to seek redress and the rights of the alleged perpetrators to a fair trial. Any imbalance must be justified for if not there is bound to be injustice for one side or the other.

A broader issue raised by the attempt to criminalize certain sexual activities is the invasion of privacy not just of likely sexual offenders but of the society at large. If today it is legitimate to criminalize sexual activity in a public toilet because children have access to the toilets, why not tomorrow criminalize the same activity in a private toilet on the same grounds that minor children use the facility. After all common law jurisdictions such as Singapore and Winnipeg (Canada), have criminal laws against being nude in one's own home on the rather dubious grounds that nudity is likely to incite pornographic activity.[8]Once again the question arises as to whether the purpose of the criminal law is to impose the moral views of the dominant element in society or whether it should restrict itself to preventing individuals from harm. [9]Although the European Court of Human Rights has

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[6] Sunday Times 14 August 2000

[7] ibid

[8] Crombie, David , *The World's Stupidest Laws* ,O'Mara Books Ltd. London, 2000

[9] Hart, H , *Law, Liberty and Morality*, Stanford University Press 1965

ruled that the State has a legitimate interest in protecting the public morals even when there is no harm done to any one individual,[10] the margin of appreciation afforded the state is narrow.

Society is enraged by sex offenders and the crimes they commit.[11] Although the number of crimes is small compared to other violent offences, the few cases of horrible mutilation and or murder that accompany sexual attacks on children arouse public outrage. Across the western world there are many such cases; Megan Kanka (USA), Sarah Payne (UK), Christopher Stevenson (Canada), and very recently the Huntley murders in England. The uproar that ensued resulted in the hurried enactment of laws to deal with these crimes. However, according to Stuart Scheingold[12] there is reason to believe that laws adopted in the wake of highly publicized and emotionally charged crimes are likely to be ill considered and create more problems than they solve.

Not only is there a risk of enacting laws that are poorly conceived, but inevitably there will be pressure placed on the judiciary to hand out severe punishments. This is already evident in the UK. In an article published in the

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[10] *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39

[11] Winick, Bruce , *Psychology, Public Policy and the Law*, Vol. 4, 1998

[12] Scheingold, Stuart, "The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation" *University of Puget Sound Law Review*, 15, (Spring 1992) pp809-820

Times[13] provocatively titled "The judges who [sic] even the Court of Appeal thought were too soft on guilty men" several judges were named and their sentences compared derisively to the heavier sentences subsequently imposed by the Court of Appeal.

In reaching its conclusions the Court of Appeal, through Lord Justice Mackay, criticized the judges for having paid "insufficient weight to the victim's proper interests." The Court complained that the judges had paid "too great a regard to the interests of the defendant". In one case[14] an 82 year old former minister was sentenced to custody for 2 years for offences committed 25 years previously. The trial judge had imposed a 2 years suspended sentence. The Appellate Court was sending a strange message to the judges. If they did not impose severe sentences then the government would do so by legislating minimum sentences. Where does this leave judicial discretion to impose sentences that are consistent with the facts of the individual cases? There is some reason to suspect that the Appellate Court is itself responding to the pressure of the political establishment and

elements of the public. It invoked the spectre of vigilantism, the anguish of the victims, and public loss of confidence in the judiciary. This is a gross

[13] Times OnLine, October 24, 2003

overstatement as sexual crimes should not be considered more reprehensible than other crimes against the person. There is certainly no evidence of a massive haemorrhage of public confidence in the judiciary, not withstanding Lord Woolf's lamentations to the contrary.[15] What is particularly troubling is the opinion expressed by Lord Justice Mackay that the trial judges had paid "insufficient interest to the victim's proper interests." It would be fair to ask what exactly is meant by this. It would be fair to ask what the interests of the victims are other than to hope that the perpetrator will be found guilty and punishment consistent with the sentencing guidelines and the gravity of each case imposed. Should victims dictate the punishment and should judges oblige them? Are victims ever satisfied with anything less than the maximum sentence? Where does just punishment end and vengeance begin? It would be interesting to know what prompts politicians, prosecutors and the judiciary to behave the way they do when faced with sexual offences. Are they guided by scientific studies, by the past experiences of other jurisdictions, by the need to be punitive in the assumption that this is what the masses want, or by personal prejudices? Is justice only an instrument of retribution or is it an objective and fair combination of even handed

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[14] ibid

[15] TimesOnLine, April 23, 2004 " Justice is failing, top judge admits"

punishment, rehabilitation, and the opportunity to reform? Are not claims of justice obliged to be consistent with scientific evidence and established bodies of knowledge?

First this thesis will trace the historical definitions of sexual offences, and examine how, over the centuries, societies have changed the ways in which they have viewed sexual crimes and how they have punished them. Second it will analyze models of sexual criminology in order to discover what they might contribute to a theoretical criminal jurisprudence of sexual offences. Third it explores the effects and success such models have had when applied in various common law and civil law jurisdictions. Fourth, the thesis will critically analyze the Sexual Offences Act 2003. Finally, the human rights aspects of this legislation and those that have preceded it will be looked at from the angle of established case law. The thesis will also argue that future laws should be based on the current body of scientific knowledge rather than on religious dogma, the whimsies of politicians out to settle a score, or spur of the moment impulses caused by legitimate outrage felt over any particular horrific crime. Laws should have a definite sunset moment and at the time should be reviewed and repealed if found incompatible with rational requirements and scientific evidence. This will obviate the abusive use of antiquated laws to prosecute individuals otherwise acting legally.

CHAPTER 2

CRIMINALIZATION, DECRIMINALIZATION AND RECRIMINALIZATION OF SEXUAL BEHAVIOURS

The historical definition of a sexual offence has changed dramatically over the centuries. What constitutes a sexual crime is primarily determined by the changing mores of societies. There are many good examples of how the sometimes whimsical nature of social conventions changes with no real scientific or compelling sociological basis to support the changes. The scope of the problem is vast. Numerous human peccadilloes have been criminalized and then decriminalized over the centuries. This thesis will examine three such areas of human sexual activity that have preoccupied society. Although there are many that merit attention this thesis will focus on three: homosexuality, sex with children, and rape.

Homosexuality

Homosexuality as a crime is one such example. Although there is now some scientific evidence that homosexual behaviour is determined by early hormonal influences *in utero,*[16] many contemporary societies have adopted extreme and fairly violent responses to homosexual practices even between consenting adults.

In ancient times homosexuality was, and in certain so called primitive cultures today is still tolerated and often considered a normal phase of development. Ford and Beach[17] found that homosexual activity was considered acceptable for certain groups of people in 64% of the 76 societies they studied. Institutionalized homosexuality was commonplace in many old world cultures including the Greek culture, in the Islamic world, ancient China, and feudal Japan. Homosexual love reached a peak in the Han Dynasty of Imperial China when it was known as the love of the cut sleeve apparently a metaphor occasioned by the story that the Emperor Ai-Ti on being summoned to a council cut his sleeve rather than wake up his lover.[18] In Japan the shoguns and samurai kept young male lovers who accompanied them to war up to the end of the Meiji era at the end of the 19th century.[19] Many Indian epics including the 3rd century B.C. Ramayana[20] and the Kama Sutra[21] contain homosexual scenes subsequently proscribed by the 1860 Victorian Indian Penal Code .

According to Herdt:[22]

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[16] Rahman, Q & Wilson, G.D., " Born Gay? The psychobiology of human sexual orientation ", *Personality and Individual Differences*. 34: 1337-1382, 2003

[17] C.S. Ford & F. Beach, "*Patterns of Sexual Behaviour*"(New York 1951)

[18] Van Gulik, " *Sexual Life in Ancient China*", Leiden 1961

[19] Thara, S, *Comrade Loves of the Samurai*" Tuttle, 1972

[20] Nelson, E, glbtq "Encyclopaedia of Gay, Lesbian, Bisexual , Transgender and Queer Culture", 2002

[21] Vatsyayana, "*Kama Sutra*", chapter 9 p 18 2 translated by Alain Danielo, Park St Press

[22] Herdt, Gilbert "Homosexuality", *The Encyclopaedia of Religion*, NY

> "It has been demonstrated that between 10% and 20% of all Melanesian societies, ranging from Fiji, New Caledonia, Malekula island in the New Hebrides, and other off lying and low lying islands of New Guinea practiced ritualized male sex; in the Papua Gulf region of New Guinea it was universal"

Homosexual practices were common in sub Saharan Africa. The San tribes of that region even went so far as to record their Sodomitic orgies on rock paintings.[23] Under British colonial rule, in what was then known as Rhodesia, prosecution of homosexual crimes amounted to 1.5% of all crimes and in 90% of the cases the offenders were black Africans.[24]

In the Americas the original French fur trappers were surprised to find native men dressed as women and referred to them as "berdache."[25] They were further astonished to see that these men were held in high esteem by the other tribesmen and were though to be spiritually gifted. The so called "Two Spirit" practice went underground on the arrival of the Spanish Conquistadores.

Herdt also asserts that the laws of the ancient world do not appear to have condemned homosexual behaviour.

> "The evidence exists that homosexuality was broadly accepted and known from the Near East and the Mediterranean. Homosexual prostitution was known in the ritual cults of Mesopotamia and Canaan. Mesopotamian law codes do not mention homosexuality. The Hittite

[23] Bidstrup. Scott "Saint Aelred the Queer" www.bidstrup.com/phobiahistory.htm
[24] ibid
[25] according to Herdt the word is derived from Arabic meaning boy-slave kept for erotic purposes

Code,[26] prohibits only father- son incest and the Middle Assyrian code forbids only homosexual rape."[27]

The Old Testament appears to form the basis of a change in the way Western society viewed homosexual conduct; Leviticus 18:22 and 20:13 proscribes male homosexuality. Sodom was destroyed by fire to symbolize ostensibly God's disapproval of the practice. However, some have argued that the destruction took place for other reasons such as inhospitality to strangers and that the suggestion that the men of Sodom demanded to see the strangers (angels of God) so that they might "know" them is a misconstruction of that word for carnal knowledge.[28] It can be argued thus that even the Old Testament was not uniform or consistent in its disapproval. Leviticus itself was ignored for centuries by the Christians themselves as something that along with animal sacrifices, the excesses of Mosaic Law and other Jewish idiosyncrasies was out of date.

There has been much debate about whether the ancient Greeks tolerated or accepted homosexuality. Of greater interest is whether they regulated homosexual practices. In the trial of Timarkhos,[29] accused of male prostitution, Aiskhines, based his prosecution on the law prohibiting the sale

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[26] Thatcher , Oliver "*The Library of Original Sources" Vol III The Roman World*' (also known as the Nesilim Code of Laws, c. 1850- 1500 BCE)
[27] Herdt op cit.
[28] Bailey, Derrick "*Homosexuality and The Western Christian Tradition*" London 1955

of one's body. There is no mention of penalties for having had homosexual intercourse, nor indeed of anything like the modern preoccupation with "unnatural practices" or " gross indecency". There appears to be no penalty for those who engaged in homosexual relations for love or for the fun of it. Consequently, one can take Plato at face value when he appears to give the impression that homosexual practices were widespread in his time and not illegal.[30] Furthermore, in *Laws*, he seems to imply that it would be very difficult if not altogether impossible to prohibit these practices.[31] According to Herdt:

> "There is no question that that the far famed figures of Greek philosophy. the teacher Socrates and his student Plato and Xenophone, among others engaged in homosexual relationships as part of the educational process. The teacher transmitted the noble qualities of *erete,*[32] knowledge and virtue in the context of homoerotic love with his students"[33]

Cicero, one of Rome's greatest jurists, describes in detail the laws of ancient Rome but makes no specific reference to homosexuality. The Roman Empire also did not have laws against homosexuality until very late in its existence.[34] The case of one Calidius Bonboniensis[35] suggests that a defence of homosexuality was successful in obtaining an acquittal on a

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[29] Dover, K.J. "*Greek Homosexuality*" Vintage Books 1980
[30] ibid at p 12
[31] Boswell, John "*Christianity. Social Tolerance and Homosexuality*" University of Chicago Press 1981, p51
[32] Erete implied masculine valour, beauty, nobility and heroism
[33] Herdt op cit

charge of adultery with a married woman. Like the Greeks Cicero did not condone male prostitution but did not indicate that it was illegal.[36] Indeed it is said that in defending one Cnaeus Plancius from the charge of taking a male lover to the country to have sex, Cicero categorically denied that this was a crime.[37]

Roman laws regulating various sexual offences such as the statutory rape of minors to homosexual marriages only emerged in the 3rd century A.D. and the absolute ban on all homosexual activity in the 6th century coincided with the advent of Christian dominance in the Empire.

There has been much debate about the New Testament and its opposition to homosexual activity. In particular proponents of the view that homosexuality is anathema to Christians often refer to the writings of St. Paul. Indeed Paul has been quoted in the Scriptures on several occasions condemning sexual excesses. In *Romans* he said:

> "In consequence, I say, God has given them up to shameful passions. Their women have exchanged natural intercourse for unnatural, and their men in turn, giving up natural relations with women, burn with passion for one another; males behave indecently with other males, and are paid in their persons the fitting wage of such perversions"[38]

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[34] Greenberg & Bystryn 1982
[35] Boswell, John p65
[36] Cicero , "*De re Publica, De Legibus*" translated by Clinton W. Keyes, Harvard University Press 2000
[37] Boswell, John. page 69
[38] Paul of Tarsus , "1 Romans 26-27", *New English Bible* , Oxford & Cambridge 1961

Boswell in his scholarly review of the New Testament concludes:

> "The New Testament takes no demonstrable position on homosexuality. To suggest that Paul's references to excesses of sexual indulgence involving homosexual behaviour are indicative of a general position in opposition to same-sex eroticism is as unfounded as arguing that his condemnation of drunkenness implies opposition to the drinking of wine. At best the attitude of Christian Scriptures on attitudes towards homosexuality could be described as moot"[39]

It remains unclear when Christian attitudes towards homosexuality changed. According to Scott Bidstrup,[40] the church fathers based their views on morality on what transpired in nature. In this he is supported by the widespread popularity of the so called *Bestiaries*, and in particular the one known as *Physiologos*.[41] In this Christian theological book written as early as the 2nd century A.D. the hyena is reputed to change its sex every year One is admonished not to eat hyena to avoid becoming like it, taking the male role one time and then the female. As a result homosexual behaviour in man was found to be equally disgusting.

Christianity became the official religion of the Roman Empire in the 4th century. The first law to abolish homosexual marriages was promulgated in 342 by the Emperor Theodosios. But it was only much later in the 6th century that homosexual relations lost their legal status. The campaign to

[39] ibid page 117
[40] Bidstrup, Scott' The Surprising History of Homosexuality and Homophobia' www.bidstrup.com
[41] Catholic Encyclopaedia, "Physiologus" newadvent.org/cathen

openly outlaw homosexual conduct began in earnest and was spearheaded by St. Augustine who was probably tormented and bitterly ashamed of his own intimate relationship as a youth with another male. To him the Western world is indebted to his view of evil as both an alien and antithetical force as well as inherently intrinsic. The sexual pervert is the incarnation of evil the more dangerous for having being before disclosure no different from the rest of men.[42] While no one can minimize the influence of Augustine on Western culture, as far as the civil law was concerned it was the Emperor Justinian who in 550 enacted the first laws punishing homosexual activity by

[42] Dollimore, Jonathan, "*Sexual Dissidence*" Oxford University Press 1991

castration. Ironically, it was done without the input of the Church and even more ironically, the first to be castrated were notable bishops.[43] Thereafter all those who experienced sexual desire for another man lived in terror. False denunciations were readily made and less readily refuted as evidenced by the Empress Theodora's false accusation against a young man who made unflattering references about her person and found himself without testicles.[44] The Byzantium practice spread to Spain in the mid 7th century where the Visigoth king also ordered castration for homosexual activity. By the early middle ages, however, the extreme attitudes against homosexuality diminished. For example the Bishop of Worms canonical law pronouncements in 1025 punished adultery far worse than homosexual excesses by a married man, although neither offence brought much discomfort to the defendant.

The later middle ages were a different story.[45] The rise of the national state required uniformity of its citizens socially, culturally and religiously. Thus began the Inquisition, the genocide of the Jews, the expulsion of the Muslims, and the rise of intolerance. It was at the Lateran III of 1179 that sanctions were imposed on money lenders, heretics, Jews, Muslims, mercenaries, and homosexuals. The Christian occupiers of Jerusalem during

[43] Boswell, John page 172

the crusades were the first to enact legislation specifying death by burning for "sodomites".[46] Christian European hatred of the Muslims especially after their repeated defeats in the crusades only heightened their disgust for what they perceived was a Saracen addiction, the pederasty of white boys. The law codes devised for the Castilian King Alfonso the Wise (1252-84) prescribed death for any man over the age of 14 engaging in homosexual activity. In 1283 in France the law demanded burning of the "bougrerie", in Italian cities it demanded confiscation of property, and in Norway it demanded the expulsion of those guilty of sodomy. In England the situation passed, within a century, from the point where homosexuality was not mentioned in the *The Laws of Henry the First* (1100-1135) to the compilation known as the *Britton* where homosexual acts, sexual intercourse with a Jew, and bestiality were punishable by being buried alive.[47] The culmination of this homophobic era is best represented by the brutal deaths of Edward II of England and his reputed lover Hugh le Despenser in 1327,[48] the former being impaled through the anus with a flaming iron rod and the latter decapitated after seeing his genital s cut off and burnt in public

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[44] ibid p 173
[45] Carr, Sir Raymond, " *Spain: A History*" Oxford University Press 2000 pp 90-116
[46] Boswell, p 281
[47] Boswell, p 292. The Britton was probably composed in the 14th century
[48] Davies, Norman ' *The Isles: A History*'Oxford University Press 1999

So, indeed by the 14th century in Dante's Hell,[49] the author was able to create a special place for his homosexual enemies in the seventh circle where they were tormented by burning dust and flames and perpetual fruitless running. In the United Kingdom homosexuality was viewed as a practice so abhorrent the behaviour was criminalized until 1967[50] when the Sexual Offences Act received the Royal Assent. It should not be overlooked that this legislation was based on the Wolfenden Report[51] whose recommendations were made well over a decade earlier.

Other common law jurisdictions took just as long to overturn criminal homosexual laws. In the United States the American Law Institute recommended in 1955 the decriminalization of consensual sexual relations conducted in private but it took until 1961 for the first state (Illinois[52]) to enact such legislation[53]. Although the federal Australian legislature passed a sexual privacy law in 1991, the state of Tasmania retained its punitive laws against homosexual activity until this law was overturned by the High Court of Australia. Finally, in 1997 the state legislature repealed the law which provided for jail sentences for up to 25 years.[54]

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[49] Dante Alighieri '*The Divine Comedy. Part 1. Hell*' Penguin Books 1949
[50] Statutory criminalization occurred in 1985 (Criminal law Amendment Act)
[51] Report of the Committee on Homosexual Offences and Prostitution, 1957 'Wolfenden Report'
[52] Illinois Criminal Code (1961) s.11
[53] Eskridge, W, '"*Gaylaw: Challenging the Apartheid of the Closet*" 1999
[54] Unknown Author, 'Australian State Scraps Anti-homosexual Laws' *Reuters* January 1997

Historically and legally the practice of sodomy is intricately related to homosexuality. Sodomy, between men and women and men and men had been an offence in England since 1533. In the U.S. sodomy was similarly a criminal offence in all of the original 13 States when the Bill of Rights was ratified, and by the time the 14th amendment (the privacy clause) was approved in 1868 only 5 of the then 37 States did not have anti sodomy laws.[55] Selective prosecution of same sex sodomy practices in private only started in the 1970s and only in 7 states.[56] As late as 1986 the US Supreme Court, in *Bowers v Hendrick,*[57] upheld anti sodomy laws. Years later, in *Lawrence et al v Texas* decided on 26, June 2003, the Court struck down these laws and upheld a constitutional right to sexual expression under the Due Process clause of the Fourteenth Amendment. [58] In doing so the Court admitted that *Bowers* had been wrongly decided even for its time.

