HOMOSEXUALITY AND THE LAW

The Wolfenden Report in Historical Perspective

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Larousse's encyclopaedic *Grand Dictionnaire Universel,* issued in 1866, contained as a matter of course a 4,200-word essay coolly and clinically surveying what was known of *pédérastie* from Greek times onwards. Across the Channel three years later, in a work specifically devoted to morals, Lecky dismissed 'that lower abyss of unnatural love, which is the deepest and strangest taint of Greek civilization', in 550 guarded words, because it was a topic 'to which it is extremely difficult to allude in an English book.'[1] The contrast between the two nations was sharpened by the trials of Oscar Wilde in 1895. They resulted in England in a virtual taboo on discussion of a subject which must have aroused repressed guilt feelings in many leaders of opinion, who had passed through the Victorian public schools. Three years later, Havelock Ellis's pioneering study of sexual inversion was held at the Old Bailey to be a 'lewd, wicked, bawdy, scandalous, and obscene libel.' Thirty years after that, it was still possible for Radclyffe Hall's 'Well of Loneliness' to be suppressed on similar grounds. Today the intellectual climate is far freer. The debates which followed the Montagu trials of 1953 and 1954 ended differently—in the appointment of the Wolfenden Committee. The Roman Catholic advisory committee which gave evidence to this inquiry declared that 'penal sanctions are not justified for the purpose of attempting to restrain sins against sexual morality committed in private by responsible adults.'[2] Church of England spokesmen made similar declarations. The Wolfenden Committee adopted the same attitude in its report.

Some Merits of the Report

This article does not review the findings of the Wolfenden report. It discusses what, in the writer's view, are some of its shortcomings; and it attempts to remedy one of them. It would be wrong, however, to pass on to criticism

[1] 'History of European Morals from Augustus to Charlemagne,' 1869 (1911 ed., ii, p. 293). When Peel had to mention sodomy in Parliament, he did so in Latin: 'The crime *inter Christianos non nominandum*' (Hansard's Parliamentary Debates, 5th May, 1828).

[2] See *Dublin Review,* 5th Oct., 1956.

without first briefly noting the report's outstanding merits in fact-finding, in attitude, and in statement of principle.

As to ' the law and practice relating to homosexual offences ', the report's factual picture is clear enough for its purpose. The penalizing of male homosexual conduct ' probably makes little difference ' to the amount of such conduct actually occurring. For the law does not and cannot catch more than a tiny fraction of punishable acts, and is, moreover, haphazardly enforced. So much depends on local police attitudes and waves of public sentiment that no conclusions about the prevalence of homosexuality can safely be drawn from the rising trend of prosecutions.[3] Only a minority of men who are charged with homosexual acts are convicted of conduct which is at once private, consented, and confined to adults. Even so, in the three years to March 1956, 480 men were convicted in England and Wales and 9 in Scotland, in purely ' adult and private ' cases; and of these 307 were not known ever to have indulged in homosexual acts with non-adults or in public. Convictions depend largely on the ability of the police to induce suspected men to confess, since confessions are usually the only corroborative evidence obtainable. This necessity places ' before the police a temptation which does not exist in the same degree' in the case of crimes of most other sorts. In Scotland, where the admissibility of confessions is more stringently handled, the volume of prosecutions is markedly lower and written admissions of guilt are unusual. Of the 480 English cases, however, no fewer than 449—94 per cent.—did make written admissions. Nearly half the cases of blackmail reported to the police concern homosexual acts. More might well be reported but for the fact that, if he complains, the blackmailed invert cannot rely on police protection, despite the fact that extortion under threat of an accusation of buggery is specifically mentioned by the Larceny Act, 1916, as a felony punishable with life imprisonment. The blackmailed invert who calls in the police is sometimes himself prosecuted, together with the blackmailer, for the homosexual acts they have jointly committed.

As to the Committee's attitude, they deserve high praise for their cool, dispassionate tone and their warning against basing the criminal law on nothing more than feelings of ' revulsion against what is regarded as unnatural, sinful or disgusting '. As to principle, they stand firmly on the civilized values which form the common ground occupied by thoughtful Christians and thoughtful humanists alike. They hold that it is not ' proper

[3] Asked by the Association of Municipal Corporations to account for this rising trend, most chief constables who ventured an opinion ' thought that better supervision by the police was the answer '. (*Municipal Review*, Supplement, Jan., 1956). This seems to be confirmed by the sudden and unexpected 14 per cent. drop in 1956 in the number of prosecutions and convictions against adult men for homosexual offences.

for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good.' And they examine and reject each of the arguments for holding that private and consented male homosexual acts are so much more contrary to the public good than lesbian behaviour, fornication, or adultery, that they alone should remain criminally punishable. They find their 'decisive' argument in 'the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is... not the law's business.'

