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Preface

This book contains the text of the Clarendon Lectures in Law which I gave (at the invitation of the University of Oxford's Law Faculty and the Oxford University Press) in October 2005. Footnotes, giving sources and a certain amount of additional information, have been added; but the printed text is that of the three lectures as they were delivered. This reflects my belief that the function of such lectures is primarily to stimulate the audience's interest in the subject matter rather than to provide a systematic exposition appropriate for readers seeking a comprehensive knowledge of the subject. Moreover, I have made no attempt to update the text to take account of developments in the period between the delivery of the lectures and delivery of the text to the printer. For example, it has become apparent that in practice Civil Partnership Registrars will often include an exchange of words of mutual commitment by the parties, even though the statute provides only for the signing of a document. The text reproduces what I actually said, whether or not future events falsify any predictions I may have made.

The twentieth century saw many striking changes in social attitudes, but none is as remarkable as the shift in attitudes to sexual relationships, and especially to relationships between people of the same sex. The first lecture (Chapter 1) sketches in the historical background to the enactment of the Civil Partnership Act. The second lecture (Chapter 2) analyses the provisions of the Act. Family law reform in this country has usually been a matter of compromise, and the Civil Partnership Act is no exception. But as with the divorce reform legislation of the sixties and seventies, the result may not always be a model of logical consistency. The third lecture (Chapter 3) seeks to put these matters in the broader context of constitutional reform. In some other English speaking countries, the pace of reform has been largely driven by court decisions determining that to deny the legal status of marriage to same sex couples infringes constitutional guarantees of equal protection and freedom from discrimination. In this country in contrast, although judicial decisions increasingly came to reflect changing attitudes, civil partnership is the creation of a statute passed after a consultation process starting with a full examination of the issues by the Wolfenden Committee and concluding many years later after extended (some would say over-extended) debates in the two Houses of Parliament.

The enactment of the Human Rights Act in 1998 ('bringing home' the provisions of the European Convention on Human Rights and Fundamental Freedoms) and of the Constitutional Reform Act 2005 (creating a Supreme Court for the United Kingdom) raises questions about the traditional understanding of

the respective positions of the judiciary and the legislature; and whilst there are many obvious advantages in allowing the higher judiciary a somewhat broader role in resolving issues on the basis of 'constitutional principle', I believe that there are also dangers—perhaps exemplified by recent experience in the United States—in so doing. I hope that my description of the process of appointing a Justice of the United States Supreme Court will be of interest.

The materials in the Appendix provide, as I have suggested, an opportunity for a case study of different methods of law making (on the one hand, the discussion of issues by an enquiry conducted by 'the great and the good' and eventually a statute of enormous complexity; on the other, judicial decisions interpreting constitutional provisions). But the case law materials also contain much powerful and in some cases (notably the dissenting view of Justice Scalia in the Texas sodomy case) vigorous analysis of issues about the proper role of the law in relation to sexual activity. It will become clear from a study of the judgments of majority and minority in the three cases from the United States that these are matters on which views can be sharply divided and sometimes pungently expressed, and that forensic debate can be more overtly combative than has been customary in the superior courts of this country.

I am grateful to Oxford University and the Press for the opportunity to give these lectures. My debt to the facilities provided by the Bodleian Library will, I think, be self-evident. But I would like, above all, to place on record the great debt which I (in common with so many others) owe to my colleague at All Souls College, the late Professor Peter Birks FBA QC, Regius Professor of Civil Law in the University. It was he who originally suggested that I might give the Clarendon Lectures. A passionate enthusiast for legal scholarship as an integral part of a humane education, he profoundly disagreed with my own pragmatic (and perhaps unprincipled) approach to the law making process. But no one could have been more insistent that such different approaches were matters for rational argument and informed debate. His inspiring example to all those who, in one way or another, sat at his feet will ensure that his memory is treasured for many years to come.