Despite this tortoise like pace in reforming laws that are inconsistent with scientific evidence that homosexuality is not a product of sinfulness, many common law countries, such as India and Singapore,[59] continue to criminalize homosexual activity. Gays continue to experience discrimination

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[55] Scalia Justice, *Lawrence v Texas* 539 US 2003(Dissenting Opinion)
[56] Kennedy, Justice. *Lawrence v Texas* (Majority Opinion)
[57] *Bowers v Hardwick.* 478 U.S 1986
[58] *Lawrence et al v Texas*, 539 U.S 2003
[59] s 377Indian Penal Code states " whosoever has sex against the order of nature with any man, women or animal shall be punished with imprisonment for up to life." The Singapore Penal Code is modeled after the Indian

in other areas of life including the right to marry. It is an irony of the progress of mankind that homosexuals in today's ostensibly free and democratic western world enjoy fewer rights than they did under the totalitarian Roman Empire.

Children and the age of consent

In contrast to the evolution of attitudes toward homosexuality, attitudes toward sex with children have moved in the opposite direction, permissiveness to zero tolerance. Age of consent laws have their origin in Roman Law which allowed for some degree of emancipation for a boy at age 14 and a girl at age 12. Under Roman law, the concept of *potentas patres familia* gave complete authority to the head of the family until his death. In the English tradition these laws seemed to have derived from the father's interest in keeping his daughters virgins until he could marry them off at the age of 12 or 13, these ages coinciding with the onset of the child bearing period. This was merely protection of property; it had nothing to do with protection of the child from abuse. Although children are no longer considered property in common law countries this age limitation has stuck decapitated from its original purpose and bereft of any logic. The age of consent law was first codified in the Statute of Westminster 1275.[60] Of

[60] Brownmiller, S *'Against Our Will: Men, Women and Rape'*London, Secker and Warburg

course, it had nothing to do with giving consent for sexual relations. Until 1885 it was not a criminal offence to have sex with an under 12 year old with her consent. This changed quickly from 12 to 13 and then to 16 in the nineteenth century.[61] It was raised because of the outrage over the Jeffries case and the ensuing panic regarding the alleged widespread selling of children into white slavery and prostitution.[62] It should be noted that the age for marriage remained 12 until 1929 when the Marriage Act 1929 raised it to 16. The school leaving age was also raised to 16 by the Education Act 1944 through Order 444 of 1972.[63] Thus although arrived at somewhat arbitrarily there has been some uniformity in the choice of 16 as a cut off point for emancipation.

Ages of consent for sexual relations vary widely across the world. In Chile it is 12, in Spain and Japan 13, in Italy 14. Seen from another angle in Ireland the minimum age for marriage was until 1972 14 for boys and 12 for girls.

[61] Criminal Law Amendment Act 1885 ss 4 & 5
[62] 'Times on Line 'Law' November 18, 2003
[63] Honore. Tony "*Sex Law in England*" p81, Archon Books 1978

In 1962 the UN General Assembly passed Resolution 2018 recommending the minimum age be 15. Ireland subsequently raised its minimum age for marriage to 16.[64] In the US the age of consent in some States was 9 years. It has ranged from 7 to 21. According to Kourany the age of sexual consent is chosen in an arbitrary manner mainly the product of legislative compromise.[65]

At the present in the UK there is no uniformity; intercourse is legal at age 16 in England, Wales, Scotland and the Channel Islands whereas in Northern Ireland it is 17. Surely no one can rationally argue that children mature at different ages across the world or that suddenly in the space of one decade centuries of practice are suddenly deemed to have been bad for children.

When the Committee on Homosexual Offences and Prostitution deliberated the age of consent for buggery, it concluded that:

> "A boy is incapable at the age of 16 of forming a mature judgment of actions of a kind that might set him apart from the rest of society. We have encountered several cases in which young men have been induced by means of gifts of money or hospitality to indulge in homosexual behaviour with older men.[66]

[64] 'The Law Relating to the Age of Majority', Law Reform Commission Working Paper 2-1997, Republic of Ireland

[65] Kourany et al , 'The Age of Sexual Consent' *Bull. Amer. Acad. Psychiatry & the Law* 12(2) 171-5, 1986

[66] Wolfenden Report, 1957

On 13 November 2000, in a speech to the House of Lords, one of the members of the original committee, Lord Mischon, in discussing the Sexual Offences (Amendment) Bill 2000 that would equalize the age of consent for boys and girls said:

> "It seems to me absurd that if a young man of 16 were to sign a tenancy agreement of a bedsitting room his act would be voidable because under the law he is not considered capable of making a contractual obligation and does not have the experience to do so, but would be responsible for what happened in that bedsitting room if we lowered the age of consent to 16."[67]

This deeply flawed argument ignored the fact that girls could consent to sex at the age of 16, and seemed based more on high level judicial prejudice rather than on sound legal reasoning. And it would not be limited to this Lord. The United States Supreme Court as recently as 1981, in *Michael M v Superior Court of Sonoma County*, upheld the constitutionality of a law criminalizing sex with a female minor but not a male minor.[68] The argument put forward here was that the risk of the girl getting pregnant made the heterosexual act more harmful.

Over the centuries the other problem of mental capacity arose as a general problem for the law. When should a child be adjudged capable of being

[67] parliament.uk, publications, 199900/ldhansard/vol 001113
[68] *Michael M v Superior Court of Sonoma County*, 450 U.S. 464 [1981]

responsible for his actions? In England this issue was historically addressed by Blackstone.[69] He noted that children as young as 8 were executed for capital crimes because the judges found them capable of assuming full responsibility for their actions as each case was evaluated individually. Blackstone himself discussed what became to be known as the Rule of Sevens.[70] In Commentaries he wrote (olde English words replaced):

> "The civil law distinguished the age of minors. Of those under twenty five years old, into three stages: *infantia,* from birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas* from fourteen upwards. The period of *pueritas*, or childhood, was again subdivided into two equal parts; from seven to ten and a half was *aetas infantiae proxima*; from ten and half to fourteen was *aetas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood they were not punishable for any crime. During the other half stage of childhood, approaching to puberty, from ten and a half to fourteen, they were indeed punishable if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigor of the law. During the last stage (at the age of puberty, and afterwards) minors were liable to be punished, as well as capitally, as otherwise,"and
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> " By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when the first the understanding might open." But " by law as it now stands , and has stood at least ever since the time of Edward the Third (1327-77), the capacity of doing ill, or contracting guilt, is not to be measured by years and days, as by the strength of the delinquent's understanding and judgment".[71]

Blackstone appears to be advancing the argument that children under the age

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[69] Blackstone, Wm.' *Commentaries on the Laws of England'* Oxford Clarendon Press MDCC LXV, Book IV page 22

[70] ibid , Book IV page 23

[71] ibid, loc cit

of 7 are incapable of giving consent or taking responsibility for their actions, whereas children above 14 should be treated as adults whilst those between these ages should be judged on an individual basis. This seems to make more sense in the light of what modern day science has ascertained, and certainly provides greater flexibility in dealing with child abuse and child crimes. According to Judith Levine:[72]

> "Legislators and the courts have been behaving like freaked out moms and dads finding their 13 year old *in flagrante* on the living room couch. Reviving laws that reduce consensual trade offs of love, lust, need and power to alleyway assaults of vicious predators on powerless victims, public officials in the 1990s increasingly attacked complicated social problems with the blunt instrument of criminal law and then applied hysterical penalties."

SOA 2003 continues to criminalize sexual behaviour with a child under the age of 13 regardless of consent unless they are lawfully married. Yet, what sense does it make if a child of this age can be held criminally responsible yet constitutionally incapable of consenting to have consensual sex. It would not be an offence for a married girl of 13 to have sex with her husband, but she would be considered a rape victim if she had sex with another man or woman. Judith Levine says [73]

> "There ought not to be a fixed age of consent, it has to be individualized. We can further draw from scientific psychological studies that there is no

[72] Levine, Judith '*Harmful To Minors*', University of Minnesota Press 2002, p79
[73] ibid p 91

> specific age at which a child reaches psychological maturity. Children are up making decisions throughout their lives and major ones indeed. There is no distinct moment when a person is ready to take on adult responsibilities, nor is it self evident that only those who have reached the age of majority are mature enough to be granted adult privileges. People do not grow at sixteen, eighteen or twenty one if they ever do."

It has been a matter of convention not scientific deliberation[74] when they are allowed to make decisions independent of their parents or their guardians. In some cultures even adults are not allowed to make decisions independent of the husband, the family or the clan as the case might be. The ancient Roman *potentas pater familias* tradition is still prevalent in many cultures.

In 1997 two 10 year old boys were charged in a London court with the rape of a 9 year old girl.[75] Recently an 11 year old boy pleaded guilty to murdering another child,[76] and a Florida Appeals court overturned the life sentence without parole imposed on a 14 year old convicted of murder committed at age 12.[77] If children are capable of making independent decisions regarding criminal responsibility at a certain age why can they not make similar decisions regarding other matters, especial sexual decisions, at the same age? The argument for lowering the age of consent has been

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[74] Judith Levine cites a study of 30,000 adolescents and adults that found that the average person functions at the level of a 16 year old, p88

[75] e.library.com, retrieved 6December 2003

[76] Talk Left, Juvenile Offenders 10 December 2003

[77] Talk Left, Juvenile Offenders 12 December 2003

examined in a series of television documentaries and dramas.[78] Miranda Sawyer, the programme presenter is quoted as saying "That the age of consent at 16 is out of step with the modern world is jaw-droppingly apparent."[79] She referred to a teen magazine survey in which 83% of correspondents who were sexually active did so before they were 16 years old. Research in the United States in the last 30 years has consistently shown that the majority of girls lose their virginity to a man older than they.[80]

Professor June Brown's survey showed that 6-12% of children between ages 12-14 engage in intercourse and 50% kiss.[81] Sawyer herself concludes that the age of consent ought to be lowered to 12. Although the majority of professionals would balk at this suggestion, based primarily on their ignorance and preconceived notions rather than on scientific knowledge, concern has been expressed at the highest level of the judiciary on the validity of age of consent laws.

In *R v K* [82] Lord Millet bluntly stated:

> "But the age of consent has long since ceased to reflect ordinary life, and in this respect Parliament has signally failed to discharge its responsibility for keeping the criminal law in touch with the needs of society. Injustice is too high a price to pay for inconsistency,"

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[78] Times on Line , Law Section ' Sex and the Under -16s. Is the Law doing more harm than good' November 18, 2003

[79] ibid

[80] Moore, Driscoll and Lindberg "A Statistical Portrait of Adolescent Sex"

[81] Talk of The Nation, National Public Radio, 10 June 2004

[82] *R V K* [2002] 1. A.C. 462. Held allowing the appeal that s 14, SOA 1956 required proof of *mens rea*

Unfortunately, Parliament in its most recent exertions to reform the law on sexual offences avoided this issue for obvious political reasons. Once again timidity prevailed over temerity.

The Convolutions of Rape Law

Rape is another matter that has had a convoluted legal history and additionally raises concerns about what constitutes consent. Here too is the elusive definition of how does a male go about getting permission for engaging in sexual intercourse without committing rape. Even the definition of rape has not stood the test of time, but has changed according to the vagaries of custom and the tactics of pressure groups. Recently some feminists are on record claiming that all sex is rape. In an interview with Ben Wattenberg [83]Catherine Mackinnon, Professor of Law at the University of Michigan and confidante of U.S. Senator Clinton, said

> "The major distinction between intercourse (normal) and rape (abnormal) is that the normal happens so often. (Rape involves) forms of force that involve authority, power but it isn't always violent at that moment, but there is always force and domination going on and there is...in which a sexual interaction is coerced without the person who is having wanting to have it."

[83] Wattenberg, Ben 'A Conversation With Catherine MacKinnon' Think Tank with Ben Wattenberg

She went on to add that not only do men not take rape seriously but that "the incest figures suggest they participate in it considerably." These are not the ravings of an out of the mainstream radical gender feminist. In 1986 the U.S Supreme Court endorsed her view that sexual harassment was a form of sexual discrimination.[84] A decade later the Canadian Supreme Court adopted the view advanced by MacKinnon that " what is obscene is what harms women, not what offends our values."[85] Thanks to the efforts of another gender feminist, Andrea Dworkin, the Supreme Court of Canada has overturned all legal precedent governing sexual assault law and those of consent.[86] In *R v Ewanchuk*[87] the Canadian Supreme Court overturned an appeals court decision allowing for implied consent. In doing so, according to Petra Dickenson, formerly of the Alberta Law Society, they have:

> "Jettisoned the Anglo-Canadian liberal tradition of impartial justice and individual rights, and (substituting it with) the subjective approach – validating any belief held by a protected group which is not objectively reasonable."[88]

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[84] *Meritor Savings Bank F.S.B v Vinson* 477 U.S. 57, 64 (1986)
[85] Finan, Christopher ' Catherine A MacKinnon: The Rise of a Feminist Censor 1983-1993, www.mediacoalition.org/reports/mackinnon.html
[86] *R. v. Ewanchuk* [1999] 1 S.C.R. The supreme court overturned appeal court decision allowing for implied consent in the case of a 17 year old complainant who alleged that the accused progressively and incrementally touched her in a sexual manner stopping when she said no and eventually desisted altogether. The complainant alleged she complied out of fear.
[87] ibid
[88] Dickenson, Petra 'The Hellhole Spectator: Canadian Justice' *American Spectator*

She goes on to chastise one of the justices, Mme. Claire L'Heureux-Dube, as a jurist who was never "terribly constrained by some fusty concept of justice" and quotes the justice as saying:

> "Since our legal system is so ineffective in protecting the rights of women and children, it is necessary to re-examine the doctrines which reflect cultural and social limitations that have preserved dominant male interests at the expense of women and children."

The new subjective standard adopted by the Canadian court is that any fear on the part of the victim which, even if not reasonable or communicated to the accused, will vitiate consent. If the trier of facts accepts the victim's statement that she did not consent even if her behaviour at the time contradicted this, the absence of consent is established. Justice L'Heureux-Dube, in her assenting opinion went a notch further adding:

> "This case is not about consent since none was given. It is about myths and stereotypes. The error (of the original judgment) does not derive from findings of fact but from myth assumptions. It denies women sexual autonomy and implies that women are in a state of consent to sexual activity."[89]

In India, not known for its equitable views regarding women or its feminist agenda, the State of Delhi will set up special courts to try rape cases and these courts will be "manned" only by women judges and prosecutors.[90].

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[89] *R v. Ewanchuk*, *op cit* at p 4

[90] 'Women to judge Delhi's rape cases' BBC News 19 December 20, 2003, www.bbc.co.uk

In this kind of a politicised environment it remains to be seen not only whether justice can be done but whether as stated by Viscount Gordon Stewart, "Justice should not only be done but should manifestly and undoubtedly be seen to be done."[91]

In England rape is defined as unlawful sexual intercourse with a woman or a [man][92] who at the time of the activity did not consent to it.[93] Sexual intercourse involves penetration of the vagina or anus, no matter how minimal.[94] However, until passage of the Sexual Offences Act 1993,[95] boys under the age of 14 were considered incapable of committing rape.[96] According to Tony Honore, [97]

> "This strange rule comes by an indirect route from Roman law in which 14 was the age of puberty and majority for boys, and it was thought indecent to inquire whether a boy under that age had in fact attained puberty. The age of majority and marriage having been raised, the reason for the rule has long since disappeared, but it lingers on in English criminal law"

Although finally removed, this provision is yet another indication of the irrational basis on which sexual laws are developed. Furthermore, adding to

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[91] *Rex v Sussex Justices* L.R. K.B.D (1924) vol. 1 p 259
[92] word inserted by s 142Criminal Justice and Public Order Act 1994 c.33 Sch 10 para 35(2) to amend s 1(2) of SOA 1956
[93] Sexual Offences (Amendment Act) 1976 s 1(1) (a) amending s 1 Sexual Offences Act 1956
[94] Sexual Offences Act 1956 s.44
[95] s 1 Sexual Offences Act 1993 chapter 30
[96] Sexual Offences Act 1956 s. 40
[97] Honore Tony, ' Sex Law in England' p 60 Archon Books 1978

the absurdity of the situation was the fact that a boy could not be found liable for attempted rape but he could be convicted for indecent assault if what he did would amount to rape by an adult.[98] In a similar vein, he could not be found guilty of intent to commit rape on the same grounds that he was unable to penetrate,[99] both of which were not based on scientific facts known well before 1993. From physiological standpoint boys under 14 can achieve a full erection, and from a psychological they can certainly form the *mens rea* of rape. Consequently, under the law as it stands today a boy over the age of 10 can be held criminally responsible for committing rape whereas 10 years ago they could not. This roller coaster approach to enacting laws can only have a destabilizing effect on society, and is not conducive to protecting the public from harm and will only cause more harm to the healthy development of children.

Until 1992, *R v R,*[100] a man could not be charged with rape of his wife; only a charge of assault could be prosecuted as decided in *R v Miller*.[101] This interesting twist to the law stems from Sir Mathew Hale, the renowned English jurist who was also Chief Justice of England in the 17th century. He wrote:

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[98] Honore p 60, citing *Williams 1893, 1 QB 320*
[99] Honore p 60 citing *Phillips (1839) 8 Cr. & Ph. 736*
[100] R v R [1992] 1 A.C. 599
[101] R v Miller [1954] 2 QB 282

> "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimony consent and contract, the wife hath given herself in kind unto the husband which she cannot retract."[102]

His opinion was largely supported by Sir William Blackstone who in his own epic treatise on the laws of England said:

> "By marriage the husband and wife [are] one person in law: that is. The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband: under whose wing, protection and cover she performs everything."[103]

The marital exemption maintained its firm grip on legal reasoning through the 19th century despite changes in the right of women to own property in their own right. According to Jill Elaine Hasday, Assistant Professor of Law at the University of Chicago she was not able to find even one case of a husband being prosecuted for marital rape in the 19th century and only one instance of prosecution in the early 20th century of a husband for personally raping his wife and that prosecution was unsuccessful.[104]

The HL decision to overturn the marital exemption was subsequently confirmed by statute[105] *R v R* was unsuccessfully appealed to the ECtHR on

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[102] Brownmiller citing Hale, Sir Mathew "History of the Pleas of the Crown"
[103] Blackstone, Wm. 'Commentaries on the Laws of England' op cit
[104] Hasday, Jill Elaine 'Contest and Consent: A Legal History of Marital Rape' vol 88, October 2000 California Law Review
[105] s 142 of the Criminal Justice and Public Order Act 1994 which removes "unlawful" from the definition of sexual intercourse (and procuring under ss 2 and 3 of the Sexual Offences Act of 1956).

the grounds it was a violation of article 7 of the Convention. In *SW v United Kingdom and CR v United Kingdom*,[106] both involving appeals against retroactive convictions of marital rape, the ECtHR opined that:

> "There was no doubt under the law as it stood on 18 September 1990 that s husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was evident evolution, which was consistent with the essence of the offence, in criminal law, through judicial interpretation towards treating such conduct generally as within the scope of rape. This evolution had reached the stage where judicial recognition of the absence of immunity had become a reasonable foreseeable development of the law."

It is not clear why the Strasbourg Court came up with this convoluted reasoning to justify retroactive punishment. According to Nash[107]

> "Dissenting opinion by Mr. Loucaidis and Mr. Nowicki (at the Commission level) found that *R v R* had dramatically changed the law of rape with an effect on the applicants. It was neither a clarification of the existing elements of the offence in question nor an adaptation of such elements to new circumstances which could reasonably be brought under the original concept of the offence. Thus the change in case law could not have been reasonably foreseeable to the applicants."

In the United States marital rape become a crime in all 50 states under at least one section of sexual offences codes. In 17 states there are no marital exemptions while 33 still offer some exemptions.[108]

In *Kaitamaki v R*,[109] the Privy Council held that sexual intercourse is complete on penetration, and is only completed, so to speak, on withdrawal.

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[106] *SW v UK* and *CR v UK* (1995) 21 EHRR 363
[107] Nash and Furse ' *Essential Human Rights*' p 191
[108] Bergen, Raquel Kennedy PhD 'Marital Rape' Applied Research Forum, www.vaw.umn.edu

Should a woman have a change of mind and withdraw consent, the man failing to withdraw can be charged with rape. How this withdrawal of consent is to be expressed in the context of an intense psychological and physical activity in which the parties are coupled is not made clear in law. That decision is left to the discretion of the trial judge and jury hearing individual cases. This was reinforced in *R v Olugboja*[110] where it was held that consent may be absent even when there is no force, fear of force, or fraud. Consent is a question of fact for the jury who should consider its ordinary meaning. A distinction ought to be made between consent and submission in accordance with a very old case *R v Day (1841)*. [111]

The recent California case highlights the difficulties and absurdities encountered when deciding what constitutes consent and withdrawal of consent. In January 2003, the California Supreme Court ruled 6-1 that it is rape if a man continues to have sex with a woman who originally consented but then changed her mind.[112] In her sole dissenting opinion Chief Justice Janice Rogers Brown said that in this "sordid, distressing, sad little case",[113] the majority provided no guidance about what constitutes withdrawal of consent and what amount of force turns consensual sex into rape. The

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[109] Kaitamaki v R [1985] A.C. 147
[110] R v Olugboja [1982] QB 320, CA
[111] R v Day(1841) 9C & P 722
[112] law.com, copyright 2004 ALM Properties .Inc

defendant minor had continued to have sex for four minutes or so after the complainant had asked him to stop. Justice Brown took the position that not only should the complainant communicate her change of mind clearly, the prosecution should also prove that force was used to continue the sexual act.