Stephen Cretney

Holy Innocents Day
28 December 2005

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Chapter 1

From Felony to the Love that is Proud to Speak its Name

Odious crime

On a cold winter day in March 1953 in the Hall of Winchester Castle three men stood in the dock. They were accused of offences arising from their having had homosexual sex with willing adult partners. (The partners were not themselves in the dock because they had purchased immunity for themselves by agreeing to give evidence for the prosecution.) All three accused were convicted. The Assize judge, Mr Justice Ormerod, sitting beneath the round table said to be that used by King Arthur and his Knights, sentenced them all to imprisonment. That one of them was not only an old Etonian graduate of New College but a peer of the realm (Lord Montagu of Beaulieu), that another (Michael Pitt Rivers) was a member of a prominent Dorset military and land-owning family, and that the third (Peter Wildeblood[1]) was Diplomatic Correspondent of *The Daily Mail*, whilst the 'victims' (one of them an RAF corporal with whom Wildeblood had fallen in love—love, fervently expressed in letters read aloud to the Court, with apparent relish, by prosecution counsel) were very much their social inferiors helped ensure that the case attracted wide publicity.

The Montagu case is sometimes called a 'show trial'. But in fact in its essentials it was by no means unusual. In 1953[2] no fewer than 2,267 men were prosecuted for indictable homosexual offences. The accused was sentenced to imprisonment in as many as half of those cases in which the 'offence' had been committed in private with a consenting adult.[3] But whatever the sentence, each and every prosecution (as Wildeblood put it) implied the 'downfall and perhaps the ruin' of a human being. And it was not only those prosecuted to conviction who could be,

[1] Wildeblood's published account of the trial and his experience of imprisonment, *Against the Law* (1955) is an important source. The book was republished (with a Foreword by Matthew Parris) in 1999.

[2] *Report of the Committee on Homosexual Offences and Prostitution* (Chairman: Sir John Wolfenden) (1957) Cmnd. 247, Appendix I, Table II. This report is subsequently cited as '*The Wolfenden Report*'; and extracts are reproduced in Appendix 2 to this book.

[3] Appendix I, Table VI of *The Wolfenden Report* provides statistics showing how the courts dealt with the 300 adult offenders convicted during the three years ending March 1956 of offences committed in private with consenting adults. 118 of the 300 were sentenced to imprisonment.

and were, ruined. Some, confronted with exposure, succumbed to blackmail and thereby bought an uneasy freedom. There were those who, unable to bear the disgrace of exposure and the shame of imprisonment, preferred to kill themselves.[4]

Today it seems difficult to believe that this ever happened. Even in the 1950s the perceptive observer might reasonably have thought that the laws which sent more than a thousand men to prison each year would probably not survive into the twenty-first century. But who could have foreseen that, fifty years on, in 2004, the United Kingdom Parliament would in the name of 'equality and social justice'[5] pass an Act (the Civil Partnership Act) which was intended to acknowledge same sex relationships as analogous to heterosexual relationships, and to recognize the 'legitimacy of the claim' that they be 'accorded equal respect with heterosexual relationships' and placed 'firmly in the civil sphere of our national life'? And there was overwhelming all-party (albeit not unanimous) support for the Act which permits same sex couples to acquire legal rights and subject themselves to legal duties similar to those of a married couple and aims to remove the 'practical difficulties' such couples faced.[6] In little more than fifty years, behaviour regarded as *criminal* (that is to say, so wrong that it is properly the business of the state to pursue the perpetrator and impose penal sanctions intended in part to mark society's disapproval of what he has done[7]) has been moved not merely into the neutral zone where the state leaves it to the individual to make decisions but into the zone in which the state, by creating supporting legal or administrative structures, recognizes and approves the conduct in question.

1885: Scope of criminal law extended

The transformation is all the more dramatic if we look in a little more detail at the attitude which the law for generations took to homosexuality. Sending men to prison for having sex with one another was in fact, by the standards of earlier times, comparatively lenient: from the sixteenth century until the Offences against the Person Act in 1861 death was the penalty for certain kinds of

[4] A verse in AE Housman's *A Shropshire Lad* was apparently inspired by the suicide of a cadet involved in a sex scandal at the Royal Military Academy Woolwich:

> Shot? so quick, so clean an ending?
> Oh that was right, lad, that was brave:
> Yours was not an ill for mending,
> 'Twas best to take it to the grave...
> Oh lad, you died as fits a man.

For Housman's own troubled life see the entry by Norman Page in *The Oxford Dictionary of National Biography*.

[5] Mrs Jacqui Smith, Deputy Minister for Women and Equality, *Official Report* (HC) 12 October 2004, vol 425, col 174.

[6] For a detailed and dispassionate account of the philosophy underlying the Bill see the *Fifteenth Report of the House of Lords and House of Commons Joint Committee on Human Rights* (HC 885, 2004).