The *mens rea* of rape has also come under scrutiny and the defence based on its meaning has been on the shifting sands of judicial tinkering. In *DPP v Morgan*,[114] the HL held that an honest mistaken belief in consent is inconsistent with the *mens rea* of rape. Mistaken belief does not have to be based on reasonable grounds which are consistent with the fact that rape requires proof of *mens rea* rather than being satisfied by negligence.[115]Furthermore, in *R v Satnam & Kewal*[116] it was held that the definition of recklessness was not objective as in **Caldwell** but should be based on the definition given in **Morgan**, which was as described by Lord Hailsham, "intention to have sexual intercourse without consent or recklessly doing so".[117] The burden remained on the prosecution to prove this but when the Sexual Offences Act 2003 is implemented the burden will

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[113] In Re John Z, 03 C.D. O. S.129
[114] DPP v Morgan [1976] A.C. 182
[115] Childs, P ' Nutcases: Criminal Law' 3rd edition, p 50, Sweet & Maxwell 2002
[116] R v Satnam & Kewal [1984] 78 Cr. App. R 149
[117] ibid

shift to the defendant.[118] This would constitute a radical shift in the law and raises questions of violation of article 6(2) of the European Convention.[119]

Conclusion

This chapter has attempted to show that by and large over the ages sexual offences legislation has been based on irrational notions, superstitions, extremist views, and religious fanaticism. Almost never has it been based on sound well considered theories of jurisprudence or science. The next chapter will review some of the theoretical models offered to address sexual offences and what impact they have had on legislation and on controlling sexual crimes.

[118] s 76 places an evidential burden on the defendant.
[119] See chapter 4 p 69

CHAPTER 3

LEGAL MODELS FOR SEXUAL OFFENCES

I have tried to show that sexual offences laws have developed largely in response to irrational moral beliefs or to the political manipulations of pressure groups. What I shall consider now is whether it is possible to develop laws based on sound jurisprudential and scientific thinking. I shall take up the question of whether the current Sexual Offences law might stand the test of scientific and objective legal scrutiny.

Various legal models for dealing with sexual offenders have evolved over time, each new model replacing its predecessor due to the failure of the latter to meet public expectations of total control of sexual crime. The debate centred, primarily, on whether offenders should be dealt with by the criminal justice system or routed to psychiatric programs. Sexual offences have aroused public ire and fear because of the psychological trauma inflicted more so than the actual, if any, physical harm. For instance rape is known to be a cause of one the most severe of catastrophic psychic traumas often

causing Post Traumatic Stress Disorder.[120] Sexual offenders are perceived as evil and dangerous. Consequently, it is imperative to understand what sexual dangerousness is and whether it can be predicted with any degree of accuracy. Society can be protected from the future acts of sexual offenders only if their risk of reoffending can be predicted accurately enough to warrant taking preventative measures, such as incapacitation, without at the same time abusing the rights of criminals who have completed their punishment to life and liberty.

Dangerousness: Definition and Prediction:

The concept of dangerousness has played a major role in determining how to label individual criminals so that the dangerous one might be denied the right to live freely in society. According to Michael Petrunik,[121] the definition encompasses three different perspectives:

> "The religious perspective which sees dangerousness as a product of sinfulness and the violation of divine law subjecting the evil doer to divine, clerical and state sanctions. The medical perspective which views dangerousness as a product of mental or physical illness not freely chosen by the individual and over which he has little or no control, and which should benefit from treatment, and the legal perspective in which laws have been violated by a person who knowingly or negligently committed the wrongdoing and which subjects the criminal to retribution and rehabilitation and the victims to redress and protection."

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[120] Scrignar, C ' *Post Traumatic Stress Disorder: Diagnosis, Treatment and Legal Issues*' 3rd Edition Bruno Press

[121] Petrunik, Michael 'Models of Dangerousness: A Criminal Jurisdictional Review of Dangerousness Legislation and Practice'

The legal perspective pays attention to the safeguarding of the rights of the accused through due process of law and respect for fundamental rights. Legislation takes into account not only the legal perspective but also the medical and the religious. Petrunik[122] believes, the law has become an

> "arena of competing perspectives; clinical, scientific, civil libertarian, and moral. It is in such an arena that decisions about dangerousness are made. Popular conceptions about dangerousness often are based on primitive fears of persons, usually the mentally ill, sex offenders, and, in earlier contexts witches and the demonically possessed. As a result dangerousness legislation has usually focused on those considered to be mentally ill and sex offenders."

This has been shown to be contrary to research findings where sexual or violent offences occur primarily in domestic contexts, whereas most legislation addresses the rare instance of predatory violence by strangers.[123] In fact, until recently the state of Illinois allowed for probation for rapes committed in the family home,[124] and this law is still extant in other American states, including New York and California. In North Carolina until last year, the rape of a niece by an uncle was considered a misdemeanour under an 1879 incest law punishable by a fine. As a further oddity in the application of the law, a state judge in Queensland, Australia ruled that the statutory rape of a 15 year old girl by a 50 year old man was not rape but

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[122] ibid

[123] Marshall, P and Vallaincourt, M 'Changing the Landscape: Ending Violence and Achieving Equality' Report of the Canadian Panel on Violence Against Women, 1993

[124] Protect All Children legislation enacted Illinois May 2003. ILCS 720 5/11-10

rather as an expression of the aborigine man's right to have sexual intercourse, a 40,000 year old traditional practice.[125]

Models of Dangerousness

It is generally recognized that there are three legal models of dangerousness; the clinical, the justice and the community protection models.[126]

(a) Clinical Model

The clinical model is the oldest of the three and is still relevant in England & Wales, the Netherlands, and in such states as Illinois in the USA. This is based on the concept of psychopathy, an alleged mental disorder of the individual that originates from 19th century psychiatric ruminations. The putative disorder renders the afflicted incapable of empathy or moral judgment with tendencies to inborn predatory sexual behaviour. These individuals were outside the scope of legal insanity provisions, but the law accepted the concept of inherent dangerousness of the so called criminal man, and advocated the position that there should be social control proportionate, not to the seriousness crime itself but to the risk of dangerousness posed by the individual. Controls were to be non-punitive and indeterminate. Offenders thus designated as dangerous due to a mental disorder were dealt with not so much from the standpoint of their right of

[125] Judge Rules Rape of Aboriginal Girl 'Traditional', Women's News, 29 November 2002,

equality before the law but on the duty of the State to ensure public protection in its *parens patriae* powers.

England and Wales do not have special indeterminate criminal legislation. They can be dealt with through the provision of discretionary life sentences under the Criminal Justice Act 1988. The 1959 Mental Health Act, revised in 1983 (MHA 1983), provides for a system of hospital orders for dangerous offenders. Dangerous mentally ill offenders can be placed under a restricting hospital order in one of 3 ways:

- First the court has the power to impose a hospital order in lieu of imprisonment under Ss 37 and 41 of MHA 1983.
- Second is the obligation of the court under s 3 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 to impose an order on those found not guilty by reason of insanity, and the discretion to do so for other offences
- Third, the power vested in the Home Secretary to impose restrictions on prisoners transferred to psychiatric hospitals under Ss 37 and 41 of MHA 1983.

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www.womensnews.org

[126] Petrunik, op cit

- Fourth under the Crime (Sentencing) Act 1997, for the Court to impose a sentence of imprisonment but to direct the offender to be sent to a hospital.

Patients can be confined to a hospital as long as they are deemed to constitute a risk to the public. They can be released once they are considered no longer in need of inpatient care and not dangerous to the public by a Mental Health Tribunal or by the Home Secretary. Once released, they are subject to monitoring by medical practitioners and can be readmitted for cause. The difficulty in making objective evaluations regarding the stability and safety of the offender and the unlimited discretion given to the Home Secretary raises questions of potential abuse. In 1998 according to Home Office statistics[127] there were 1062 mentally ill offenders admitted as restricted patients of which 93 were sexual offenders. Of the total of 2776 inpatients 368 were sexual offenders. The proportion who was suffering from a mental illness was 94% whereas the group known as psychopathic offenders declined to 3% in 1998 from 15% in 1988. The increase in the sexual offence category grew from 33 in 1988 to 93 in 1998. There were only 45 (12%) sexual offenders given unrestricted hospital orders by the

[127] Johnson, S and Taylor, R 'Statistics of Mentally Disordered Offenders in England & Wales 1998' Home Office Bulletin

courts in 1998. Use of hospital orders for the psychopathic offenders has been criticized, as there is no known treatment and it is therefore difficult to determine recovery. This is further compounded by plans to have a new category of offenders referred to as Dangerous Persons with Severe Personality Disorders sent to indeterminate confinement after serving their custodial sentences.[128] The medical profession does not recognize psychopathy as a psychiatric diagnosis and the two accepted diagnostic manuals, the ICD 9 and the DSM IV TR[129] make no reference to it. However, there is the perception that psychopathic offenders are more dangerous than other mentally ill persons. For the 2 year period between 1983 and 1985 of the 90 psychopaths released 16 reoffended, 9 seriously. This is twice as high as the overall recidivism rate of discharged mentally ill patients.[130]

The clinical model came under severe criticism for its inattention to the rights of offenders and the mentally ill. They were also challenged because of the inability of psychiatrists to accurately predict dangerousness. Monahan's 1981 review of the literature[131] showed that clinical prediction of

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[128] Cobley, C, p 355

[129] International Classification of Diseases No 9 of the World Health Organization , and the Diagnostic and Statistical Manual Vol 4 Text Revised of the American Psychiatric Association

[130] ibid

[131] Monahan, John ' Clinical Prediction of Violent Behaviour' pp 47-49, 1981

violent behaviour was accurate only one out of three times. According to Winick:[132]

> "Clinical predictions are often based on opinions grounded in clinical observation and experiences that have not been scientifically tested and validated. These observations may be idiosyncratic, and the theories underlying such predictions may be invalid Moreover, the clinical grounds that form the basis of these predictions may be contaminated by the evaluators' biases and the heuristics he or she may rely on"

(b) Justice Model

Sexual psychopathy statutes gave way, mainly in Canada and the United States, to Sexually Dangerous Persons laws in accordance with the justice model. Indeterminate confinement in mental institutions was replaced by fixed sentencing rules. However, the justice model law also came in for criticism particularly in the area of sexual offences as it was perceived that recidivism rates for sex offenders were much higher than for other crimes. A Canadian study[133] found that sex offenders were more than twice as likely to commit violent crimes than were other offenders released on full parole, and that repeat sexual offenders were more than twice as likely to reoffend compared to other sex criminals. Another problem had to do with claims that a very low proportion of sexual crimes is actually reported. In 1990

[132] Winick, Bruce ' Sex Offender Laws in the 1990s: A Therapeutic Jurisprudence Analysis' Psychology, Public and Law 1998, vol 4, No ½ p 559
[133] Research and Statistics Branch, Correctional Services of Canada, 1991

about 685,000 rape cases were reported in the US, only a third to law enforcement agencies. The National Victim Centre estimated that the actual number of rapes probably exceeded 2 million.[134] The Canadian Urban Victimization Survey found that 62% of female sexual victims did not report their assault to the police.[135] Rape statistics are nonetheless suspect as they revolve around the definition of what constitutes rape. The U.S. Justice Department reported an 8% lifetime prevalence of rape but the most quoted studies in feminist and politically correct circles are the 1985 *Ms* study reported by Mary Koss, and the 1992 National Women's Study by Dr. Dean Kilpatrick. Both these studies concluded that roughly one in four women had been raped even though in the Koss study only a quarter of the women who met the study's criteria for rape thought they had been assaulted.[136]

In addition, several studies have entertained doubts about the high recidivism rate of all sexual offenders. For instance, a study done by Sturgeon and Taylor[137] on a group of sexual offenders released in 1973, found a significant difference in the rate of recidivism in the various categories of untreated sex offenders. Overall, the group had a 26% rate of

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[134] Time Magazine, May 4, 1992

[135] Petrunik, op cit

[136] Hoff Sommers, Christina, ' Researching the " Rape Culture" of America: Leadership U, 14 July 2002, www. Leaderu.com

[137] Sturgeon V & Taylor " Report of a five year follow up study of mentally disorderd sex offenders released from Atascadero State Hospital in 1973" *Criminal Justice Journal* 4(31): 31-63, 1980

reoffence, but within the group incest perpetrators had a 0% rate of reoffence compared to homosexual paedophiles who had a rate of 37.5%. A study by the Home Office in 2003[138] on a group of offenders in treatment suggested that if only the official reconviction was considered, reoffending by sexual perpetrators was as low as 3%. However, looking at the broader measure of recidivism [139] the reoffending rate was 15%. The findings of another Home Office study[140] on reconviction rates of all discharged prisoners, the results shown below suggest that sexual offenders are less likely to reoffend than other convicts.

TABLE 1	
Crime	Relapse Rate
Violence against the person	46%
Sexual Offences	18%
Burglary	75%
Robbery	51%
Theft and Handling	74%
Drug Offences	38%
Fraud and Forgery	37%

With reconviction rates this high in all categories of offences, the justice model, which had won widespread professional acceptance in America and

[138] Falshaw, L et al ' Sexual Offenders- measuring reconviction, reoffending and recidivism' Home Office Findings 183

[139] defined as offence related behaviour whether legal or illegal

the Nordic countries in the 1960's to the 1970's, did not, however, garner public support. Furthermore, it did nothing to quell the fears about predatory sexual offenders. The justice model had protected the rights of the offenders but not those of the victims. As a result the pendulum swung back to a reconsideration of the old psychopathic laws.

(c) Community Protection Model

A trend emerged in North American and Australia to develop "community protection models", which ostensibly would address the deficiencies noted in the clinical and justice legal models. The Washington Sexual Predator Act, 1990[141] has become the paradigm for legislation designed to control the menace of sexual predators, but which in reality has encompassed many minor sexual offenders. Washington's law does several things:

- Expands the list of sexual offences to include crimes such as residential burglary and arson when these were deemed to be sexually motivated.
- Increases the penalties for sex offences.
- Mandates treatment of juvenile offenders.
- Extends of the period of post release supervision.
- Requires convicted offenders to register with the police.

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[140] Councell, R et al 'The prison population in 2001: a statistical review' Findings 195

- Mandates community notification of the whereabouts of sex offenders.
- Notifies prosecutors of impending release of sex offenders.
- Provides for indefinite civil commitment of an offender after serving the full sentence if deemed to be a sexually violent predator. The standard of proof is the same for criminal offences. And even though no treatment may have been provided during his incarceration the commitment will be based on the need for treatment, which if not successful will subject the offender to indeterminate confinement.

According to Farkas [142]

> "There is evidence that once committed an offender has little chance of release. (She quotes) E. Janus as stating that in the two states with the longest contemporary commitment programs (both operating since 1990), Washington and Minnesota, no individuals have been released from commitment and only a handful are in transitional placements".

Civil commitment laws have been adopted by jurisdictions in the United States including Kansas. In *Kansas v Hendricks*,[143] the U.S. Supreme Court upheld the constitutionality of the Kansas Sexually Violent Predator Act[144] ruling that it did not constitute ex post facto punishment nor double jeopardy as the law was civil and not criminal. Notwithstanding critics[145] of the decision who view this new penology as abandoning "our modernist faith in scientific rationality" and escaping "direct review" and leading to the

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[141] Wash. Rev. Code Ann .§ 71.9.01
[142] Farkas, M et al ' Sex Offender Laws: Can Treatment, Punishment, Incapacitation, and Public Safety Be Reconciled?' Criminal Justice Review vol 27 no 2, autumn 2002
[143] Kansas v Hendricks 117 S. Ct 2072 (1997)
[144] Kan. Stat. Ann. § Section 59-29 (a) (01)(West. Supp. 1994)

"decline of constitutional standards", almost all states in the Union have adopted the Kansas version of the law.

In *Kansas v Crane*[146] the U.S. Supreme Court revisited *Hendricks* and tightened the definition of a mental abnormality thus preventing the ordinary recidivist from falling into the ambit of the law, and the Court also emphasized that the offender must have serious difficulty in controlling his behaviour. Nonetheless, individuals with Personality Disorders or any mild mental defect that are untreatable could be incarcerated. In addition civil commitment is often based on actuarial models of prediction[147] which are experimental at best and of low reliability when applied to the individual being tested.[148]

England and Wales have not been particularly innovative in this area. Perhaps this is due to the fact there are fewer sensational cases, and the fact that there are fewer sexual offences committed. For instance the rape rate in Britain is 13 times less than that in the US.[149] There are several Sexual

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[145] Simon, J ' Managing The Monstrous: Sex Offenders and the New Penology' Psychology, Public Policy, and Law 1998, Vol 4, No ½, 452-467

[146] Kansas v Crane 534 US 407 (2002)

[147] see appendix 2, p 145

[148] Abrams, A " Predicting Future Sexual Violence", American College of Forensic Psychiatry, Annual Meeting , March 2004

[149] Brakel et al '*The Mentally Disabled and the Law*' American Bar Foundation, 1988

Offences Acts and people are still being charged under one or more of them[150].

The Sex Offenders Act 1997 makes violations of these laws a requirement for notification and registry as a sex offender. The case of *ADT v UK* [151]is illustrative of how the law reaches back in time to secure a conviction under statutes that are clearly not consistent with modern social mores. In Setting the Boundaries,[152] the Committee report admitted that the law on sexual offences needed review because it was

> "A patchwork quilt of provisions ancient and modern that works because people make it do so, not because there is coherence and structure. Some is quite new but much is old dating from nineteenth century laws that codified the common law of the time, and reflected the social attitudes and roles of men and women of the time."

Although England and Wales have not gone all the way in implementing the draconian Washington State SVP law, there are mutterings about doing so. The Daily Mail[153] reported that ministers had promised to further strengthen the laws against paedophiles. Whitehall officials were considering new indeterminate sentences for paedophiles as well as for the psychopaths for whom they were intended.[154] Even the Lord Chief Justice jumped into the

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[150] see Appendix 1, p 143
[151] *ADT v UK* (2001) 31 EHRR 611. The applicant was charged with gross indecency under s 13 SOA 1956 even though this provision was considered untenable
[152] Setting the Boundaries, Vol. 1, July 2000, Home Office Publication
[153] The Daily Mail, 27 December , 2001
[154] The Birmingham Post, 14 March, 1998

fray by proposing that paedophiles be incapacitated before they commit a crime.[155] Mr. Hague may be long gone as a political force, but one of his few successes in public life would be the eventual enactment into law of his ideas on how to deal with sexual offenders by his nemesis in the British Labour Party.

The next chapter will analyse the recently enacted Sexual Offences Act 2003 (SOA 2003) in the context of its promises to overhaul and modernise the law on sexual offences and its compatibility with the Human Rights Act 1998 (HRA 1998). It is based on the Community Protection Model but shies away from adopting the full draconian measures of community notification.

CHAPTER 4

SEXUAL OFFENCES ACT 2003: RIGHTING WRONGS ?

[155] The Daily Mail, op cit

The Sexual Offences Act 2003 (SOA 2003) which came into force 1 May 2004 attempts, as its proponents would have the public believe, to "modernise the laws on sexual offences and to deter and manage sex offenders".[156]

(a) Aims of the Act

The broad scope of the legislation according to the House of Commons research paper[157] is the following:

- Protection of children and other vulnerable people
- Widening of the law on rape and changing the permissible defences in relation to consent
- Making the law more gender neutral, repealing offences applying to gay men
- Creating new offences
- Increasing prison terms for all offences
- Tightening notification requirements on sex offenders and widening registration of those convicted overseas.

How does the law propose to achieve each of these objectives?