[7] See A Ashworth, *Principles of Criminal Law* (4th edn, 1999).

homosexual conduct.[8] And this law was enforced: men were hanged. Then in 1885 the Criminal Law Amendment Act—perhaps in a fit of parliamentary absence of mind[9]—greatly extended the type of conduct which the law penalized: the 1885 Act provided that 'any male person who, in public or private', committed 'any act of gross indecency with another male person' should be liable to two years' imprisonment.[10] And there is no shortage of outspoken denunciations of homosexuality as an 'odious crime',[11] 'surely one of the darkest of all shadows that blackens the face of man' as the former Lord Chancellor Buckmaster (a liberal, but also a stern moralist) described it.[12] No one doubted that when the Marquess of Queensberry left a card at a gentlemen's West End club describing Oscar Wilde as a 'sodomite'[13] this was so seriously defamatory that it would be in the public interest to allow a prosecution for criminal libel. Wilde rose to the bait: he initiated a prosecution. Queensberry successfully convinced the jury that the allegation was justified, and Queensberry's solicitors obligingly sent Queensberry's plea of justification and the evidence supporting it to the authorities. Wilde was prosecuted and sent to hard labour for two years. The only good thing to come out of this human tragedy—for remember, that although Queensberry seems to us deranged, he believed that he was saving his son Lord Alfred Douglas from corruption—is Wilde's great poem *The Ballad of Reading Gaol.*

[8] ie what the Buggery Act of 1533—apparently reflecting Henry VIII's policy of asserting the Royal supremacy against the ecclesiastical courts which previously had jurisdiction—described as the 'detestable and abominable Vice' of sodomy. For a lucid account of the various forms of male sexual expression with which the law was concerned, see Honoré, *Sex Law* (1978) 90.

[9] The Act's long title states that it is an 'Act to make further provision for the Protection of Women and Girls, the suppression of brothels and other purposes'; and for an analysis of the relevant provisions see *R v J* [2005] AC 562, 587–588 (Baroness Hale, HL). It may be that the introduction of a clause penalizing male homosexuality was a not altogether serious attempt by the MP H Labouchere to demonstrate what he believed to be the folly of allowing 'well meaning enthusiasm' to lead to the use of the criminal law in an attempt to enforce sexual morality. Labouchere and others were especially exercised by fear that to criminalize 'consensual' intercourse with young females would operate harshly against young upper middle-class men who seduced domestic servants: see generally R Davenport-Hines, *Sex, Death and Punishment* (1990) 133–135; J Weeks, *Sex Politics and Society, the Regulation of Sexuality since 1800* (2nd edn, 1989), and *Making Sexual History* (2000).

[10] It appears that the possibility of physical homosexual relationships between women was not widely understood at the time.

[11] See eg *Russell v Russell* [1897] AC 395 (where it was held that a wife's conduct in repeatedly making allegations she knew to be false that her husband had had a homosexual affair with a young man justified him in leaving her).

[12] *Official Report (HL)* 11 March 1924, vol 56, col 636. At this period it was often suggested that homosexual conduct should be specifically included amongst the grounds for divorce.

[13] In February 1895 Queensberry left a card at the Albermarle Club addressed to 'Oscar Wilde, posing as a somdomite' (or, on one reading, 'ponce and somdomite'). Queensberry was able to produce detailed evidence of Wilde's sexual relationships with male persons and the prosecution collapsed. Wilde was charged under the Criminal Law (Amendment) Act 1882, and (after one trial in which the jury failed to agree) was convicted on 25 May 1895. Wilde's grandson, Merlin Holland, has edited a full verbatim account of the libel trial: *Irish Peacock and Scarlet Marquess, The Real Trial of Oscar Wilde* (2003) (which includes a photocopy of the offending card). See also H Montgomery Hyde, *The Trials of Oscar Wilde* (1948) and R Ellman, *Oscar Wilde* (1987).

Glamourizing homosexuality?