(b) Protecting children and vulnerable persons

(*i) The child as victim*

Section 5 makes it an offence of rape for a person to intentionally penetrate with his penis the vagina, anus or mouth of a child under the age of 13 regardless of consent. Section 6 makes it an offence for a person to intentionally penetrate sexually the vagina, anus of a child under the age of 13 with a part of his body such as a finger or an object regardless of the consent of the child. Sexual intention is defined in section 78 as what the reasonable man would consider sexual. The Act does not define what sexual or intent are. It offers a circular explanation that "sexual is whatever may be considered to be sexual in nature" without considering the intentions of the subjects involved. The Explanatory Notes that accompanied the Bill on its introduction provide simplistic examples of what does not constitutes a non sexual penetration of the vagina; the examination of a women/girl by a physician if the physician's purpose were medical rather than sexual.[158] The Explanatory Notes further go on to muddy the waters of what is sexual gratification by advising that even if an act were subjectively sexually gratifying to the accused, if the reasonable man did not think it was so then it is not. It unhelpfully offers examples of "obscure fetishes" as falling into the

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[156] Berman, G et al ' Sexual Offences Bill [HL] Policy Background, House of Commons Library. 10 July 2003

[157] Thorp. A ' The Sexual Offences Bill [HL] , House of Commons Research Paper 03/62, 10 July 2003

[158] Sexual Offences Bill, Explanatory Note. House of Commons

non -sexual category. By its very definition a fetish,[159] obscure or not, in the context of this Act, provides sexual gratification. The authors of the legislation simply assume or cravenly leave, to the jury the unwholesome and often impossible task of defining very complex legal terms such as consent and intent. It is not enough to direct them to consider the "ordinary"[160] meaning of the words.

(ii) The child as defendant:

Wholly apart from the issue of what constitutes sexual intention, the law clearly does not specify the age of the perpetrator. Consequently, a child of any age could conceivably be accused and convicted of rape. Granted by law a child under the age of 10 is considered *dolix incapax*,[161] and today would be subject to various judicial orders[162] if found responsible for activities that would be considered criminal in an older person. In the past there was the rebuttable presumption of *dolix incapax* in a child between the ages of 10 and 14, but the Crime and Disorder Act 1998 abolished this presumption.[163] If a child under the age of 13 is by statutory definition not able to give consent how could a child of the same age commit an intentional criminal

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[159] Fetish is defined in Merriam Webster's dictionary as an object or body part whose real or fantasized presence is necessary for sexual gratification
[160] *R v Olugboja* 1982
[161] s 50 Children and Young Persons Act 1933 as amended
[162] s 11Crime and Disorder Act 1998
[163] s 34 Crime and Disorder Act 1998

sexual act. Would a child convicted of rape be required to register as a sex offender? This may not be as bizarre as it may appear at first blush. The Illinois Supreme Court tackled this very same problem in February 2003 in the case of a 12 year old boy who made an admission of two counts of aggravated sexual assault in February 2000 and was adjudicated a delinquent. As a condition of probation he was banished from his village of South Elgin and required to register as a sexual offender for life. On appeal the Supreme Court of Illinois upheld the lifetime registration of the juvenile since the relevant Illinois statute[164] categorized him as a sexual predator for which lifetime registration was required because the statute did not specify any age limitation.[165] In responding to a Parliamentary enquiry regarding notification requirements for children, the Government gave a rather contorted explanation but eventually conceded that

> "Where the offence by definition is always a serious one and therefore no sentence thresholds applies, the Government considers that the offending behaviour by that child, whether aged 10 or 18, is sufficiently serious to justify applying the notification requirements to that offender. This view is reached taking into account that the CPS will have taken the decision to proceed with the charge in the public interest."[166]

Criminalizing sexual activity between children is provided for by section 13 which reads that it is an offence for a person aged under 18 to do anything

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[164] Illinois Sex Offender Registration Act P.A. 84-1279 Art. 1 § 1, eff 1986

[165] *In re J.W. No 92116.* Illinois Supreme Court Summaries (unpublished order under Supreme Court Rule 23) www.state.il.us/court/opinions/SupremeCourt/2003/February

that would be an offence under any of sections 9-12[167] if he were aged 18 or over. The maximum penalty is 5 years imprisonment. Ostensibly the purpose of the clause is to provide for lower penalties for the miscreant child. Furthermore, the Policy Background analysis that accompanied the introduction of the Bill in the House of Lord reassures us that the Crown Prosecution Service (CPS) will retain discretion in whether to prosecute such crimes.[168] Small comfort! Lives and reputations are destroyed merely by the initiation of a criminal investigation. The CPS will be acting as judge and jury. The case of *B .B v UK*[169] is emblematic of why the CPS should not be trusted. Even when an inquisitorial system is used such as in France, investigative judges are prone to make catastrophic blunders.[170]

The government did not submit evidence of rampant sexual abuse between children[171] in order to justify such a measure. It will criminalize normal developmental behaviour of children. Dr Lawrence Kutner was quoted in Parents Magazine, 1994[172] saying that "this type of behaviour is perfectly normal although socially inappropriate." This is a statement that is logically

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[166] Joint Committee on Human Rights, Memorandum from the Home Office, March 2003
[167] ss 9-12 deal with inciting or having sexual activity with a child
[168] The Sexual Offenders Bill: Policy Background, House of Commons Library 10 July 2003
[169] *B.B. v United Kingdom* , Application no. 53760/00. The case involved a man charged for having sex with a 16 year old boy in 1998 although it was known at the time that the age of consent would be changed. He was eventually acquitted but was awarded damages by the ECtHR for hurt suffered.
[170] TimesOnLine 27 May 2004 " French Judges Go On Trial As Case Collapses"
[171] It did claim without citing evidence that one third of all sex offences involved adolescents
[172] Levine, J p 45

inconsistent. What some adults might disapprove off does not make behaviour socially inappropriate and certainly does not call for its criminalization. The harm that these laws can cause is immense. The author has personal experience of a number of children wrongly tagged as sexual perpetrators. In one instance a 15 year old boy was diagnosed to be a paedophile because he was having sexual relations with a 13 year old girl and this diagnosis was accepted by the juvenile court. A 5 year old was accused of being a sexual perpetrator by his school because of an incident in the kindergarten toilet where he touched another child's buttocks. A 13 year old girl was admitted to a mental institution after having anal sex with her 12 year old brother, and eventually removed from the family home.

Judith Levine[173] describes several horror stories of children labelled as sex offenders and then left to rot in the various juvenile and mental institutions where they were sent ostensibly for rehabilitation. One particular poignant story is that of a 11 year old boy who was refused release from a sex offender program because he would not admit to his crime and was diagnosed to be in denial. He committed suicide at age 14.

The zero tolerance policy has raised the bar so high that normative childhood behaviour is now unacceptable in many educational institutions.

[173] ante, at p 45

In a Vermont school an 8 year old was indicted for sexual harassment because she sent a note to another child asking whether he wanted to be her boyfriend. [174]

There is almost no reliable scientific data on what constitutes normal sexual behaviour in children. Yet, there is no dearth of self proclaimed experts who have successfully created a sexual abuse pandemic in the UK and the US. One such expert, a social worker, Kee MacFarlane, headed the team that found credible allegations of abuse in 369 out of 400 children in the infamous McMartin Preschool trials in which bizarre tales of satanic rituals, anal rape, animal mutilations and other macabre perversions were reported none of which were ultimately substantiated.[175] In 1984 there were no treatment programs for sexually abusive children. By 1998 there were over 400 for prepubescent sexual offenders and 800 for adolescents. In the absence of any scientific basis to their treatments, they must necessarily rely on dogma in order to justify their work. That the courts unquestioningly accept the preaching's of these professionals is a sad testimony to the level of ignorance prevailing in the legal profession. Levine correctly notes[176] that

> "Over the past two centuries the moral judges have moved from the pulpit to the clinic,. As the medical historian Peter Conrad put it Badness has

[174] ibid p 49
[175] Sauer, Mark, 'Believe the Children' Times Union, August 29, 1993
[176] ante at p 66

> been written as Illness. The category of childhood sexual behaviour is a reincarnation of the eighteenth and nineteenth century disease of masturbation insanity"

The odd axis that has developed in the last decade with the legal system branding children as sex offenders and then turning them over to the mental health field for treatment appears a combination of the worst of the legal and religious jurisprudential model. It is a reminder of the forcible and cruel treatment of homosexuals in the twentieth century. Categorizing what could well be normative sexual behaviour as a crime and a psychiatric disease is ominously akin to the branding of political dissenters as mentally ill and remanding them to mental institutions. The legal question that arises is whether the punishment afflicted on these children and their families is cruel and unusual. Article 3 of the Convention specifies that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 8 deals with the right to respect for private and family life.[177] On examination of related cases in the area of physical chastisement of children analogies can be drawn that might be helpful in understanding how Strasbourg might proceed.

[177] Human Rights Act 1998, Schedule 1

In the case of *A v UK,*[178] which dealt with what constitutes appropriate chastisement, the European Court found violations of article 3 of the Convention. It ruled that the State had a positive obligation to provide protection to children and vulnerable persons from treatment and punishment. In *Z v UK*[179] the Court ruled that the system had failed to protect the applicants, who were beaten and neglected despite supervision by social workers, from long term abuse, an article 3 violation, and, furthermore, the courts had failed to provide them with an adequate remedy. However, in an earlier case, *Costello-Roberts v U.K.*[180] no violations of article 3 or 8 were found in the case of an applicant who had been beaten as punishment in an independent boarding school. Furthermore, when the ECtHR heard the case of the Bulger boy killers, it ruled their trial, while stressful and unfair, did not constitute inhuman or degrading treatment under Article 3 of the Convention.[181]

Nonetheless, it could be argued that the branding and referral for indeterminate rehabilitation of children for engaging in sexual activity that may very well be age appropriate could constitute violations of articles 3

[178] A v UK (1999) 27 E.H.R.R 611
[179] Z v UK (2002) 34 E.H.R.R.
[180] Costello-Roberts v UK (1993) 19 E.H.R.R. 112
[181] World Socialist Web Site, 17 December 1999

and 8 of the Convention. No cases have so far been brought to the Strasbourg court.

(iii) Over protection of children:

A disturbing feature of the Act in its attempt to protect children is the requirement of section 14 which proscribes arranging or facilitating the commission of a child sex offence. This has raised concerns that health care professionals or counsellors may be accused of violating this clause by providing advice to children on sexual activity. Knowing for instance that a minor was having or going to have sexual relations with another person a professional might decide to prescribe birth control measures or give advice regarding safe sexual practices. Could this be construed as a violation of this section? A person found guilty could be sentenced to 14 years imprisonment. Subsection (2) ostensibly provides relief from prosecution if the person involved intended to act to protect the child. There is a very fine line between facilitating and protecting. Once again it will left to the discretion of the CPS to pursue or drop prosecution. In the United States the matter was brought to the attention of the courts in *Conant v Walters* [182]in which the 9th Circuit Court of Appeals in San Francisco rejected the US government's argument that recommending or prescribing marihuana would

[182] Conant v Walters No 00-17222

be helping a patient commit a crime. Chief Judge Mary Schroeder in writing the majority opinion said "A doctor's anticipation of patient conduct does not translate into aiding and abetting or conspiracy". The US Supreme Court declined to hear the government's appeal of that decision. The ruling was based on Article 1 of the Bill of Rights guaranteeing freedom of speech. Consequently, it would be expected that article 10 of the Convention[183] which addresses freedom of expression would be applicable to this section of the law. It is also somewhat reassuring that the Explanatory Notes on the Bill suggest that health professionals need not fear prosecution.[184] Thus there is some legal and legislative precedent that would offer protection to individuals involved in the care of minors engaging in sexual activity. However, the explanatory notes also create a hypothetical criminal situation under section 14 where:

> "A person (A) intentionally drives another person (X) (*who could also be a minor*)[185] to meet a child with whom he knows X is going to have sexual activity. A may not intend X to have child sexual activity but he believes X will do so if he meets the child."

Furthermore, the ruling by the European Court of Human Rights in *Handyside v UK*[186] allowing some scope to the State to determine what

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[184] Sexual Offences Bill 2003 , Explanatory Notes
[185] my italics
[186] Handyside v UK (1976) E.H.R.R. 737

constitutes protection of morals may not bring much comfort to those sceptical of the government of the day. Whatever false reassurance the politicians and the bureaucrats offer now there is no escaping the fact that the law will have a chilling effect in deterring professionals from getting involved with sexually active children leaving them even more unprotected than they had been before the passage of the law. The recent controversy in the Press regarding protecting the confidentiality of a pregnant teenager is only the tip of the iceberg.[187]

A further complication will be the inevitable rise of false accusations by children against people in a position of trust especially by children involved in consensual sex and who want to evade responsibility. Recently, the media announced the release of a care worker who was sentenced to 8 years in jail for sexually abusing two boys.[188] His sentence was quashed by the Court of Appeal. The media reported that lawyers for the Historical Abuse Appeal Panel estimate there are over 200 innocent care workers who have been falsely convicted and in prison. The Labour MP, Claire Curtis -Thomas said Parliament was concerned about police investigative methods such as trawling, and the compensation culture for encouraging false allegations.[189]

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[187] BBC News 13 May 2004 " Teen Pregnancy and Confidentiality":
[188] TimesOnline, February 6, 2004
[189] ibid

This has not stopped the Government from introducing legislation[190] that will make it much easier for a flood of false abuse allegations against parents and others in a position of authority. Stewart Room, head of Data Protection at the law firm of Rowe & Cohen is reported to have said a child would only have to appear with "two unexplained bruises" for a child protection unit inquiry to be initiated.[191]

(iv) Criminalizing Teenage Sex:

Another example of the intrusiveness of the State is found in section 9 which prohibits "sexually touching a child under age 16 by a person over age 18". Touching is defined in section 79(8) as

> "Touching to include (a) with any part of the body, (b) with anything else and (c) through anything and in particular includes touching amounting to penetration. 'Sexual' is defined in section 78 as penetration, touching, or any other activity is sexual if (a) from its nature, a reasonable person would consider that it may (at least) be sexual, and (b) a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or of all or some of these considerations."

Where the child is between 13 and 15 the prosecution must prove that the defendant did not reasonably foresee that the child was under 16. This defence does not apply to a child under 13. Consent is irrelevant. A person convicted under this section is liable to imprisonment for up to 14 years.

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[190] Childrens Bill 2003
[191] TimesOnline, March 11, 2004

This section would essentially criminalize teenage sexual play. A boy in his final year of his A levels would be in violation of this section if he were, on a date, involved in kissing or fondling a girl in the first year of the A level class.

The law presumes that children in this age category are incapable of giving free consent, and therefore must be protected from adults or other children. If the data are correct there should be literally thousands of arrests and convictions. The Teenager Pregnancy Report showed that 28% of underage boys and 18% of underage girls were sexually active in 1991.[192] The Durex Global Survey, 1999[193] showed that the average teenager in the U.K. was sexually active at age 15.3, the global average being 15.9. Its 2001 report found that 32 % of adults surveyed admitted that they were 16 or under when they first lost their virginity and young people continued to have sex at an earlier age than previous generations.[194] In 1995 in California a sociologist uncovered datum that showed at least half of the babies born to teenage mothers were fathered by men over twenty.[195] The New York magazine reported that 47% of teenagers engage in sexual intercourse.[196] According to American prosecutors two thirds of complaints regarding illicit

[192] Sexual Offences Bill: Policy Background 10 July 2003, p 8
[193] Durex Global Survey Report 1999. www.durex.com
[194] Durex Global Sex Survey Report 2001, www.durex.com
[195] Males, Mike' Scapegoat Generation: America's War on Adolescents' Common Courage Press 1996

sex come from parents of minor children giving them enormous power in putting their daughters' boyfriends behind bars.[197]

The story of Sean Penny might put a human face to this conundrum and the devastation that ill conceived laws, such as this particular section, can cause.

In the summer of 2001 Sean Penny, then 18, was caught having consensual sex with a 14 year old boy. As part of a plea bargain he pleaded guilty to two counts of lewd and lascivious battery on a minor. The judge withheld adjudication meaning that Penny was not found guilty. However, he had to register under the Florida Sexual Predator Act [198]as a sex offender until 2012. By law probation officers were required to notify university officials.

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[196] New York Magazine 30 May 2004
[197] Elstein & Davis " Sexual Relations Between Adult Males and Young Teen Girls'
[198] Florida Sexual Predator Act 2003, Title XLVI, Chapter 775

As a result the officials asked him to move off campus. He was then expelled. He moved into a new apartment in another town but when the landlord was notified by the authorities he evicted him. He applied to another University but was denied admission as he was considered at high risk for reoffending. The legal argument offered was that the Florida legislature found that:

> "Sexual offenders who have committed their offences against minors often pose a high risk of engaging in sexual offences even after being released from incarceration or commitment."[199]

Thus the consequences for innocent teenage sex can be devastating.

(c) **Widening of the law of rape and sexual assault:**

(i) Consent

In rape consent is at the heart of the matter.

Section 1 makes it an offence of rape for a person to intentionally penetrate with his penis the vagina, anus or mouth of another person without the person's consent if the accused does not reasonably believe that the person consented. This expands the current law by adding oral penetration to the definition. Conviction under this section will attract life imprisonment and indefinite placement on the sex offenders register. Section 2 defines a new

offence of Sexual Assault. This provides imprisonment for up to 10 years for a person who intentionally and sexually touches another without consent and without reasonable belief that consent was given. Any successful conviction under this section will attract mandatory registration for a minimum of 7 years. Spontaneous acts arising out of unfettered energy and unbridled enthusiasm such as pseudo sexual play on the sports field or in the locker room will all become high risk activities. S 3 will essentially criminalize horse playing.

Subsection(2) provides that whether a belief is reasonable is determined by having regard to all the circumstances including any steps the accused has taken to ascertain whether consent has been given. *Subsection (3)* provides that sections 75 & 76, which deal with rebuttable and conclusive presumptions as to consent, apply to this clause.

Section 75 is a critical departure from the traditional obligation for the Crown to prove beyond a reasonable doubt that the defendant committed the crime. Section 75 applies to section 1 (rape), section 2 (assault by penetration), section 3 (sexual assault) and section 4 (causing a person to engage in sexual activity without consent).

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[199] ' U. Miami student says arrest for sex offenses didn't warrant expulsion' www. ask. elibrary.com

In *Director of Public Prosecutions v Morgan*[200] the House of Lords established the principle that in a rape trial the subjective belief of the defendant that he had the consent of the victim afforded a defence even if he had no reasonable grounds for doing so. This principle was statutorily confirmed and modified in s1(2) of the Sexual Offences (Amendments) Act 1976:

> "It is hereby declared that if at a trial for a rape offence (a) the jury has to consider whether a man believed that a woman or man was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

Section 75 removes the authority of the jury to consider all circumstances of the case. In *subsection (1),* if the prosecution can show that the defendant did the relevant act, in circumstances specified in *subsection (2)*, and the defendant knew those circumstances existed, then the complainant will be presumed to have not consented, and the defendant will be presumed to have not reasonably believed that the alleged victim consented. In order for these presumptions not to apply the defendant will have to satisfy the judge that there is a real issue of consent based on the evidence submitted. If the judge disagrees the jury will be directed to find the defendant guilty.

The circumstances of *subsection (2)* are that:

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[200] op.cit

"Any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, that immediate or that immediate violence would be used.

- "The complainant was, and the defendant was not, unlawfully detained at the time of the relevant act.

- The complainant was asleep or otherwise unconscious at the time of the relevant act.

- Because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented.

- Any person had administered to or caused to be taken by the complainant, without complainant's consent, a substance, which, having regard to when it was taken, was capable to of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act."

Section 74 defines consent as "a person consents if he agrees by choice, and has the freedom and capacity to make that choice"

Consequently, it is apparent that the defendant apart from getting a written consent validated at every step of the sexual activity by a commissioner of oaths (who then might be liable for the crime of voyeurism per section 67), has a severe burden to submit evidence that consent remains an issue. In the original version of the Bill, the Government had placed a burden on the defendant to prove on the balance of the probabilities that the presumption could be rebutted. Although it was subsequently amended to only require an evidential burden rather than a persuasive burden, it has imposed an

objective standard and a shift away from *Morgan*. Furthermore, the determination of whether consent was obtained goes to the heart of the case and should be left to the jury to decide. To remove this right from the defendant to present his case to the jury effectively denies him a right under article 6 of the Convention[201] that specifies that "everyone is entitled to a fair and public hearing within a reasonable period of time by an independent and impartial tribunal established by law."

A charge of rape based on the absence of consent is by far the most serious criminal offence for both the victim and for the defendant. As far as the victim is concerned the psychiatric implications are serious and victims of completed rape are more likely than victims of any other crime to suffer from Post Traumatic Stress Disorder,[202] a crippling and often incurable psychiatric illness. For the defendant it means a sentence of life in prison if convicted. Rape and murder are considered offences of a similar despicable nature. However, it is rare that a victim of murder consents to the crime, the recent cannibalism case notwithstanding.[203] In *R v Cox*[204] it was established that consent can never be a defence to a murder charge. In rape consent is at

[201] Human Rights Act 1998, Schedule 1
[202] Scrignar, C.B.' *Post Traumatic Stress Disorder: Diagnosis, Treatment, and Legal Issues*' p 53, Third Edition 1996 Bruno Press
[203] BBC News 12 December 2002
[204] R v Cox (1992) 12 BMLR 38

the heart of the matter. The standard of proof of guilt should be of the highest and strictest scrutiny and the procedure should be unassailable. Unfortunately, over the years, as a result of pressure groups such as the gender feminists, there has been a dilution of the strict common law standards. They have been replaced by statutory requirements that do not allow for a level playing field for the defendant.

For example the Sexual Offences (Amendment) Act 1976[205] does not permit the alleged victim to be questioned about her sexual experiences except with the man on trial unless the judge believes it would be unfair to the defendant. This limits the ability of the accused to confront his accuser and expose her as habitual liar when it comes to sexual liaisons. The recent case of the American basketball player Kobe Bryant[206] offers an excellent example of the need to allow all facts into the picture. There is no reason to believe that the judge will necessarily be an impartial referee given the pressures on all involved in the criminal justice system to find more men guilty of rape. This is evident from the outrage expressed in government circles and pressure groups over the supposedly low conviction rate for sexual assaults despite the increased number of sexual assaults reported. [207] One study showed that the rape convictions amounted to only 6% of the total incidents reported to

[205] s. 2, 3 & 2(2)SOAA 1976

the police.[208] Yet another survey showed the decline in the conviction rate from 33% in 1977 to 7.5 % in 1999.[209] A logical argument would be that more incidents may well be reported but that would only increase the likelihood that more will be unfounded. The number of cases is also bound to go up as date rape and lack of consent due to intoxication cases make their way into the court rooms. The fact whether consent was freely given as required by section 74 might increase the rate of convictions. After all if a person imbibes freely, loses inhibitions, has sex and then wakes up the next morning with either alcohol induced amnesia or bitter regrets and guilt, may successfully argue that consent was not given freely. In the Canadian case of *R v Esau,*[210] the complainant said she was drunk and had no recollection of what had happened the night before, but woke up realizing she had sex, and would not have consented to sex with the accused because they were related. The deliberate consumption of alcohol precludes a defence of lacking *mens rea* for a crime. In *Director of Public Prosecutions v Majewski*[211] Lord Elwyn-Jones said:

> " If a man of his own volition takes a substance which causes him to cast of the restraints of reason and conscience, no wrong is done to him by

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[206] Talk Left: The Politics of Crime, Kobe Archives, www.talkleft.com
[207] Home Office Statistical Bulletin 21/99
[208] Colby, Cathy ' Sex Offenders: Law, Policy and Procedure, p 41
[209] Home Office ' A Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape'
[210] *R v Esau [1997] 2 S.C.R 777*
[211] *Director of Public Prosecutions v Majewski [1977] AC 443*

holding him answerable criminally for any injury he may do while in that condition."

The same could be said of a person who willingly drinks and then consents to have sex while in this state cannot raise the argument that she was " unconscious" at the time of the relevant act as *subsection (2) (d)* [212] of section 75 would provide.

Yet, the feminist groups have expressed dissatisfaction with this section claiming it does not go far enough to protect women. The Rape Crisis Federation which claims that only 12 % of the women rape victims who contact them report the crime to the police complained that the list of circumstances where consent was unlikely to have been given in section 75 was too limited.[213] It should be anticipated that these groups will pressure Parliament to introduce more exceptions to the defence of consent. An argument could thus be advanced that the more such circumstances are made available to the complainant to retrospectively obviate consent, the less likely will the accused have a level playing field and the more likely will the Human Rights Act be resorted to in appealing convictions

(ii) False Accusations:

[212] provides that the subject was asleep or unconscious at the time of the relevant act
[213] Sexual Offences Bill[HL] Policy Background Research Paper 03/61 p 37

False accusations are quite likely in sexual assaults given the extreme human emotions involved of lust, jealousy, fear and rage, and the moral conflicts of shame, guilt, self hatred and remorse. History abounds with tales of treachery as the result of being scorned. Brownmiller tells us with great scepticism (as behoves a radical feminist) of the biblical story of Joseph and Potiphar's wife who having failed to seduce Joseph accused him of rape whereupon Joseph was thrown into prison.[214]

Gibbon recounts the even more horrifying story of the Emperor Baldwin who after being captured by the Bulgarian king was tempted by his amorous wife and after chastely rejecting her found himself accused of rape. His arms and legs were hacked off and he was tossed into a pile of animal carcasses and breathed his last after three days of being picked at by the birds of prey.[215]

More recently, there has been much publicity given to false charges of rape made against public officials and prominent sports figures. A rape charge against Jody Morris, the Leeds United footballer, was dropped after new evidence emerged following forensic tests.[216] The same month a South African High Court judge attending an international conference in Bombay, India was accused of raping another attendee and jailed for several days until

[214] Brownmiller, Susan 'Against Our Will' loc cit p22

she withdrew the charges.[217] The ordeal experienced by the already much suffering Hamilton's[218] whose accuser was subsequently jailed for obstruction of justice is yet another example of the enormous ease in which a charge of sexual assault can be made regardless of the circumstances.

This is even more apparent in the charges of rape brought years after the alleged event took place. This is noticeably so in the so called recovered memory cases in which the alleged victims are assisted by psychotherapists to recover repressed memories of being sexually assaulted years before, and on the basis of these recollections charges are brought against the alleged perpetrator. A recent astonishing case which prompted a police investigation is that of Jim Fairville, the former deputy leader of the Scottish National Party, whose daughter accused him and 17 other men of sexually assaulting her and of murdering a 6 year old girl many years previously.[219] She had undergone intensive psychiatric therapy for unexplained somatic symptoms and after a 15 month stay on a mental ward recovered these childhood memories. Despite the bizarre nature of the accusations the police proceeded

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[215] Gibbon, Edward 'The Decline and Fall of the Roman Empire' p 1129, Modern Library
[216] Times Online January 21, 2004
[217] Times of India, January 22, 2004
[218] Daily Telegraph, August 29, 2001
[219] Times Online, December 12, 2003

with an investigation. The Hamilton's' too were subject to a Scotland Yard probe and arrest even though they had iron clad alibis.[220]

Not only do these cases raise questions of the over reaction of the police to charges of rape regardless of how improbable they appear, and thus establish the enormous influence of the gender feminist movement, they also raise serious questions as to whether those accused of rape can have a fair trial. We are getting very close to the point where the accusation alone will suffice to prove guilt and fully endorse the gender feminist slogan that all sex is rape. By placing greater and greater burden on the accused to prove he did not commit the offence are we not approaching the Islamic version of rape law manifested in the Hudood Ordinances of Pakistan where a woman

[220] Daily Telegraph, op. cit.

failing to prove rape will then be jailed for adultery.[221]

(iii) Vulnerable Adults

- **Legislative Changes**

Several sections in the Act are dedicated to the protection of the mentally disordered and the learning disabled. [222] Section 79(6) defines mental disorder as the meaning given in s 1 Mental Health Act 1983 (MHA 1983).

S 1 MHA 1983 defines mental disorder as "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind."[223] It goes on to describe the 4 subcategories of the disorder with (my) *emphasis* added to note the distinctions:

> **Severe Mental Impairment** means a state of arrested or incomplete development of the mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.
> **Mental Impairment** means a state of arrested or incomplete development of mind (*not amounting to severe impairment*) and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.
> **Psychopathic Disorder** means a *persistent disorder or disability of mind* (*whether or not including significant impairment of intelligence*) which results in abnormally aggressive or seriously irresponsible conduct.

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[221] Hindustan Times ,Sunday, May 2nd 2004

[222] These include s 30 (sexual activity with a person with a mental disorder (MD) or learning disability, (LD), s 31 (causing or inciting a person with MD or LD to engage in sexual activity), s 32 (engaging in sexual activity in the presence of a person with MD or LD) a 33 (causing a person with a MD/LD to watch a sexual act). Ss 34-37 are similar offences caused by inducement, threat or deception.

[223] Turner, Nigel 'Hyper Guide to the Mental Health Act', www.hyperguide.co.uk

> **Mental Illness** is oddly enough not defined, although the Act does specify that immoral conduct, sexual deviancy, alcohol and drug abuse do not fall under the scope of the definition of mental disorder.

Simply stated ,therefore, the MHA 1983 does not define mental illness clearly enough and there are no other legal definitions except the one put out by the Department of Health[224] which does not have either statutory or case law authority. The courts would have to rely on the testimony of experts who in turn would rely on the relevant psychiatric texts on nomenclature which in turn caution against the misuse of psychiatric diagnoses in the forensic field.[225]

- **Consent Between Vulnerable Adults**

It is an offence for a person to have sex with a mentally defective individual because the law presumes that person is unable to consent.[226] It is obvious that Parliamentarians and civil servants who draft the laws have had minimal contact with mentally ill persons. At any given time 20% of the population

[224] Turner, Nigel, op cit
[225] Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition , p xxiii, American Psychiatric Association
[226] SOA 1956 s. 7(1)

suffers from some kind of a mental illness.[227] The likelihood of having sex with a person with a mental illness is very high as a result. The vagueness of the definition of what constitutes a mentally disordered individual that would preclude this person from giving consent to sexual activity is cause for alarm. The operative subsection is the subsection in each of the sections that asserts that the victim

> "is unable to refuse if: (a) he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or (b) he is unable to communicate such a choice."

This broadening of the previous offence of having intercourse with a "defective" as laid down in s 7 Sexual Offences Act 1956 is intended to protect those who are vulnerable. While those who are suffering from a severe mental abnormality should be protected from threats, deception or inducements and arguably should not be allowed to have sexual activity with care givers or those in a position of trust, it is plainly absurd that they should be subject to paternalistic and overly protective controls. Another problem with the Act is the lack of clarity of *subsection (1)(d)* and of the relevant sections 31,32,33,and 35, and *subsection (1) (e)* of section 34. This particular subsection reads as follows:

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[227]www.surgeongeneral.gov 'Mental Health: A Report of the Surgeon General'

> " A knows or could reasonably be expected to know that B has a mental disorder or learning disability and that because of it B is likely to be unable to refuse."

The Government was called upon[228] to clarify the meaning of capacity but did not do so. Requiring the mentally disordered to be aware of the consequences of his sexual actions is imposing a very high level of awareness more so than is expected of the ordinary person, and the Government has acknowledged this.[229] It is believed that the Draft Mental Incapacity Bill[230] will clarify the definition, but a preliminary review of this legislation does not offer much hope. In fact s 3 of the draft Bill confuses matters when it states that "a person must be assumed to have capacity unless it is established that he lacks capacity."

The burden on a person accused of abuse of a vulnerable individual is twofold; one that he should know that the complainant has a mental disorder and two, that he should also know that because of the mental disorder the complainant is unable to give consent.

This is asking the ordinary person quite a bit. Psychiatrists themselves are unable to agree on what constitutes a mental illness or disorder. The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, generally the model for psychiatric nomenclature

[228] Thorp, A Research Paper ' Sexual Offences Bill' p 38

across the world, admits that "the concept of a mental disorder like many other concepts in medicine and science lacks a consistent operational definition."[231] In addition the ability of a mentally ill person to give consent is often a matter of complex forensic evaluation. Harold Schwartz correctly observes that:

> "The concept of informed consent is superficially an uncomplicated one; competent patients have the right to make informed treatment decisions for themselves free from coercion. The translation of this seemingly straightforward principle into practice, however, has been fraught with confusion and dissent. Significant confusion continues to surround the definition of competency in part because the courts have remained vague on the subject."[232]

It is plainly wrong to equate mental illness with incompetence, and the presumption should be that a person is competent unless otherwise adjudicated.

The English Courts have struggled to develop a consistent and rational approach to the inherent difficulty of determining the ability of a mentally defective to give consent. Prior to 1956 the law was governed by the Mental Deficiency Act 1913 s. 56 (1) which provided that:

> "Any person (a) who unlawfully and carnally knows any woman or girl under treatment in an institution or certified house or approved home or

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[229] Thorp, A loc cit
[230] Draft Mental Incapacity Bill, June 2003
[231] Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association. 1994
[232] Rosner, Richard ' Principle and Practice of Forensic Psychiatry' 1994, p 103

whilst placed out on licence [therefrom] or under guardianship under this Act shall be guilty of a misdemeanour."

In *R v Cook,* [233] the defendant was found not to have breached this law although he did have sexual intercourse with a certified mental defective who was under the statutory supervision of a social worker. The Sexual Offences Act 1956, s. 7 made it an offence for men who have sexual activity with a mental defective defined in s 45 as:

" A person suffering from a state of arrested or incomplete development which includes severe impairment of intelligence and social functioning."[234]

The accused is not guilty of any offence if he did not know or had no reason to suspect the woman was a defective. Under s 47 the man must prove on the balance of probabilities that he fell under the exception. Under this law, according to Tony Honore:

"There is no way in which a man can have sexual intercourse with a defective, unless he is married to her, without committing a crime. Even if he is willing to look after her he is not excused. This could be hard on the woman who it is meant to take care of."[235]

In *R v Blair (Dennis)*[236] the Court of Appeal relied on psychological testing that showed that the mental age of the 22 year old alleged victim was 9, and that a properly instructed jury would conclude that the accused knew that the

[233] R v Cook [1954] 1 W. L. R. 125
[234] Sexual Offences Act 1956 as amended by Mental Health (Amendment) Act 1982
[235] Honore, Tony ' Sex Law in England' pp75-76
[236] R V Blair (Dennis) [1996] 1 Cr. App. R. (S) 336

victim was a defective. It is apparent from this ruling that the courts do not equate severe impairment of intelligence with the official psychiatric definition of severe mental impairmen.[237][238] In *R v Deric James Adcock,*[239] the Court described the complainant as a "woman with learning difficulties. Regarding sexual matters she was naive." The court was able to get away with this shockingly vague definition of the incapacitation of the woman because the accused eventually pleaded guilty.

It is a serious error to confuse intellectual capacity with emotional maturity.[240] If this were the case hundreds of millions of illiterates would be denied the opportunity to engage in sexual activity.

Consequently, as is evident from the lack of a clear definition in the Sexual Offences Act 2003 and an equally vague interpretation in case law of what constitutes a mental disorder that would preclude the ability to give or refuse consent, the law leaves the accused at the mercy of *ad hoc* and unscientific

[237] Diagnostic and Statistical Manual of Mental Disorders, (DSM IV) 4th edition, American Psychiatric Association

[238] IQ in the range of 20-40 (normal above 70)

[239] R v Deric James Adcock [2000] 1 Cr. App. R. (S) 563

[240] A 3 year old understands the consequences of being good/bad but cannot speak correctly. " Textbook of Child and Adolescent Psychiatry" p 76 American Psychiatric Press 1997

opinions of the jury or the judiciary.

There is a dearth of scientific data in this problematic area. David Holmes President of Eden Service, [241] an organization that helps people suffering from autism,[242] lists some absolute requirements to be present in order for consent to be valid:

- "The individuals involved must be able to say or demonstrate "no", can make informed choice.
- Knows that intercourse can lead to pregnancy and or disease.
- Differentiate between appropriate and inappropriate times and places for sex.
- Differentiate between male and female genders.
- Be able to stop when asked to do so.
- Be aware of potential threats to self."

This seems to be an unusually restrictive and paternalistic approach that lacks scientific scrutiny.

On the other hand, a study by Fisher and Cea on the consent capacity for research work of adults with mental retardation[243] found that most adults with mild mental retardation[244] and 50 % of those with moderate mental

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[241] Holmes, David ' Sexuality and Individuals with Autism' July 23, 2002 www.edenservices.org
[242] Defined in DSM IV, op cit. as a pervasive and severe impairment of developmental, communication and social interaction skills,
[243] Fisher Phd, Celia & Cea Phd, Christine ' Assessing the Consent Capacity of Adults with Mental Retardation, www.fordham.edu
[244] Silka MD, Van & Hauser MD, Mark, ' Psychiatric Assessment of Persons with Mental Retardation' Psychiatric Annals 27: 3 March 1997

retardation[245] could understand confidentiality procedures, the voluntary nature of participation, the nature of compensation, the research risks and the potential benefits of the experimental treatment. They were able to generate a logical reason for their participation decision.

Given the availability of such scientific data the Courts should not rely exclusively on the common sense of the jury to reach a verdict It would minimize the use of paternalistic and moralistic arguments to deny mentally handicapped individuals their right to enjoy sexual rights.

In 1914 Justice Benjamin Cardozo of the US Supreme Court wrote in *Schloendorf v Society of New York Hospital* that " Every human being of adult years and sound mind has a right to determine what shall be done with his own body."[246]

There is no reason why this right should not apply to the mentally disordered unless they have been adjudicated incompetent.

The penalties under the new law are severe; life imprisonment for offences under s 32 *subsection (4*) where the sexual activity involved penetration, and up to 14 years for other offences, as compared with the maximum of 2 years in custody under the Sexual Offences Act 1956. It is remarkable, therefore,

[245]Mild MR constitute 85 % of all retardation cases, Moderate MR 10%
[246] Schloendorff v Society of New York Hospital , 211 NY 125(1914)

that so little thought went into ensuring that the drafting was done with due care.

- **Competency to have sex**

A final problem arises from sexual relations between the mentally disordered. What if one is unable to refuse and the other unable to recognise the presence of this inability? What if both consent but their care givers do not think they can consent. This is not an isolated problem. The author was called upon on more than one occasion to evaluate *post facto* the ability of two mentally disordered individuals to consent to sexual relations in an institution. The consequences for the person who has sex with an incompetent person are of course potentially serious. No less are the consequences for the institution and their staff subjecting them to violations of s 39[247] and liable to imprisonment for 14 years. The new law will make it obligatory for all institutions, care facilities and clinics to do formal competency evaluations on all residents or clients. In addition they will have to provide extra supervision for those incapable of providing consent to sexual activity. To what extent they will have to educate the other residents or clients is a complex problem with enormous legal implications.

- **Vulnerable Persons and Caregivers**

[247] s 39 creates an offence of causing or inciting sexual activity in a mentally disorder person

The intrusive encroachment of the new law is evident from the Explanatory Notes[248] of the House of Commons which includes a clinic receptionist as an example of a care worker as defined in section 42. This definition is overly broad. Clinic receptionists are not generally considered to be part of the professional treatment team and should not ordinarily have access to clinical information about patients. The same would apply to housekeeping staff and other ancillary personnel. To classify them as caregivers and subject them to the same penalties as the patient's doctor would require them to have access to sensitive clinical information about the clinics clients. This in turn would have consequences for the privacy and confidentiality of the patients' records, potential violations of article 8 of the Convention as well as the Data Protection Act 1998. Except in emergencies or for specific administrative needs it would be inappropriate for the professional staff to share clinical information about their patients with other clerical staff.

An example of this would be a receptionist in a busy multi physician group practice where mentally disordered patients are treated along with other patients. It is not likely that a receptionist is going to know, without access to the patient records, who is mentally disordered. Furthermore, he should not have access to patient records to ascertain this. Another example of the

[248] Explanatory Notes, clause 44, Sexual Offences Bill, House of Commons

problems caused by this interpretation would involve a receptionist in a small town medical clinic which serves the entire population. This person would have to commute to another town in order to date. This is not as absurd as it sounds. For instance, there is only one dental clinic in Stornoway (population 5,900).[249] The hapless staff is not only overworked but under the new Act they would have to go to the mainland for their sexual liaisons or cavort only with those with halitosis.

Consequently, for the staff and the clinic administration to not fall foul of the law a broad policy of not having any social contact with the clinic's clients would be required making it a rather onerous if not altogether impossible to monitor or to enforce. Even if it were socially desirable to have such a policy, is it really necessary to criminalize such contact?