Although the enforcement (or even the threat of enforcement) of the criminal law was capable of (and did in fact) ruining lives it seemed to be largely ineffective in preventing offending. In the period between 1931 and 1955 there was a ten-fold increase[14] in the number of 'offences known to the police'. Of course, the degree of enthusiasm with which the police sought 'knowledge' in this respect seemed to vary from police force to police force; and it was even suggested that the risk of prosecution helped to give homosexuality a certain dangerous glamour. Oscar Wilde certainly paid a terrible price in terms of personal suffering but did this deter others? Did it perhaps even encourage some? Professor Jeffrey Weeks[15] believes that it was the Wilde case which encouraged homosexuals to define themselves; whilst AE Housman (author of *A Shropshire Lad*) even said that it was the Wilde case which made the unmentionable mentionable. It is noteworthy that two chapters of the brilliant analysis by Noel Annan (successively Provost of King's College Cambridge, Provost of University College London, and Vice-Chancellor of London University) of twentieth century British political intellectual and cultural life, *Our Age: Portrait of a Generation* (1990) are entitled 'The Growth of the Cult of Homosexuality' and 'The Cult Flourishes'; and it is difficult to deny that in literature (think of Bloomsbury, think of EM Forster) and some other professions (especially the theatre, fashion, and the arts: think of Cecil Beaton, Noel Coward, Ivor Novello, Dirk Bogarde, John Gielgud[16]) the fact that homosexual behaviour was criminal did not seem to be a deterrent or a serious obstacle to advancement. And even amongst the most senior of Senior Members of the University of Oxford, the Heads of Houses, there were in the mid-1950s several whose sexual orientation was widely known: the Warden of All Souls, John Sparrow, was an active homosexual who (it has been said[17]) 'experienced in his own life an added thrill in being on the wrong side of the law'. And he had—so his biographer tells us—a stable relationship which lasted for thirty years and was ended only by his lover's death. The Warden of Wadham, Sir Maurice Bowra,[18] coined the term 'the Homintern'[19] for those he regarded as a secret society, not without power and influence. And there were

[14] *Wolfenden Report*, Appendix I Table I. The figures are 622 in 1931 and 6,644 in 1955. It is often said that some of those in a position to influence policy on the enforcement of the criminal law had a 'crusading zeal' to 'smash homosexuality': see D Sandbrook, *Never Had It So Good* (2005) 564. It is certainly true that the number of prosecutions varied markedly between different police authorities. [15] *Sex Politics and Society, the Regulation of Sexuality since 1800* (2nd edn, 1989).

[16] Gielgud was prosecuted in 1953 for soliciting in a public place (a public lavatory) for an immoral purpose, and this was widely publicized. The *Wolfenden Report* did not propose changing the law under which he was convicted (although it did recommend that persons accused should have the right to trial by jury): para 123. [17] See John Lowe, *The Warden* (1998).

[18] See the entry by LG Mitchell in the *Oxford Dictionary of National Biography*.

[19] cf the *Comintern*, or Communist International, the organization claiming leadership of the world socialist movement, and (until the end of the Cold War) often used to suggest a relationship with unscrupulous, powerful, secretive, political organizations.

also prominent undergraduates who did not seek secrecy for what society officially regarded as a vice. Indeed, Sebastian Faulks in *The Fatal Englishman*—biographical sketches of three outstandingly gifted young men who died young—describes one of the most renownedly brilliant of the late 1950s Oxford generation as 'precociously and openly homosexual'. His name was Jeremy Wolfenden; and by a curious irony,[20] it was his father, Sir John Wolfenden—the classic Establishment figure of his time: 'brilliant product of Chapel and grammar school', Oxford philosophy don, public school headmaster at age 28, war-time civil servant, Vice-Chancellor[21]—to whom Sir David Maxwell-Fyffe (a not notably liberally minded Home Secretary in a not notably progressive conservative government) turned in 1954 to chair the *Departmental Committee on Homosexual Offences and Prostitution.*

The Wolfenden Committee: a response to public concern?

Why did the Government set up an inquiry? So far as homosexuality is concerned, it is true that bodies such as the Howard League for Penal Reform and the Church of England's Moral Welfare Council[22] had expressed concern about the working of the criminal law and pressed for an official enquiry;[23] but we have to remember that the Wolfenden Committee was concerned not only with homosexuality but also with prostitution and other 'street offences'; and it may be that the most powerful factor influencing the Government's decision to set up the inquiry was not the law relating to homosexuality but the public concern about what the *Wolfenden Report* described as 'the visible and obvious presence' of large numbers of prostitutes in the streets of parts of London and a few provincial towns.[24] Apart from anything else, this was apparently bad for the tourist trade.