- **Vulnerable Persons and Consent in the US**:

While the English courts have shied away from decisive definitions of the standards to be met, the American courts while producing clear opinions have widely differing standards. New York State has the most conservative standard restricting the ability of the mentally handicapped to give consent

[249] BBC News, 11 November 2003

for sexual intercourse. In *People v Easely*,[250] the court required that mentally handicapped persons would be expected to be capable of understanding and appraising

> "The nature of the stigma, the ostracism or other non criminal sanctions which society levies for such conduct it labels only as immoral"

This standard was upheld in *People v Cratsley*[251] where the court noted while care must be taken not to restrict the freedom of persons with mental retardation who are capable of giving knowing consent to a sexual relationship by confusing deliberate failure to adhere to a particular set of values with lack of understanding that values exist. Only the latter lack of understanding that values exist is an appropriate consideration in assessing legal capacity.

In sharp contrast to this moral based view is the opinion of the neighbouring state of New Jersey where the Supreme Court ruled in *State of New Jersey v Olivio*[252] all that was required for consent was an understanding of the sexual nature of the act and a voluntary decision to participate. The understanding of the risks and consequences of the act were not required.

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[250] People v Easely, 42 N.Y. 2d 50, 56-57 (1977)
[251] Peop;e v Cratsley, 156, 1995 WL 391986 (N.Y. Ct. App. July 5, 1995)
[252] State of New Jersey v Olivio, 123 N.J. 550, 589 A.2d 597 (S.Ct N.J. 1991)

The American Law Institute Model Penal Code, s 213.1(2)(b)[253] provides the following offence as a felony:

> "A male who has sexual intercourse with a female, not his wife, commits a felony of the third degree (gross sexual imposition) if he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct."

This imposes a very high standard for liability which the authors of the Code felt was necessary so as to avoid questions of value judgment and future consequences of the act.

In *R v Morgan*[254] the Supreme Court of Victoria, Australia ruled that for a woman to lack the capacity to consent to intercourse

> "it must be proved that she has not sufficient knowledge or understanding to comprehend (a) that what is proposed to be done is the physical fact of penetration of her body by a male organ or if that is not proved (b) that the act of penetration proposed is one of sexual connection as distinct from an act of a totally different character."

The purpose of this restricted view has been justified by Glanville Williams[255] to prevent men who have intercourse with willing but sexually innocent women from being convicted of rape and also not to forbid sexual expression by women of low intelligence.

- **Protecting the Vulnerable Person's Right to Enjoy Life**

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[253] Kaplan, John et al ' Criminal Law: Cases and Materials' Appendix B The Model Penal Code, Little, Brown & Co 1996

[254] R v Morgan [1970] VR 337

[255] Williams, Glanville 'Textbook of Criminal Law' 571 (2nd edition 1983)

Even more important than protecting the vulnerable person from exploitation is the obligation society incurs to ensure that they have the same rights to the pursuit of happiness and the enjoyment of life. The Law Reform Commission of Ireland struggled with the dilemma of, on the one hand, protecting the mentally handicapped from harm and on the other not intruding in their right to privacy and sexual activity. Recognising the enormous difficulty in the prosecution of such cases it recommended changing Irish law to provide for an indictable offence for any person having sexual intercourse with another person who is at the time of the offence suffering from mental handicap or illness of such a nature or degree that the person is incapable of guarding against exploitation.[256] It proposed to shift the burden of proof to the accused, and hoped (rather naively) to rely on prosecutorial discretion

> "To prevent the prosecution and conviction of a person who is engaged in a loving rather than exploitative relationship with a person with a mental handicap."

The Sexual Offences Act 2003 attempts in a rather bizarre way to provide for an exception to mandatory chastity for the mentally disordered. Section 43 provides that conduct that would otherwise be an offence under sections

[256] The Law Reform Commission, Ireland ' Report On Sexual Offences Against The Mentally Handicapped' 1990

38-41[257] would not be an offence if the parties were married. This logic is odd at best. How could a person who otherwise would not be able to consent to sexual activity be able to consent to do so if married, and how could that person contract for marriage which must necessarily requires a higher standard of competence? Strasbourg has tackled this issue from another perspective; the right to a fair trial under article 6 of the Convention and the right to respect to private and family life under article 8.

In *X and Y v the Netherlands*[258] the court took the position that contracting states to the Convention were under a positive obligation to ensure that the right to privacy and family life, and not merely to abstain from interfering. Although respecting the margin of appreciation granted to the contracting States in regulating the relationships of individuals with themselves, the Court concluded that in this particular instance where Y, a 16 year old mentally handicapped girl, had been allegedly sexually abused by an older man, the Netherlands had failed to provide in its Criminal Code a means whereby the victim could have filed a criminal complaint. It was not

[257] involving care workers

[258] X and Y v the Netherlands (a/91) (1986) 8 E.H.R.R. 25 (ECHR)

sufficient that she had recourse to an action in tort. In failing to provide her with an effective and practical protection for her right to private life, which the Court said covers the physical and moral integrity of the person including sexual life, the Netherlands was in violation of Article 8. The Court acknowledged the argument advanced by the Netherlands that to lay down criminal provisions to afford the best protection of the physical integrity of the mentally handicapped might lead to

> "unacceptable paternalism and occasion an unacceptable interference by the State with an individual's right to respect for his or her sexual life."

The case of *B v UK,*[259] although not addressing a right to sexual life *per se,* sheds some light on the limitations the ECtHR might impose on the ability of the State to regulate activities that may fall under the penumbra of article 8. *B*, a mentally handicapped mother was denied access to her child by the Local Authority on grounds that she had not only neglected the child but had disappeared from the area. The child was eventually placed for adoption. The ECtHR opined that there had been a violation of article 8 despite the minimal contact and apparent lack of interest of the mentally handicapped mother in her child holding that "the mutual enjoyment of by parent and

[259] B v United Kingdom (1987) 10 E.H.R.R. 87

child in each other's company constitutes a fundamental element of family life."

In both these cases the approach of the Court has been to oblige the State to intervene only when necessary to protect the integrity of the person from violation of his right to private life by another individual and to minimize the paternalistic role of the government.

(d) Repealing Offences Applying to Gay Men

The Government has finally, if rather belatedly, accepted in whole the spirit and the letter of the Wolfenden Report[260] which recommended the decriminalizing of homosexual acts between consenting adult men as well as raising questions (but ultimately retreating to the old prejudices) about the discriminatory treatment of male homosexual acts *vis a vis* similar heterosexual acts. Nonetheless, the various criminal offences peculiar to homosexuals were decriminalized by a procession of Sexual Offences Acts. The present 2003 Act has repealed the provision that sexual acts taking place in private between more than two men is an offence. It should be noted, of course, that this was not due to Mr. Blunkett's sudden, if brief enlightenment. The ECtHR had addressed the problems of differential age of

[260] Report of the Committee on Sexual Offences and Prostitution, pp25-28, September 1957

consent as well as the rights of homosexuals to privacy and non discriminatory treatment in several prominent cases involving the UK.

In *Dudgeon v UK*[261] the Court ruled that prosecuting sexual acts between consenting homosexuals in Northern Ireland was a violation of the right to privacy contained in Article 8. This position was reiterated in *Norris v Ireland*[262] and reaffirmed in 1993 in *Modinos v Cyprus.*[263] In *A.D.T v UK*[264] the Court further eroded prevailing laws in England by finding that s 1 Sexual Offences Act 1967 which *inter alia* provides for the prosecution of homosexual acts done in private between more than 2 men, was a violation of Article 8. In *Sutherland v UK*[265] the differential age of consent between homosexual and heterosexual activity was found to violate Article 14 of the Convention. This decision by the Commission led to the change of law by way of the Sexual Offences Act (Amendment) 2000. Consequently, it can hardly be said that the Government was making bold reformist decisions in introducing a gender neutral sexual offences legislation. In fact, it could be argued that homophobic sentiments continue to linger and are evident in the

[261] Dudgeon v UK Series A No 45, (1981) 4 EHRR 149. ECHR
[262] Norris v Ireland Series A No 142, (1988) 13 EHRR 186, ECHR
[263] Modinos v Cyprus Series A No 259, (1993) 16 EHRR 485(1993)
[264] A.D.T. v UK (2001) 31 EHRR 33
[265] Sutherland v UK (1998) 24 EHRR CD 22 ECom HR

new law.

- **Toilet Sex**

A controversial point of the legislation on its introduction was the proposed inclusion of a new offence, that of sexual activity in public, covering both heterosexual and homosexual persons. The measure would have permitted sexual activity in a public place as long the parties were not seen or reckless about being witnessed. According to Hillary Benn, Home Office Minister, "if the cubicle door was open then clearly an offence was committed. If it's closed it's different."[266] During the course of House of Lord's debate the government withdrew the measure relying instead on the existing public decency and public order offences. However, this led people to believe that sexual activity in a public toilet would not be prosecuted, and as a result Baroness Noakes successfully introduced an amendment to provide for a specific offence of sexual activity in a public toilet.[267] She reiterated the argument for retaining the prohibition against homosexual activity in a public toilet that existed in s 1 (2) (b) Sexual Offences Act 1967. The media too weighed in on the controversy and perpetuated the notion that the issue

[266] Telegraph, 30 January 2003
[267] Research Paper 03/62 ' The Sexual Offences Bill [HL] 10 July 2003, Hose of Commons Library p45-46

was all about homosexual men. In a leader in the Express,[268] outrage was expressed over allowing "gay men to have sex in public toilets simply because there is not a law to stop mixed sex couples from doing so is as preposterous as it is dangerous."

Simon Calvert of the Christian Institute complained that the government's original plan to:

> "To repeal gross indecency and put nothing in its place is astonishing. It will effectively legalize sex in public toilets. Parents will fear sending their children to such places. Many will become 'no go' areas for families. Weak laws such as 'outraging public decency' are no substitute for a clear and specific criminal offence which addresses this well known public offence."[269]

In spite of Lady Saltoun's scathing objections to what she viewed as a "very restrictive injunction worthy of the Government in a very nasty nanny mode,"[270] the critics were mollified by the withdrawal of the original plan and its substitution by section 71 which provides for an offence of engaging in a sexual activity in a public lavatory essentially resuscitating the previous offence directed against homosexuals in the 1967 Act. Thus it could be inferred that the legislature intended to make it a primarily male homosexual offence, and in reality it is primarily male homosexuals who are charged

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[268] Express, 20 June 2003
[269] Research Paper 03/61 ' The Sexual Offences Bill [HL] : Policy Background, House of Commons Library, 10 July 2003, p 44
[270] loc cit p46

with the crime.[271] More often than not their arrests are occasioned not by a member of the public but by a police officer who has entrapped the hapless libidinous offender. It is by no means a coincidence that the Metropolitan Police were among those who advocated for the inclusion of this section,[272] However, they consider sexual activity in a public toilet a "low level location" crime and do not keep statistics of the number of arrests.[273]

One is left to wonder whether families will avoid going to public parks, walk down High Street or take the tube where more crimes are committed given that violence against the person crimes accounted for 11.3% of all convictions in 2002 whereas all sexual crimes resulting in conviction accounted for 1.3%.[274] It has been estimated that the number of men prosecuted for consensual sexual acts amounted to less that 500 annually. This is not suggestive of an epidemic of fornicating in public that would warrant such a punitive measure. The government planned to repeal this provision but capitulated to the Christian right and the police force who remain egregiously homophobic. If these groups are right about people

[271] Telegraph, 20 November 2002
[272] op cit p46
[273] personal communication with Jenny Okwulu, Analyst, Metropolitan Police
[274] Criminal Statistics England and Wales 2002, p38, crown copyright 2003

avoiding public toilets as scenes of crime we should expect the West End to be as desolate as the Sahara desert.

The maximum sentence for violating section 71 is 2 years in prison. Consequently, a man apprehended for masturbating with sexual intent in a locked toilet cubicle could be jailed for a considerable period of time. On the other hand a man masturbating in a toilet in a fertility clinic for the purpose of donating sperm would probably escape prosecution. This creates a murky legal situation that could attract litigation suggesting violations of articles 8 and 14. After all, if a public lavatory is for the use of discharging some physiological functions why not others as long as they are done in private? Why would the Metropolitan Police so keen on maintaining the illegality of sex in toilets not object to the equally disturbing (for some) of vomiting, defecating or urinating in public? Should we ban sneezing, blowing ones nose or coughing in public too as these are perceived as offensive to those of delicate disposition? A more coherent legal argument could be made for criminalizing the latter behaviours as they do constitute a public health menace and consequently would not benefit from the protection of article 8 of the Convention.

Further evidence that the removal of gender based sexual offences is more a public relations gimmick than a reality is the introduction of two new

offences that are characteristically committed by men. Section 66 criminalises exposure of one's genitals with the intention to cause alarm or distress, while section 67 proscribes voyeurism which is described as observing without consent another person engaging in a private act.[275] Both offences are punishable by up to 2 years imprisonment. These are offences regardless of whether the offender was observed. How does he get arrested if not observed? And if observed should not the observer be prosecuted?

- **Homosexuals and the Armed Forces**

Homosexual acts such as those occurring between consenting adults in the Armed Forces were criminalized until an amendment to s 146 Criminal Justice and Public Order Act 1994 prohibited prosecution. Nonetheless, the Government maintained it homophobic posture by requiring discharge from the Services for those admitting to such acts, and in some instances it still remained an offence under the Service Defence Acts.[276] Despite being given a free vote on the issue of homosexuals in the Armed Forces, Parliament continued to vote against their open presence, the last one occurring in 1996. The usual argument advanced was one put forward earlier by the senior service chiefs of the Australian Defence Forces who opposed similar openness by offering the usual unscientific pabulum that

[275] A private act is not necessarily a sexual act

> "Allowing homosexuals to serve openly would jeopardize recruitment, troop cohesion and combat effectiveness while also spreading AIDS and encouraging predatory behaviour."[277]

On 27 September 1999, the ECtHR declared unanimously that the ban on homosexuals serving in the UK Armed Forces was a violation of Article 8 of the Convention. In the cases of *Lustig-Prean and Beckett v UK* [278] and *Smith and Grady v UK*[279], the Court concluded that the investigation into the applicants' sexual orientation, together with their ultimate discharge, was intrusive and constituted a grave interference into their private lives as well as a violation of Article 14.

This forced the Government to change its policies over the objections of senior military figures such as General Sir Anthony Farrar-Hockley the former allied forces commander who found the Court's ruling "ridiculous."[280] Having predicted dire consequences for the Armed Services, the Service Chiefs were obliged to admit in the follow up studies that the new policy has no negative impact on recruitment or operations and in a

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[276] Oakes, M , Research Paper 01/03 ' The Armed Forces Bill 2000-2001, House of Commons Library, 8 January 2001

[277] Belkin, A & McNichols, J ' The Effect of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence', Center For the Study of Minorities in the Military, 9 September, 2000

[278] Lustig- Prean and Beckett v UK (No 2)(2001) 31 EHRR 23

[279] Smith and Grady v UK (2000) 29 EHRR 493

[280] op cit Research Paper 01/03 p 35

classical understatement Rear-Admiral James Burnell-Nugent "on the whole it has not caused a great upset."[281]

Homophobic sentiments remain pervasive in the UK. Legislation to decriminalize the sexual activity between consenting homosexuals has only been enacted following years of heated debate and primarily following adverse rulings by the Strasbourg Court. It remains to be seen how aggressively the police will prosecute cases under ss 66, 67, and 71.[282]

(e) **Introducing New Offences and Expanding Old Ones**

The new law happily creates more sexual offences and widens old ones as well as sharply increasing penalties. Table 2 provides the comparison with previous laws:

Table 2

Old Law	Maximum Penalty	New Law (SOA 2003)	Maximum Penalty
Incest(SOA 1956 s 10(1): an offence for a man over 14 to have sexual intercourse with daughter, granddaughter, mother or sister, and for a woman over 16 with her father, brother, son or grandfather	7 years	Familial Child Sex Offences (s 25): An offence is committed if a person sexually penetrates a parent, grandparent, brother, sister, half-brother, half –sister, aunt, uncle, foster parent, stepparent, cousins, stepbrother and stepsister where one party is under 18 as defined in s 27.	14 years
Committing or Inciting a child to gross indecency(s 116 Indecency with Children Act 1960)	2 years	As above but when touching is involved (s 25) and inciting a child (s26)	5 years for touching, 14 for inciting

[281] loc cit, p 39

[282] voyeurism, exposure and toiler sex

No offence		Sexual penetration by a person over 16 of an adult relative over 18 as defined in s 27 (s 65)	2 years
Abuse of Position of Trust (s 4 Sexual Offences (Amendment) Act 2000) person over 18 who looks after under 18 in an institution by court order, resident in a home per Children Act 1989, hospital, nursing home, residential care home, or providing full time education	5 years	S 21 greatly expands the number of individuals who would be in a position of trust including sport coaches, part-time teachers, voluntary youth and community workers etc	5 years
No offence		Sexual grooming of a child 16 or under by a person over 18 with intent to commit an offence (s15)	10 years
Causing or encouraging prostitution of girl under 16 (s 28 SOA 1956)	2 years	Abuse of a child through prostitution and pornography (ss 47-51)	Life <13 14 yr > 16
No offence		Voyeurism (s 67)	2 years
No offence		Trafficking into the UK for sexual exploitation (s57)	14 years
Exposure	3 months	Exposure (s66)	2 years

- **The Crime of Incest**

Incest has been an offence since ancient times. The Nesilim Code,[283] 1650-1500 B.C. prohibited sexual intercourse between a father and his mother, daughter or son, and with his sister-in-law or stepmother only if his brother or father were still alive. In England incest was only an offence in church courts until Parliament proscribed it in 1908.[284] Honore criticises the law of

[283] Thatcher, Oliver ' The Library of Original Sources Vol III p 9-11, Milwaukee University Research Extension Co 1901

[284] Honore, T ' Sex Law in England' p 79 citing Punishment of Incest Act 1908

incest citing that the three possible reasons why it has been frowned upon should not attract criminal punishment.[285] He recommended instead

> "The law of criminal incest might therefore be abolished as such, and replaced by a law of sexual abuse of authority, which would not extend merely to parents and guardians but also to teachers and other persons in charge of children.[286] This type of law exists in France and Belgium."[287]

Parliament, however, in its "unbelievably puritanical and worthy only of the most bigoted ayatollah or the very nastiest nanny killjoy"[288] mood chose not only to vastly broaden the definition of incest to include what are now considered lawful activities, but also to provide for a very broad category of abuse of trust crimes. This is clearly not what Honore had in mind. Furthermore, the government did not produce evidence to show why some intrafamilial sexual conduct "while hardly to be encouraged should lead to criminal proceedings."[289] The overall number of sexual offences for which cautions or conviction was obtained declined from 8386 in 1992 to 5587 in 2002,[290] while incest convictions declined from 127 to 54 in the same period. The new abuse of trust and the sex offender notification offences (both recent additions to the criminal law) increased dramatically from 241 in

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[285] genetic deformities in the offspring, family tension, people growing up together are less inclined to be sexually attracted to each other
[286] Honore, T p 81
[287] ibid, citing French Penal Code art 333 and Belgium Penal Code art 337
[288] Thorp, A " Research Paper 03/62 quoting Lady Saltoun in the HL debates
[289] Honore, T p 81
[290] Home Office ' Criminal Statistics, England and Wales 2002, p45

2001[291] to 467 in 2002.[292] Reference has been made already to the successful challenges to historical sex abuse convictions[293] and it is quite likely that the abuse of trust convictions will go through similar legal convolutions.

Ironically, while convictions for the old taboo of indecency between males declined from 1,055 in 1992 to 72 in 2002,[294] we may now expect the "new" sex crimes to provide the Government the additional convictions it seems so desperate to procure.