So far as homosexuality is concerned, it seems that the decision to set up such an inquiry was influenced more by a belief that homosexuality—often, as Sir John was to say,[25] called 'unnatural vice', and 'degrading to the individual and society'—was on the increase, and 'there was a feeling that if it was it ought to be

[20] There seems little doubt that Sir John Wolfenden was well aware of his son's proclivities but his own autobiography (*Turning Points: the Memoirs of Lord Wolfenden*, 1976) is exceptionally reticent about their relationship. It appears that he took the view that his son 'had been given a chance, a great chance, and . . . now there was no more to be said': see S Faulks, *The Fatal Englishman: Three Short Lives* (1997) 295.

[21] See S Faulks, *The Fatal Englishman: Three Short Lives* (1997) 212.

[22] In 1952 the Committee initiated a study, and (although originally intended for private circulation) a report was published in 1954. Its 'liberal, humane tenor . . . caused much surprise': PG Richards, *Parliament and Conscience* (1970) 66.

[23] PG Richards, *Parliament and Conscience* (1970) 66. Chapter 4 of this work gives an admirable account of the parliamentary movement for reform.

[24] *Wolfenden Report*, para 229.

[25] Wolfenden, *Turning Points: the Memoirs of Lord Wolfenden* (1976) 131. *The Wolfenden Report* discussed at earnest length (see para 24 ff) the question whether homosexuality was a 'disease' or an 'illness', concluded that it could not properly be called a 'disease' but had no doubt at all that it was a 'problem': see Chapter 4. The Report criticized the practice of telling offenders that they would receive treatment in prison; but accepted that medical treatment could be effective in some cases in

curbed'. Certainly that was what some of the Press believed: a succession of spy scandals—Burgess, Maclean, Vassall—prompted the *Sunday Pictorial* to claim[26] that there existed in the Foreign Office a 'chain or clique of perverted men'; and that homosexuality was a 'spreading fungus' which had infected even such iconic figures as generals, admirals, and fighter pilots as well as the 'mincing and effeminate young men' meeting in dirty West End cafes, calling one another 'quite openly' by girls' names.[27] The fear that homosexuality was a 'proselytising religion . . . contagious, incurable and self-perpetuating' influenced even educated well informed and not inhumane figures (such as the future Lord Chancellor, Hailsham[28]).

The Wolfenden Report

The Wolfenden Committee's Report, published in 1957, seems primarily concerned to remove any grounds for what is now called a 'moral panic' about homosexuality. The 'problem' of homosexuality was *not* widespread: the Committee thought it 'very unlikely' that 'the dramatic rise in the number of offences recorded as known to the police' reflected a proportionate increase in homosexual behaviour.[29] And it concluded that homosexual behaviour was found in only a 'small minority of the population' and that it should accordingly 'be seen in its proper perspective, neither ignored nor given a disproportionate amount of public attention'.[30] And the Committee was particularly anxious to deny that there was any basis for associating homosexuality with intellectual ability:

> Homosexuality is not, in spite of widely held belief to the contrary, peculiar to members of particular professions or social classes; nor, as is sometime supposed, is it peculiar to the *intelligentsia*. Our evidence shows that it exists among all callings and at all levels of society; and that homosexuals will be found not only among those possessing a high degree of intelligence, but also the dullest oafs.[31]

This hardly suggests that the *Wolfenden Report* would be a radical document; but in fact it provided what, in retrospect, can be seen as a powerful base for reform of the criminal law. First, it enunciated in plain language a coherent and

reducing sexual activity [para 193], and could lead to a 'better adaptation to life in general'; and even to make the man 'more discreet or continent in his nature'. [para 195]. They recommended that the ban currently in force on oestrogen treatment of prisoners (intended to reduce intensity of sexual desires) should be lifted.

[26] 25 September 1955, as quoted in D Sandbrook, *Never Had It So Good* (2005) 564.

[27] See D Sandbrook, *Never Had It So Good* (2005) 565; and also 596–597.

[28] See Hailsham's essay 'Homosexuality and Society' in JT Rees and HV Usill (eds), *They Stand Apart*, (1955).

[29] *Wolfenden Report*, para 45.

[30] *Wolfenden Report*, para 47.

[31] *Wolfenden Report*, para 36: the arrest of a prominent figure would have 'greater news value than the arrest of (say) a labourer for a similar offence, and in consequence the Press naturally finds room for a report of the one where it might not find room for a report of the other. Factors such as these may well account to some extent for the prevalent misconceptions.'

apparently simple philosophical analysis of the proper function of the criminal law: for Wolfenden (who began his career, you will remember, as an academic philosopher) the proper function of the criminal law in this area was

'to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide safeguards against exploitation and corruption of others'. There should accordingly 'remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.[32]

That sufficed to justify the Committee's recommendation that 'homosexual behaviour between consenting adults in private be no longer a criminal offence'.[33] (Conveniently, it also sufficed to support recommendations about prostitution: street soliciting was offensive and the law should seek to deter it by increased penalties.) But the Committee had another string to its bow: philosophy is all very well, but (so the Report opined[34]) the *application and administration* of the law are no less important than its precise formulation and its penalties. Wolfenden, the good public servant, was shocked by the evidence[35] that what was done with 'impunity in one part of the country' would be 'severely treated in another, both by the police and the courts . . . '. In some parts of the country the law penalizing homosexuality might be administered 'with discretion', but in others 'a firm effort' was made to apply the full rigour of the law.[36] The very existence of this 'haphazard element' in its administration was a 'strong argument' against its retention: the fact that different police forces followed such different policies was likely to bring the law into disrepute.[37]

The combination of an argument of principle about the scope of the criminal law with a demonstration that the application of the existing law was incompatible with sound administrative principle was powerful; but, even so, it was to be ten years before the Sexual Offences Act 1967 gave effect to Wolfenden's recommendation that the commission of homosexual acts in private between adult consenting males should cease to be a criminal offence.

Opposition and inertia

Why the delay? It is true that publication of the *Wolfenden Report* provided ample material for well-informed and rational campaigns for reform.[38] And awareness of the potential of the law as an instrument of blackmail was brought

[32] *Wolfenden Report*, para 13. [33] *Wolfenden Report*, para 62.

[34] *Wolfenden Report*, para 128.

[35] The Table reproduced in PG Richards, *Parliament and Conscience* (1970) 67 provides evidence of 'the uneven and spasmodic character of police energy in this field'.

[36] A diversity of policies could also be shown to govern the decision to prosecute some other offences (for example, attempted suicide, street betting) but 'none . . . has such grave social consequences as a charge of homosexual conduct': PG Richards, *Parliament and Conscience* (1970) 66.

[37] Wolfenden, *Turning Points: the Memoirs of Lord Wolfenden* (1976).

[38] A letter to *The Times* announcing the Formation of the Homosexual Law Reform Society was signed by an impressive array of figures prominent and distinguished in public life, including Noel

vividly to the attention of a wide public, not least by the successful 1961 release of the film *Victim* in which Dirk Bogarde had courageously accepted the role of a homosexual lawyer. But not everyone agreed on the strength of the case for reform. The prominent Labour MP Richard Crossman (whose published diaries made revelations about the operation of government not to be equalled until the Hutton Enquiry of 2004[39]) is said to have complained that 'working class people in the north ask their MPs why they're looking after the buggers at Westminster instead of looking after the unemployed at home'. And this unsympathetic approach was not confined to the uneducated. Lord Devlin's 1959 Maccabean Lecture, arguing that it was a proper function of the law to seek to enforce morality, would have refuted the philosophical underpinnings of the Wolfenden Report; and a couple of years later a Lord of Appeal in Ordinary made his position on the moral and legal issues quite clear:[40]

> I now assert that there is in [the Courts] a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare . . . [G]aps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance. . . . Let it be supposed that at some future, perhaps early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity such practices were publicly advocated and encouraged by pamphlet and advertisement?

Ten years later in *Knuller v DPP*[41] the House of Lords upheld a conviction for conspiracy to corrupt public morals in relation to a contact magazine directed at people who wished to meet and have gay sex in private.

The real barrier to implementation of Wolfenden's comparatively modest proposals was that successive governments saw no political advantage in their legislating. Hence, four years after publication of the Report, the progressively minded Conservative Home Secretary RA Butler was still using the classical formula that 'more information was needed' and hence 'more time' before a decision could be taken.[42]

This is not the place for any detailed account of the pressures which eventually led to the legislature being allowed to reach a decision in favour of reform.[43]

Annan, former Prime Minister Lord Attlee, the philosophers AJ Ayer and Isaiah Berlin, the social scientist Barbara Wootton, the churchmen Canon Collins, Bishop Mortimer, and Trevor Huddleston, the writer Stephen Spender, and the historian CV Wedgewood. This was followed on 19 April by a letter signed by '15 Eminent Married Women': see generally Brian Frost (ed), *The Tactics of Pressure* (1975).