(f) Tightening Notification Requirement for Convicted Sexual Offenders

(i) The Previous Law

The *piece de resistance* of the Act is Part 2, which enjoys half the amount of paper dedicated to the legislation. Despite the fact that sexual crimes account for less than 1% of all crimes,[295] the Government responded to public perception that their communities were besieged by rapists and predatory paedophiles to prescribe even stiffer notification and monitoring requirements for convicted sexual offenders than existed under the current law, Sex Offenders Act 1997 which will be repealed. It is not that the public

[291] year the law went into effect
[292] ibid, loc cit It is not clear why the Home Office chose to lump these two discrete offences in the same statistical category
[293] TimesOnLine, 6 February 2004
[294] Criminal Statistics p 45
[295] Cobley, C ' Sex Offenders: Law, Policy and Practice' p 34

outrage was genuinely based on a lax and permissive judiciary leading to a low rate of punishment. The trend is actually in the opposite direction. In 1993, 8% of offenders over the age of 21 who were convicted of an indictable offence in magistrates' courts and 73% of those convicted in Crown Court were sentenced to immediate custody, compared to 16% and 77% in 1998 respectively.[296] The number of persons sentenced to immediate custody almost doubled from 1992 to 2002.[297]

The presumption in penological theory is that the public can be protected from a convicted offender by keeping track of his movements and whereabouts. Accordingly, an offender may be monitored in the community either as a result of a community sentence through a Probation Order or a Combination Order. Following release from custody all offenders sentenced after 1 October 1992 to 12 months or more of imprisonment are required to serve a period on licence. Custodial sentences are usually ended after half the sentence is served for short term offenders or two-thirds for long term prisoners. Both are required to be on licence until the end of three-quarters of their sentence. However, according to s 44 of the Criminal Justice Act 1991, sex offenders were required to be on licence for the full term of their sentence, and following enactment of the s 58 Crime and Disorder Act 1998,

[296] Home Office Statistical Bulletin 21/99 ' Cautions, Court Proceedings and Sentencing in England and

offenders convicted of a violent or sexual offence could face a period of licence up to 10 years beyond the three-quarter point of the original sentence. Those sentenced to life would remain on licence for the rest of their lives in accordance with the provisions of s 31(1) Crime (Sentence) Act 1997.

In addition there are also community sentences orders created by the Criminal Justice Act 1991 that provide for regulation of an offender in the community. There are seven such types of orders of which the Probation Order provides the greatest control over the offender. It may include control over the location of residence and a requirement to appear at specific locations on a regular basis. Whereas, for most offenders there is a time limit to these impositions the Criminal Justice Act 1991 removed the limits on sexual offenders. Under the Mental Health Act 1983 offenders can be subject to involuntary commitment orders, or if they do not meet the criteria for a Hospital Order or guardianship they can still be required to enrol in treatment under the terms of a Probation Order.

Ss 12 and 13 of the Criminal Justice Act 1991 provided for Curfew Orders and electronic monitoring of offenders. While not appropriate for all sexual offenders, such as those convicted for familial sexual offences, they could be

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Wales 1998. The Home Office has not produced this bulletin since so recent figures are not available

useful to monitor other sexual offenders at low risk for reoffending and who could benefit from the discipline imposed by the orders.[298]

Despite having all these comprehensive monitoring orders available to keep track of sexual offenders, the Government nonetheless proceeded to introduce legislation that would unjustifiably impose harsher requirements on sexual offenders. The Sex Offenders Act 1997 was modelled after the draconian Washington Sex Predator Act 1990.

(ii) The New Law

Sexual Offences Act 2003 will repeal Part 1 of the Sex Offenders Act 1997, replacing its provisions with tighter reporting requirements. Part 2 of the SOA 2003 addresses the new notification requirements.

Section 80 lists those who are subject to notification requirements. These include the following situations:

- Convictions for one of 93 discrete offences in Schedule 3 or for which the person has been found not guilty by reason of insanity
- Offence committed but found to be under a disability, and to have been cautioned in respect of such an offence.
- Unexpired notification period prior to the commencement of the new law for persons subject to the 1997 Act

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[297] Criminal Statistics England and Wales 2002, Home Office , December 2003

- Convicted prior to 1 September 1997 but had not been dealt with in respect of the offence
- Under prison release supervision having served the whole or part of the sentence
- Subject of a community order
- Detained in a hospital under the MHA 1983 following conviction.
- Individuals who at the time of commencement of Part 2 were subject to order provisions of several other laws[299]

All such persons, statutorily referred to as the relevant offender are subject to s 82 Part 2 notification requirements. The following table outlines the requirements for selected sentences

TABLE 3

A person who in respect of the offence is or has been to imprisonment for life or for a term of 30 months or more	An indefinite period beginning with the relevant date
A person who has been made the subject of an order under s 210F(1) Criminal Procedure (Scotland) Act 1885	An indefinite period beginning with the relevant date
A person who has been admitted to a hospital under a restriction order	An indefinite period beginning with the relevant date
Person sentenced to imprisonment for more than 6 months but less than 30 months	10 years beginning with the relevant date

[298] Cobley, Cathy ' Sex Offenders : Law, Policy and Practice op. cit. p 217

[299] S 5 A, Sex Offenders Act 1997 (restraining order)
S 2, Crime and Disorder Act 1998 (sex offender order)
S 2A of the Crime and Disorder Act 1998 (interim order)
S 20, Crime and Disorder Act 1998 (sex offender order and interim orders in Scotland)
Article 6, Criminal Justice (Northern Ireland) Order 1998(sex offender order)
Article 6A, Criminal Justice (Northern Ireland) Order 1998(Interim order

Person sentenced for a term of 6 months or less	7 years
A person admitted to a hospital without a restriction order	7 years
A person within s 80(1)d	2 years
A person of any other description	5 years

Where the person is under the age of 18 on the relevant date[300] the notification periods except for the indefinite one is reduced by one half.

S 83 of Part 2 requires the offender to notify the police within 3 days of the relevant date the following information:

- date of birth
- national security number
- name on the relevant date
- home address on the relevant date
- name on the date notification is given
- home address on the date notification is given
- address of any other premises used regularly in the UK

S 84(1) of Part 2 requires similar notification of any changes in address and other identification within 3 days. The temporal requirements then get

[300] relevant date is the date of conviction, caution, finding, or date relevant to the person subject to Part 1 Sex Offenders Act 1997

bogged down in the minutia of what constitutes proper notification. For instance s 84(2) allows for early notification of a requirement but s 84(3) provides that if the event occurred more that 2 days before the date specified it does not satisfy the requirement imposed by s 84(1). If notification is given under s 84(2) and the event does not occur, then the person is required to notify the police per s 84(5) within 6 days that the event did not occur within the 3 days starting with the date specified. S 84(6) provides for a "qualifying period" as it applies to s 84 (1) and (5). This is fixed as 7 days or two or more periods in any period of 12 months which taken together amount to 7 days.

S 85 requires annual notification to the police unless in detention, in a hospital, imprisoned, or outside the UK.

S 86 requires notification if the offender intends to travel outside the UK and further specifies that the regulations to be promulgated may require other obligations that are to be reported. Consequently, given the disposition of the incumbent Home Secretary they are likely to be even more onerous.

S 87 requires the offender must personally make the notification to a police station and in writing using a form specified by the Home Secretary, and may be subject to fingerprinting or having any part of his body photographed.

S 91 provides for imprisonment up to 6 months on summary conviction or a fine, and imprisonment for no more than 5 years in conviction on indictment.

- **Sexual Offences Prevention Orders**

In addition to the notification requirements, s 104 provides for a sexual offences prevention order (SOPO) that can be applied for by the chief officer of police on individuals who reside or intend to reside in his area of authority, and who have been convicted with schedule 3 or 5 offence.[301] This order purportedly is to protect the public from serious sexual harm and can last for at least 5 years. A person in breach of a SOPO is liable to imprisonment of 6 months on summary conviction or up to 5 years on conviction on indictment. Under s 114 foreign travel orders can be used to prevent an individual from travelling abroad to any or some specified country for a period of not more than 6 months.

[301] Schedule 5 lists 172 offences, schedule 3 lists 93 offences

- **Risk of Sexual Harm Orders**

S 123 provides for risk of sexual harm orders (RSHO) designed to protect children from individuals who have "done" either before or after the commencement of the Act or certain offences against children. These orders last a minimum of 2 years. Breach of a RSHO attracts the same penalties as for breach of the other preventative orders. It is not clear whether the individual has to have a previous conviction for a sexual offence.

- **Sex Offender Register**

When the Government introduced the SOA 1997 it took pains to point out that the purpose was not to impose an additional punishment but was an administrative act to secure protection of the public.[302] The objective was to enable the police to have up to date information on the offender and be able to keep track of him and thus prevent further crimes.

Article 7 of the Convention prohibits the imposition of a heavier penalty than the one that was applicable at the time the criminal offence was committed. It stood to follow that the Government would be challenged and in *Ibbotson v UK,* [303] the applicant challenged the law as a violation of

[302] Cobley, Cathy op cit p 325
[303] Ibbotson v UK [1999] Crim LR 153

article 7. The Commission, however, ruled that the notification measures of the 1997 Act were preventative rather than punitive.

- **The American Experience**

As administrative measures, Sex Offender Registries have not succeeded. Since their inception in California in 1947 when the first sex offender registration law was enacted, and which eventually spread throughout the USA following the enactment of the so called Jacob Wetterling Act.[304] This law required the states to create registries of offenders convicted of sexually violent offences against children and to establish heightened registration for highly dangerous sexual predators. It further required offenders to verify addresses annually for 10 years and required sexually violent predators to do so on a quarterly basis for life. Since states that did not comply were subject to funding cuts, all states have registration laws that comply with minimal federal standards. The Wetterling Act gave the states the authority, but did not mandate them, to release information about sex offenders to the public.[305]

The failure of the registries was evident almost immediately. The disappearance, rape and murder of Megan Kanka by a convicted registered child offender so outraged the citizens of the state of New Jersey that a

mandatory community notification law was adopted by the state legislature within 90 days of her disappearance.[306] The federal Wetterling Act was amended to require states to release "relevant information as necessary to protect the public." This amendment became to be known as Megan's Law. The Pam Lynchner Act, required lifetime registration for certain aggravated and multiple offences. The 1998 DCJSJA[307] amendments established a National Sex Offender Registry in the USA requiring all states to participate. On 11, July 1999 the FBI started a Convicted Sexual Offender Registry File that will serve as the permanent National Sexual Offender Registry.

Each state is permitted considerable flexibility in registration requirements. In all states sex offenders are required to register for a minimum of 10 years although a small number require lifetime registration for all sex offenders.

The information collected also varies. Besides the basic identifying information 39 states obtain a photograph of the offender, and 13 obtain blood samples for DNA analysis. 33 states require annual updates and 22 require sexually violent predators to update quarterly. In Delaware offenders are required to renew their car registration every year and are required to

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[304] Jacob Wetterling Act Crimes Against Children and Sexually Violent Offender Registration Act (Title XVII pf the Violent Crime Control and Law Enforcement Act of 1994 [42 U.S.C.A. § 14071]).
[305] Ahearn, Laura "Megan's Law Nationwide" Prevention Press USA, New York 2001
[306] New Jersey Stat. Ann . §§ 2C: 7-1 to 2C
[307] Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act 1998

display a symbol on the registration plate indicating that the car is owned by a registered sexual offender.

Failure to meet these stringent requirements is punishable by a fine of up to $ 5000 and/or confinement from one to five years.

Twenty five states have retroactive registration requirements for those convicted prior to the statute's enactment. Seventeen apply the requirements only to those incarcerated or under supervision at the time of the law's enactment. The retroactive application has been challenged in only 9 states so far and has not succeeded in most of them despite the fact that the law constitutes ex post facto conviction, breach of due process and additional punishment.

Several state registries are available to the public as part of the community notification programs. Some have toll free numbers but others such as California charge callers $10 for each request. The California number has yielded over 42, 000 requests with only 1400 positive identifications in the 4 years since it started operating.[308]

At least 15 states, and several local authorities, also have web sites that post the names, photographs and other relevant information about sex offenders.

[308] Center For Sex Offender Management, op cit p 10

Despite this vast network of registration requirements and the infliction of severe humiliation on some offenders for many years beyond their actual sentences, the accuracy of the information has been very poor, and the success of the program in reducing sexual crimes has been limited.

To some extent this has been due to the lack of resources, but other problems such as lack of uniformity among the state regarding registration requirements, limited authority in Indian reservations, the movement of sex offenders out of state all pose problems for maintaining an accurate register. In 1996, 45 % of sex offenders had inaccurate or missing registration information.[309] More recently, the Connecticut State Police reported that as much as 50% of their information was inaccurate.[310]

According to Petrunik, although there is widespread support for registration and community support, there is little evidence that these measures have improved community protection.[311] He quotes David Boerner the primary drafter of the Washington Sexual Violent Predator law as saying the legislation was "a windbreak to protect..[state officials] from the raw force of public passion."

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[309] Center for Sex Offender Management op cit ,p 11

[310] Hartford Courant, 1999

[311] Hannen-Kish, S & Petrunik, Michael ' Circles of Support and Accountability: A Restorative Justice Initiative for the Reintegration of High Risk Sex Offenders' presented at Canadian Studies Conference, Brock University 5 November 2003

In most states the degree and method of notification depend on the placement of the offender on several tiers of risk of reoffending.[312] A quarter of the jurisdictions uses one tier but most use three. Prosecutors use widely accepted, but not necessarily scientifically validated criteria to place the offender in one of the tiers. All offenders are placed in one of these tiers. Those at lowest risk (tier 1) have their registration information made available to all law enforcement agencies in their state. For those at moderate risk (tier 2) information is given to schools and youth and religious organizations in the community where the offender is residing. For those at high risk for reoffending (tier 3), information is given to members of the community. The amount of information provided varies from state to state. In Louisiana[313] the offender must notify everybody residing in a one-mile radius of his residence. The prosecutor can also require the offender to have a bumper sticker on his car, wear a label on his clothes and a sign at his home.

These requirements bring to mind the novel by Nathaniel Hawthorne, *The Scarlet Letter*, in which the heroine is made to wear a scarlet A on her clothing after being convicted of adultery. More ominously it brings to mind

[312] Winick, B & LaFond, J ' Protecting Society from Sexually Dangerous Offenders: Law, Justice and Therapy' American Psychological Association 2003

[313] La. Code Crim. Proc. Ann. Art. 895(H) 2002; La Rev. Stat. Ann. § 15: 542, 2002

the coloured patches Jews were required to wear in medieval Spain,[314] and then centuries later again in Nazi Germany.[315]

There is much debate about the effectiveness of the registration-notification laws. Both Winick and Farkas argue convincingly that these requirements, while here to stay, are neither therapeutic for the offender nor beneficial to the communities they are supposed to help. In the first place more than 75% of sexual offences against children are by someone whom the child knows, more often than not by a family member. Incest offenders are at very low risk for reoffending or for committing offences against others in the community. Notification not only serves no purpose but may actually discourage victims from reporting the crime to avoid the resulting embarrassing publicity for the family.

Offenders are likely to be shunned, persecuted and assaulted in their communities. Some will be effectively banned from their communities by laws that require them to reside more than 2000 feet from a school.[316] They are required to wear a label for years if not for the rest of their lives giving them little motivation for rehabilitation and reintegration. Their high anxiety about finding a place to live, employment, to have privacy and security may

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[314] Carr, R ' Spain: A History' p 105

[315] "Stars, Triangles and Markings" Jewish Virtual Library 2004

[316] Iowa Code § 692.2A. This provision has been struck down by a U.S. District Court in John Doe 1 et al v Miller and White, 3:03-cv-90067and is on appeal

make it more likely that they will relapse. The constant shaming and stigmatization will cause them to be chronically angered and likely to become violent.[317] This is all the more likely as the majority of sexual offenders suffer from a mental illness.[318] Winick soberly concludes

> "The perpetual stigma imposed by registration and notification laws seems to signal that the possibility of redemption is foreclosed. Sex offenders are given a particularly stigmatizing label and subject to social ostracism. Discharged sexual offenders will be branded with a public sex offender label that suggests that a mental abnormality is responsible for their conduct and that they suffer from a deficit that is beyond their control and unchangeable. This is a message of hopelessness that can only diminish the individual's motivation and ability to change."[319]

- **The English Experience**

.As of March 2001, there were 15,000 registered offenders at the various local police forces.[320] Every 6 months an additional 2000 join the list. The minimum period of registration is 5 years for adults and half that time for young persons. It is further estimated that little over two thirds of registrants are for life. Consequently, the list is bound to grow exponentially. It should be noted that unlike the FBI, there is no dedicated list kept by the police. Registrants are flagged as sexual offenders on the Police National Computer,

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[317] Winick, B op cit p 220
[318] Dunsieth et al, " Psychiatric and Legal Features of 113 Men Convicted of Sexual Offenses" *The Journal Of Clinical Psychiatry*, Vol. 65, No 3, March 2004
[319] Winick, p 226
[320] Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997

and obtaining data on the offenders by breakdown of various sub groups on a national basis is not possible. The Government estimates that it may take another few years before such a system is developed.

Nonetheless, despite the backward technology the Police have reported impressive figures in the registration process. The latest figures indicate that over 97% of offenders have registered. There are no published figures on the reconviction rate of registered offenders.[321] Despite the impressive figures on registration, there has been no decline in the rate of sexual offences. According to the Home Office, by the end of March 2003, the number of sexual offences recorded by the police was 48,654 a 17% rise over the previous year.[322] These figures should, however, be viewed with some scepticism as they do not indicate the actual number of convictions secured. Indeed, crime figures show that whereas the number of persons over age 18 proceeded against in Crown Court for indictable sexual offences decreased from 6,300 in 1997 to 5,100 in 2002, the percentage of those proceeded against rose from 52% in 1997 to 65% in 2002.[323] The National Association of Schoolmasters Union of Women Teachers has reported that of 1782

[321] Police Research Series Paper 126
[322] Home Office News Release , 6 April 2004
[323] Home Office 'Criminal Statistics of England and Wales, 2002

allegations of sexual abuse against teachers in the last 10 years only 69 led to convictions.[324]

The presence of the Registry, nonetheless, has done little to restrain registered released sex offenders from reoffending. The case of Sarah Payne is one such horrifying example. Her murderer and rapist, Roy Whiting, was one of the first men to be placed on the registry.[325] He had complied with all the requirements. The only advantage of placement on the registry was to alert the police immediately to his whereabouts. The more recent case of Thomas Titley,[326] a known criminal paedophile, who had warned authorities that he posed a continuing danger but was nonetheless released from prison is a further example of how registration does not ensure safety of the community. Furthermore, any offender who chooses to thwart the intent of the law to have his whereabouts known to the police can do so with impunity. This problem was addressed by the Home Office in assessing the effectiveness of the SOA 1997. Homeless offenders have escaped the notification requirements for lack of a home address compelling the government to change to the law in the SOA 2003 to any location where the offender sleeps or visits regularly. Other offenders have changed residences at internals of less than 14 days thus escaping the obligation to register. This

[324] The Lawyer.Com , 20 April 2004

prompted the government to shorten the requirement to 8 days. In addition, the offender will be required to appear in person at the police station rather than notify by mail. Considering the numbers of offenders involved one can only expect serious problems for the local police forces to keep up with the paper work. According to Joyce Plotnikoff of the Home Office[327] most forces reckoned that the SOA 1997 had significantly increased their workload but only 40% had provided additional manpower. Only 30% of the forces thought that the registration requirements had led to crime prevention and only 23 % used registry information in investigations suggesting that police will not be inclined to find the registry useful for this purpose.[328]

Studies by Marshall[329] predicted that had the SOA 1997 been in force in 1993 the number of male sex offender who would be required to register would number 125,000. Of these 25,000 would be required to register for life. These numbers are likely to be considerably more in the present population given that the SOA 2003 has expanded the number of sexual offences attracting registration.

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[325] BBC News 12 December 2001
[326] Times Online, 2 March 2, 2004
[327] Plotnikoff. J et al ' Where Are They Now: An Evaluation of Sex Offender Registration in England & Wales' Police Research Series Paper 126
[328] ibid p (vii)
[329] ibid p 11

With no additional funding provided it will be very difficult for the police forces to comply with their obligation to monitor sex offenders in the community. The study of the effectiveness of the SOA 1997 found problems in the reliability of information received by the police from prisons, hospitals, the courts and even to some extent other police forces and the probation services.[330] Many officers responsible for registration of sex offenders obtained initial information from the offenders themselves. The study also criticised the information management system as fragmented, containing inaccurate information, and forces experiencing problems accessing the Police National Computer (PNC) which is the only mechanism available for making register information on a national basis.

Almost half the police forces identified inadequate resources as the reason for poor implementation of the Act yet they also asked for strengthening of the requirements on sex offenders, recommendations that have been incorporated in the SOA 2003.

Under SOA 1997, 97% of offenders complied with the registration requirements and fully cooperated with the police on such matters as home visits although the law did not compel them to do so. According to the 1998

[330] ibid p 21

PNC figures 4% of offenders did not register.[331] It remains puzzling, therefore, why with such a high level of cooperation of the offenders and with inadequate police resources and with little evidence that the register deterred crime, were more stringent requirements pushed through Parliament. Table 2 provides a comparison of the requirements of the 1997 and 2003 Acts.

TABLE 4

SOA 1997	SOA 2003
Registration by post or in person	Registration in person only
Registration within 14 days of change of address	Registration within 8 days
No power over offenders who travel abroad	Offenders convicted of a sexual offence abroad must register on return to the UK
Penalties of up to 6 months in prison for non registration	Penalties for up to 5 years in prison for non registration
No requirement for registration for offenders receiving conditional discharge, indecent exposure or assault on adult if sentenced to less than 30 months in prison	Registration applies to these offenders
Omission of offences that are not explicitly sexual	Includes offences that are sexual in motivation

Although the study[332] concludes by stating that the police forces had "no agreed way of quantifying the contribution of sex offender monitoring to

[331] ibid p 5
[332] ibid p 50

improving community safety", this did not stop Mr. Blunkett from claiming in his foreword to the Consultation Paper on the Review of Part 1 of SOA 1997 that "The Sex Offenders Act has proved to be a valuable tool in helping protect the public,"[333] and he felt that there was a great public interest to strengthen the provisions.

This very same consultation paper, however, recognises that "were the registration requirements to become more onerous, there could come a point at which the Act (SOA 1997) could no longer be seen as an administrative requirement."[334]

That point appears to have arrived with the Sexual Offences Act 2003.

CHAPTER 5

[333] Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997, Home Office, July 2001

Winston Churchill wrote that after the Glorious Revolution:

> "Coke's claim that the fundamental law of custom and tradition could not be overborne, even by Crown and Parliament together and his dream of judges in a Supreme Court of Common Law declaring what was and what was not legal, had been extinguished in England for ever. It survived in New England across the ocean, one day to emerge in an American Revolution directed against both Parliament and Crown" [335]

That American Revolution seems to continue. The Sexual Offences Act 2003 is almost completely based on American statutes that have been ruled constitutional in the United States by courts that are now willing to disregard the fundamental freedoms in order to justify a benefit of dubious security to the community. Jonathan Simon[336] describes how the new penology[337]and populist punitive ness come together in the passage of sex offender laws and the implementation of penal policy. Megan's law, he writes, "advertises itself as a new hybrid of private and public vengeance."[338] He concludes his critique by noting that, by

> "Upholding these laws against a variety of constitutional challenges provides little scrutiny of this transformation. Instead, the U.S. Supreme Court has begun to redefine downward constitutional expectations of state

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[334] ibid p 13
[335] Churchill, W ' A History of the English Speaking People: The New World' p 330 Dodd, Mead & Co 1956
[336] Simon, J ' Managing the Monstrous: Sex Offenders and the New Penology' Psychology, Public Policy and Law, 1998, Vol. 4 No 172, pp452-467
[337] the new penology emphasizes management rather than rehabilitation of offenders
[338] ibid p 464

> penal strategies. Not only has the new penology escaped direct review, but it features have helped mask the decline of constitutional standards. Ironically the more the state disavows the goals of individualization and transformation the more deference courts are invited to pay to their coercive use of power."

Will the SOA 2003 pass strict constitutional muster? Will the UK courts and ECtHR find its provisions to conform to the Human Rights Act 1998 (HRA 1998), and the Convention? Since the SOA 2003 has only just taken effect there is no obviously no established case law.

Prior ECtHR rulings on cases brought by UK citizens will clearly have a precedent setting effect on UK Courts when they take on the task of judging challenges to the new law. However, although the courts are required to take into account the opinions and decisions of the European Union Courts and the Commission on Human Rights they are not bound to follow them.[339] The higher courts[340] can only rule on the incompatibility of the law with HRA 1998 and not void the offending legislation. Thus individuals seeking the protection of HRA 1998 will find themselves in the position of not getting justice while at the same time making it possible for another person in their very same position to obtain judicial relief if Parliament chooses to change the law to conform to the legal ruling. So it should come as no surprise that Dr. Allot has derisively referred to HRA 1998 as the Minima Carta.

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[339] s 2 HRA 1998

It is said that of the three possible model Bills of Rights, Parliament chose the worst that of New Zealand,[341] to adopt over the American,[342] the Canadian,[343] and the European[344] all of which, to differing degrees, allow the judiciary to invalidate legislation.[345] The English courts inability to declare a law passed by Parliament as void in violation of HRA 1998 could be a major obstacle to the enforcement of the Convention Rights, and individuals may still have to go to Strasbourg to seek final redress. Lord Buxton[346] has raised doubts whether the Strasbourg jurisprudence is as binding upon the courts as is that of the Luxembourg court, and whether the inability of the English courts to void acts of Parliament that conflict with the HRA[347] could be in violation of s 3 European Communities Act 1972.[348] Furthermore, there is the confusing contradiction of s 2 (1) HRA 1998 requiring domestic courts only to take in to account the Convention but at the same time obliging them under s 6(1)HRA 1998 not to act in a manner that is inconsistent with a Convention Right.

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[340] High Court, Court of Appeal and the House of Lords Judicial Committee
[341] New Zealand Bill of Rights 1990
[342] Bill of Rights 1791
[343] Canadian Charter on Fundamental Freedoms 1982
[344] European Communities Act 1972
[345] Nash, S and Furse, M, ' Essential Human Rights Cases' p 30, Jordans 2002
[346] Buxton, L 'The Human Rights Act and the Criminal Justice and Regulatory Process', 1999, University of Cambridge
[347] HRA 1998, s 19
[348] s 3(1) provides that question s of Community law shall be determined in accordance with the principles laid down by any relevant decision of the European Court

Having raised doubts about the impact of HRA 1998, it should also be said in fairness that its greatest effect has been on the criminal law, and quite significantly on sexual offences. It has had significant impact on new legislation as is evident from the equalisation of age of consent for homosexuals and heterosexuals made in the Sexual Offences (Amendment) 2000 Act and the pseudo gender neutrality of SOA 2003. However, some of the provisions of the SOA 2003 raise questions as to whether they would violate the rights of the accused and breach fundamental principles of European Community law. In particular, the trend toward widening the definition of sexual offences and the imposition of much longer prison sentences raises worrisome questions of violation of a number of key legal concepts intrinsic to Community law.

Principle of Proportionality:

This is particularly true of the new offences of sexual touching (s3) and sex with an adult relative (ss 64 & 65), mentally ill as incapable of consent (ss 30-33), broadened definition of care workers (s42) and positions of trust (s42), changed age of consent for children (s45) for the purposes of "indecent photographs", sexual activity by children (s13), tightened notification requirements (ss 80-88), notification orders (ss 97-103), and

the creation of the Risk of Sexual Harm Orders (s 123) where severe restrictions can be imposed on a person without obtaining a conviction.

According to Nash and Furse[349]

> "The principle of proportionality requires that a fair balance is maintained between the rights of the individual and the requirements of the community at large. The principle has frequently been invoked in cases involving the restriction of a right guaranteed by the Convention". In *Goodwin v United Kingdom,*[350] the Court considered that any restriction on this right (article 10: freedom of expression) could be justified only if there was a reasonable relationship of proportionality between the legitimate aim pursued by a disclosure order and the means deployed to achieve that aim."

This distinction between the legitimate aim and the means deployed can be applied to all the sections of SOA 2003 listed above. What legitimate purpose is obtained by criminalising unwanted sexual touching? Is it not sufficient that sexual harassment in the workplace is prohibited by employment rules and subjects the violator to disciplinary action and to a civil action in tort? In *Chahal v United Kingdom*,[351] the Commission decided that the Government's legitimate aim of ensuring national security did not justify the means by a deportation order that would constitute a

[349] Nash and Furse , p 7
[350] Goodwin v United Kingdom (1996) 22 EHRR 123
[351] Chahal v United Kingdom (1996) 23 EHRR 413

breach of article 8 (right to respect for family life and privacy). In *X and Y v The Netherlands*[352] the Court also reiterated that "recourse to the criminal law is not necessarily the only answer to deterring undesirable conduct." This could be said to apply to s 13 which criminalizes kissing between children under 13. The Government's response to a Parliamentary enquiry about proportionality was to argue[353]

> "The legitimate aim under Article 8.2 (European Convention) served by clause 6 (now s 13) of the Bill is principally the protection of the rights and freedoms of others. The Government considers that children under 13 have the right to be protected from all forms of sexual activity. Arguable clause 6 also serves the legitimate aim of protecting morality, but the Government's principal concern is child protection."

A more proportionate approach might be to follow the Dutch Parliament's example which made sexual activity for children 12 to 16 legal but allowed them to use a statutory consent of 16 if they felt they were being coerced or exploited.[354] There is no reason why this approach could not be applied to children under 13.

Doctrine of Margin of Appreciation

In determining whether a Contracting State has violated a Convention Right, the Court uses the margin of appreciation test. The Court recognizes that national authorities are in a better position to know whether local customs,

[352] X and Y v The Netherlands (1985) 8 EHRR 235

conditions and mores permit derogation from or restriction of Convention Rights. The burden is on the State to prove that the deviation is reasonable and proportionate. Some Rights are absolute and cannot be derogated from. In *Smith and Grady v United Kingdom,*[355] the Court applied the test very strictly "noting that the hallmarks of a democratic society were pluralism, tolerance, and broadmindedness."[356] This approach could well be taken in the new offence of adult relative consensual sexual activity. In *Smith and Grady* the Court required the government to provide weighty and convincing reasons to justify an investigation which interfered with intimate aspects of the applicants' private life. The Government was unable to do so. Accordingly there was a violation of article 8. Regarding adult sexual relations there has been no evidence brought by the Government suggesting that consensual sex between adult relatives would tear apart the moral fabric of English society nor bring about the collapse of civilization as we know it. Unfortunately, in *R v DPP ex parte Kebilene*,[357] the House of Lords chose to interpret European law as allowing for a flexible analysis of article 6(2)

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[353] Joint Committee on Human Rights, 12th Report " Memorandum from the Home Office" March 2003
[354] Levine, J op cit p 89
[355] Smith and Grady v United Kingdom (2000)29 EHRR 493
[356] Nash and Furse p 41
[357] [1999] 3 WLR 972

using the margin of appreciation principle[358] to justify the reversal of burden of proof of portions of the anti terrorist law.[359] According to Alan Norrie[360]

> "Putting together the British attitude to interpretation of the 1998 Act and the character of Convention jurisprudence before the European Court, we are left with a pretty convincing picture that the 1998 Act is unlikely to disturb conventional UK attitudes to adjudication, or what issues to be adjudicated are. The forms of the debate may change, as new legal language comes into place, and much expensive legal activity is to be expected, but the overall result is likely to be pretty much business as usual."

Doctrine of Positive Obligation

This doctrine requires Contracting States to deter human rights abuses through effective criminal law. According to Jonathan Rogers[361]

> "(The Courts) do not say what conduct deserves to be punished nor does it say whether certain undesired conduct may be subject to other legal regulation. However, it may have a role to play in saying when the criminal sanction should be used as a means of deterring a certain type of activity. This approach accepts, as it must, that the criminal law, and its inherent threat of prosecution, does not need to be deployed to every social ill."

He further argues that the doctrine of positive obligation is one of deterrence of crime not one of prevention. In this regard the Government's introduction of numerous additional sexual offences and the widening of others is part of a misguided construction of the ECtHR decisions in *X and Y v The*

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[358] as applied by the ECtHR in Salabiaku v France (1988) 13 EHRR 379
[359] s 16 A Prevention of Terrorism (Temporary Measures) Act 1989
[360] Campbell, Ewing & Tomkins, "*Sceptical Essays On Human Rights*" p 266, Oxford University Press 2001

Netherlands[362] and *A v United Kingdom*.[363] By introducing Risk of Sexual Harm Orders (ss 123-129) the Government has gone beyond deterrence to attempting prevention of a crime by individuals who have not been convicted. It is ludicrous to equate restriction of liberty of an individual who has not committed a crime to football crowd control measures.[364]

In summary it is clear that HRA 1998 could have a dramatic impact on English jurisprudence. Even before its implementation the Convention Rights and Strasbourg jurisprudence were changing the way English courts ruled on the law. Although the HRA will not allow the courts to invalidate laws that are in violation of Convention Rights, it will have an ameliorating impact of how sexual offenders are dealt with by the criminal system as well as containing the punitive zeal of Parliament when it comes to addressing sexual offences. Much will depend on the willingness of the judges to take a positive role in interpreting their roles as demanded by ss 2(1) and 6(1) of HRA 1998. Will they follow the radical changes the New Zealand judiciary initiated in taking on an equally insipid Bill of Rights[365] or will they follow the direction of the Home Secretary to "fulfill the comforting, consensual

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[361] Rogers, J, ' Applying the Doctrine of Positive Obligation in the European Convention on Human Rights to Domestic Substantive Law in Domestic Proceedings' *Crim. L.R. 2003,OCT, 690-708*
[362] op.cit.
[363] A v United Kingdom (1999) 27 EHRR 611
[364] Joint Committee on Human Rights, Memo from Home Office 3/2003
[365] Campbell p 267

function of applying a purposive approach to create a fair and decent society and not let criminals of the hook."[366]

[366] ibid p 269

CHAPTER 6

CONCLUSION

Winston Churchill once said that

> "The mood and temper of the public with regard to the treatment of crime and criminals in one of the unfailing tests of the civilisation of a country"[367]

The entire burden of this thesis has been to show that legislation concerning sexual behaviour has always been and is even now arbitrary, inconsistent, and responsive to convention. It has little to do with morality even if such a concept can be adequately defined. In the end such legislation can claim neither to be just nor to serve effectively the somewhat whimsical ends imputed to it. In 1905, Lord Dicey pointed out that[368]

> "English lawmakers, while showing little respect for ecclesiastical dogmas, and whilst not attending to abstract principles of any kind, have been guided in the main by ideas of immediate expediency, or to put the matter more plainly, by the wish to remove the grievances of any class strong enough or organized enough to make its wishes effectively heard in Parliament."

Not much has changed since that time. In enacting SOA 2003 Parliament responded to several pressure groups and produced a law that has

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[367] Lord Woolf in a speech " Human Rights and Minorities" 13 April 2003 quoting Churchill 's statement to the Commons in 1911

[368] Adam Kuper quoting Dicey, A.V. Lectures on the Relations between Law and Public Policy in England during the Nineteenth Century, London 1905

punishment, management and humiliation as its main instrument of deterrence. It has wholly endorsed the tried and failing new penology.

The problem with so called moral legislation is that what is considered moral is seldom differentiated from those judgments that are conventional. On this logic eating pork, killing Christians or shaking with the left hand are all moral or immoral issues depending on time and place. Hart made this point emphatically in his trilogy of essays[369] on law and morality:

> "The proposition that it is justifiable to enforce morality, like its negation, a thesis of critical morality requiring for its support some general critical principles. It cannot be established or refuted simply by pointing to the actual practices or morality of a particular society. Any one who regards this question as open to discussion necessarily accepts the critical principle, central to all morality, that human misery and the restriction of freedoms are evils; for that is why the legal enforcement of morality calls for justification."

Modern western moral philosophy limits morality to questions of justice, that is, to dividing the good and evil that befalls mankind among equal moral agents. On this view sexual conduct raises few moral issues. Sexual acts are in no way immoral. They are unjust and immoral only in cases where coercion is used or where one of the participants is not an equal moral agent, for instance a child. However, because sex is not immoral and because many minors and the handicapped want it, the only moral grounds for denying

their wishes is that they are not equal moral agents. That argument may appear credible when applied to a 9 year old but becomes moral paternalism (an immorality in its own right) when applied to a 15 year old. In short morality cannot be enforced when one does not know even what it is.

Finally, the idea of using punishment and humiliation to enforce social mores, not morality, as far as sexuality is concerned, goes against the wisdom of John Stuart Mill:

> "The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good either physical or moral is not a sufficient warrant. He cannot be rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise or even right".[370]

In other words, laws directed at enforcing morality can themselves only be moral to the degree that they are justified by reason. Scripture, convention, social practices are not adequate bases for exercising power "over any member of a civilized community against his will." The only justification possible is that the act in question will cause harm to others.

The problem then becomes to find lawmakers who will listen to reason and go against the ignorant in the name of justice.

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[369] Hart, H LA "*Law, Liberty and Morality*" Stanford University Press 1965
[370] Mill, J. S. " *On Liberty*' chap. 1, Penguin Classics 1985

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Appendix 1

Relevant Existing Sexual Offences Legislation[371]

Sexual Offences Acts 1956 to 1992
The Sexual Offences Act 1956 consolidated the statutory law regarding sexual offences. The 1967 law amended the Act to allow for consensual homosexual relations in private for men over age 21.

The Sexual Offences (Amendment) Act 1976
enacted a statutory definition ofrape, and provided for the anonymity of defendants and complainants in rape cases. The anonymity provision of the defendant was repealed by s 158 Criminal Justice Act 1988. The Sexual Offences (Amendment) Act 1992 extended the existing anonymity provisions to cover victims of other sexual offences. The Youth Justice and Criminal Evidence Act 1999 repeals the anonymity provisions in the 1976 Act and amends the 1992 Act so as to extend its operations to cover offences previously covered only by the 1976 Act. These Acts may be cited together as the Sexual Offences Acts 1956 to 1992 per s 8(2) of the Sexual Offences (Amendment) Act 1992.

Sexual Offences Acts 1985 and 1993
The Sexual Offences Act 1985 increased the penalties for attempted rape and indecent assault on a woman. It also created two summary offences relating to the soliciting of women by men for the purposes of prostitution. The Sexual Offences Act 1993 abolished the common law presumption that a boy under 14 years was incapable of sexual intercourse.

Criminal Justice and Public Order Act 1994
This Act created further substantial changes to the law. It redefined the offence of rape to include non consensual anal intercourse with a man or a woman. It made lawful the buggery of a woman in private when the woman consents and both are parties over 18. It legalized homosexual acts in private when both parties are 18 and consenting. It extended the Sexual Offences Act 1967 to the armed forces and the merchant marine. It revised the penalties for the various circumstances in which buggery remains unlawful despite the consent of both parties. It further extended the anonymity provisions to cover allegations of inchoate offences. It also abolished the requirement for the court to give to the jury about convicting an accused on the uncorroborated evidence of a victim of a sexual offence.

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[371] Adapted from "The Sexual Offences Bill:[HL]: Policy Background, House of Commons Library, Research Paper 03/61, 10 July 2003. As of 30 April, 2004

Sexual Offences (Conspiracy and Incitement) Act 1996
S 2 extended the jurisdiction of the courts in relation to incitement of certain offences against children. S 1 dealing with conspiracy was repealed by the Criminal Justice (Conspiracy and Terrorism) Act 1998

Sex Offender Act 1997
The Act requires the notification of information to the police by persons who have committed certain sexual offences and to make provision with respect to the commission of certain sexual offences outside the UK. The Act was extensively amended by the Criminal Justice and Court Services Acts 2000, and Part 1 has been repealed by the Sex Offences Act 2003.

Sexual Offences (Protected Materials) Act 1997

This regulates access by defendants to certain categories of material disclosed by the prosecution relating to sexual and other offences.

Youth Justice and Criminal Evidence Act 1999

This restricts cross examination of complainants in sexual offences. It prohibits cross examination by the accused in person. It restricts questioning the complainant about previous sexual experiences. It extends the restrictions to complainants of all sexual offences rather than just rape alone.

Sexual Offences (Amendment) Act 2000

This amends the 1956 and 1967 Acts allowing for consensual homosexual activity in private between men 16 and over. It creates a new offence of criminalizing sexual activity between a person over age 18 in a position of trust and a person under that age.

Appendix 2

Risk Scales Used With Sex Offenders

Scale	Behaviour Predicted	Strength of Prediction	Strength of Replication
VRAG	Violence	High	High
SORAG	Sexual-violent	High	Low
PCL-R	General violence	Moderate	High
MnSOST	Sexual-violent	Moderate	Moderate
MnSOST-R	Sexual	High	Low
RRASOR	Sexual	Moderate	Moderate
Static-99	Sexual-violent	Moderate	Moderate

VRAG: Violence Risk Appraisal Guide, SORAG: Sex Offender Risk Appraisal Guide, PCL-R: Psychopathy Check List, MnSOST-R: Minnesota Sex Offender Tool-Revised, RRASOR: Rapid Risk Assessment For Sex Offence Recidivism,

Adapted from Table 3.2, Chapter 3 (Karl Hanson) 'Protecting Society From Sexually Dangerous Offenders' edited by Bruce Winick and John LaFond

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