[39] *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G*, by Lord Hutton (2004).

[40] Lord Simonds, *Shaw v Director of Public Prosecutions* [1962] AC 220, 268 where a conviction for conspiracy to corrupt public morals was upheld.

[41] [1973] AC 435.

[42] See S Jeffrey-Poulter, *Peers, Queers and Commons, The Struggle for Gay Law Reform from 1950 to the Present Day* (1999) especially Chapter 2.

[43] The *Wolfenden Report* was first debated (in the House of Lords) in December 1957 (see *Official Report (HL)*, vol 206, col 733). In 1960, a motion moved in the House of Commons by

Suffice it to say that eventually in 1967 the Sexual Offences Act became law. The fear of prosecution was lifted.

But decriminalization does not mean condonation or approval

Please remember: we are talking only about *decriminalizing* homosexuality; and the *Wolfenden Report* had been emphatic on this point: decriminalizing homosexual acts was not to be taken as condonation or approval. Indeed the Committee was sensitive to charges that to *change* the law 'might suggest to the average citizen' a degree of legislative toleration which could 'open the floodgates' and even result in 'unbridled licence'.[44] The Committee believed that emphasizing the personal and private nature of moral or immoral conduct would emphasize the personal and private responsibility of the individual for his or her own actions: that was 'a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law'. The Committee *assumed* the relationships which its recommendations removed from the sanctions of the criminal law were immoral. It did not seek to explain *why* homosexual acts were immoral. And of course although Wolfenden's analysis of the proper function of the law governing sexual behaviour has been highly influential neither the *Wolfenden Report* nor the Sexual Offences Act 1967 was concerned with anything beyond the *criminal* law. Wolfenden did not consider private law—the law of tort, the law of contract, and so on—where again the proper relationship between law and morality can also be an issue.[45] Nor was it concerned with family law, where

Kenneth Robinson MP was defeated by 213 votes to 99. In 1961, Leo Abse introduced a Bill under the 10-minute rule under which prosecutions would have required the consent of the Director of Public Prosecutions. In 1965, after the return of a Labour government with a tiny majority, another 10-minute rule Bill introduced by Leo Abse again failed (by 178 voted to 159: see *Official Report (HC)*, vol 713, col 611). A Bill introduced by Lord Arran in the House of Lords was given a Second Reading by 94 votes to 49 but made no further progress. In 1966 a Bill introduced by the Conservative MP Humphrey Berkeley was given a second reading in the House of Commons (*Official Report (HC)*, vol 724, col 782). The climate of opinion in the House of Commons seems to have changed somewhat after the return of a Labour Government with a substantially increased majority: another Bill introduced under the 10-minute rule by Leo Abse was passed by 244 votes to 100, and he skilfully persuaded the Government to make the necessary parliamentary time available for the Bill to complete its progress. As PG Richards, *Parliament and Conscience* (1970) 79, puts it, the eventual success 'depended largely upon Abse's crusading energy and his good personal relations with ministers'. It should also be noted that Abse was prepared to out-manoeuvre opponents by not opposing what may have been 'wrecking' amendments (for example, he did not resist an amendment excluding the application of the Bill to ships of the merchant navy). The Homosexual Law Reform Society was also discreetly active in ensuring that sympathetic MPs attended for divisions.

[44] *Wolfenden Report*, paras 55, 58.

[45] See, for example, the classical statement of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580 seeking to explain the proper scope of liability in the tort of negligence: 'acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour?

historically the supposed role of the courts in promoting morality was for many years said to be a matter of high, even overwhelming, importance.[46]

Gay, straight, black, or white: the demand for equality before the law

Wolfenden's apparent assumption that homosexual behaviour was necessarily immoral began to be vigorously questioned by some of the gay men and women who, freed by the 1967 Act from the threat of prosecution, 'came out'. 'Interest groups' were formed—the Conservative Campaign for Homosexual Equality, for example. It is true that the Roman Catholic church continued (and continues) to condemn homosexual activity, but other Christian groups took a wholly different approach. For example, the Metropolitan Community church was founded in 1968: 'The Lord's my Shepherd and he knows I'm gay', it proclaimed. In 1969 the Gay Liberation Front was founded at the Stonewall Inn in New York. It was soon emulated here: Gay Pride demonstrations and celebrations became a feature of metropolitan life. There was none of your traditional British reticence and reserve:

'In the name of the tens of thousands who wore the badge of homosexuality in the gas chambers and concentration camps, who have no children to remember, and whom your histories forget, we *demand* honour, identity and liberation . . . ', cried a 1971 pamphlet.[47]

And necessarily, once it was accepted that homosexual behaviour was no more 'wrong' than heterosexual behaviour, it had to be asked whether there was any justification for the law, in any of its manifestations—public, private, criminal, civil, family—to treat the legal consequences of homosexual sexual behaviour any differently from the legal consequences of heterosexual behaviour. As Lord Annan put it:

there spread from the United States the attitude that what had once been regarded as a problem, a sickness, at best a tragic handicap was 'now to become a glorious alternative. The new gays . . . demanded to be acknowledged as homosexuals . . . Their right to any job, to teach in schools, to adopt a child, even perhaps [*sic*] to be given and taken in marriage, should be the same as any other citizen's'.

But not everyone agrees . . .

Not everyone accepted such views. Indeed, in 1977 (ten years after homosexual acts had been decriminalized) the Law Lords[48] suggested that courts dealing with

receives a restricted reply.' (The reference to the 'lawyer's question' appears to relate to the Biblical parable of the Good Samaritan, *Luke*, 10, 29).

[46] See eg SM Cretney, 'The family and the law—status or contract?' [2003] CFLQ 403, 405.

[47] Quoted in Stephen Jeffrey-Poulter, *Peers, Queers and Commons, The Struggle for Gay Law Reform from 1950 to the Present* (1999).

[48] *Re D (An Infant) (Adoption: Parent's Consent)* [1977] AC 602, and see at 629 *per* Lord Wilberforce (a judge who, exercising the wardship jurisdiction in the Chancery Division, had had

adoption cases should not relax their 'vigilance and severity' in protecting children from the risk of being introduced to a homosexual way of life. The perceived danger was not expressed in terms of morality or immorality. Rather, it was said that a child's contact with a homosexual lifestyle might lead to his or her 'severance from normal society, to psychological stresses and unhappiness and possibly even to physical experience which may scar them for life'. The House of Lords therefore accepted that a reasonable (but gay) father would want to protect his own son against the risk of being corrupted by contact with the father's gay associates. Accordingly, any such father would accept that his son should be adopted even though this would mean that the father would never see the boy again. In the case before them the father did *not* agree. This was held to demonstrate his unreasonableness. Accordingly the Court could properly (and did) override the father's refusal to allow his son to be adopted.

You may think this terrible story is merely another example of the antediluvian attitudes of lawyers in general and elderly gentlemen in the House of Lords in particular.[49] But they were not the only ones. Attitudes to homosexual sex are, it is true, strongly correlated with age—so that twenty years ago in 1985, for example, 79% of those aged 60 or more interviewed in the British Social Attitudes Survey believed that homosexual sex was 'always wrong' whereas only half of those under 30 shared this view.[50] But even in this youthful cohort fewer than 1 in 5 thought that homosexual sex was 'not wrong at all'.[51] So it is perhaps not surprising that towards the end of the 1980s there was something of a backlash against the increasingly assertive gay liberation movement.

The backlash: section 28

Certain Local Authorities had started to take a liberal policy of making grants from public funds to increase the understanding of homosexuality. But the suggestion that school sex education curricula should deal objectively or even sympathetically with same sex relationships provoked strongly negative responses: in particular, the reported action of the Inner London Education

substantial experience of dealing with the upbringing of children and who was and is admired as one of the outstanding jurists of the twentieth century). Contrast the case of *Re W (Adoption: Homosexual Adopter)* [1997] 2 FLR 406 in which a Family Division judge held that it would be 'illogical, arbitrary and inappropriately discriminatory' to deny an adoption order to a lesbian applicant; and note now the provisions of Adoption and Children Act 2002, s 50, below.

[49] Although in fact the Law Lords' Opinions are expressed in less judgemental language than this may suggest, and certainly did not support the view that homosexuality would always be a bar to adoption.

[50] This may partially explain the fact that in 1985 the Labour Party conference did not accept the recommendation of the Party's National Executive Council (which urged 'further consideration') and, on a card vote, passed a resolution urging a charter to end all discrimination against homosexuals: *The Times*, 5 October 1985.

[51] These statistics are taken from Table 10.5 and 10.7 in G Evans, 'In search of tolerance', *British Social Attitudes* [20th Report].