Some Criticisms of the Report

Not unexpectedly, the report has evoked some strong and primitive emotions. These reactions quickly determined the Government to take no reformative action. Three months after the report's publication, the Lord Chancellor declared the Government's unwillingness to take 'the serious step' of reversing 'provisions of the criminal law which have stood for a long time'.[4] The report's authors did not anticipate these hostile responses as effectively as they might have done. In order to inform or disarm unfavourable opinion, they could have strengthened their report in four main respects.

(1) Though regrettably not asked to review the whole of the law governing sexual offences, the Committee could have insisted on making their proposals fit as far as possible into a consistent legal pattern. For instance, indecent assault on a person above the age of consent is punishable with a maximum of two years' imprisonment if the victim is female, but with up to ten years if victim and assaulter are both male. Though 'inclined to agree' that this differentiation is unjustified, the Committee (with Dr. Curran and Dr. Whitby dissenting) want to keep it, arguing that it would be better to increase the penalty for assaults on females. Yet they would surely not wish to raise the latter to ten years. Again, private and consented sexual relations between an adult and a juvenile aged 16–20 are not illegal (*a*) if heterosexual, or (*b*) if between a woman and a girl; nor would the Committee make them illegal. Yet they would punish (*c*) similar relations between a man and a youth with up to five years' imprisonment. (The two doctors would fix the maximum at two years). There is considerable force in their arguments for wanting to prevent the moral and emotional corruption which may in certain circumstances result from the seduction of a youth by a man. But these considerations may apply with equal force also to heterosexual and to female

[4] House of Lords, 4th Dec., 1957.

homosexual seductions (cases (*a*) and (*b*) above). Penal intervention is justified chiefly where there is grave abuse of a relationship of dependence between the adolescent and the adult, especially when the latter exercises moral authority (as parent or guardian) or authority of status (teacher, institutional official, officer) over the former. A law uniformly applicable to all such cases, whatever the sex of the participants, and superseding our *ad hoc* law against incest, would seem preferable to the Committee's unilateral penalizing of all homosexual relations between men and youths. The Belgian and Swedish criminal codes afford examples of a more logical approach. Had the Committee considered some such alternative, they could have disarmed critics who use the penalizing of private and consented incest between adults as an argument for continuing to penalize private and consented adult homosexual acts.

(2) By distinguishing between different homosexual offences against boys under 16, the Committee make a needless concession to obscurantism. They would keep life imprisonment as the maximum penalty for anal intercourse (buggery, sodomy), while not allowing more than ten years for other homosexual acts, some of which, such as orogenital intercourse, are equally repulsive to the ordinary mind. They propose this, apparently, because of ' the long and weighty tradition in our law that this, the " abominable crime " ... is in its nature distinct from other forms of indecent assault ', and because of the ' stronger instinctive revulsion ' to it thought to exist ' in the minds of many people '. Since on earlier pages the Committee wrote that a just law should pay no undue ' regard for the present law, much of which derives from traditions whose origins are obscure ', and warned against legislation based on revulsion, it is not surprising that four members cannot accept the case for differentiating between homosexual acts.

(3) The Committee assumed a greater measure of sophistication on the part of the public than it actually possesses. Their argument against equating ' the sphere of crime with that of sin '—a fundamental issue around which some of the crucial battles for personal freedom have been fought—is stated so succinctly as to have left the impression on the less thoughtful sections of the public that they were propounding, not an old truth, but a novel and dangerous doctrine. By indicating the historical perspective, they could have shown how the homosexual laws can reasonably be seen to be relics of earlier modes of thought which are incompatible with the spirit of a mature and tolerant society.

(4) Had the Committee substantiated their remark about ' traditions whose origins are obscure ' by a brief historical account of the homosexual laws, the respect due to those laws because they ' have stood for a long time ' could be more readily assessed. Very little of their history is known, chiefly

because no scholar has attempted a systematic exploration of this, after all very minor, facet of social history. The rest of this article attempts to sketch the broad historical outlines and to indicate some of the gaps in our knowledge which might be filled by study of the original sources.

Medieval Background

'Every system of law', says Lecky,[5] 'is a system of education, for it fixes in the minds of men certain conceptions of right and wrong, and of the proportionate enormity of different crimes.' The English 'keynote' law is Henry VIII's statute of 1533 imposing death for 'Buggery committed with Mankind or Beast'. As applied to 'mankind', case-law has long restricted its scope to a single sexual act—sodomy, whether with a male or a female. This law survives in essentials—save for the death penalty—in S.12(1) of the consolidated Sexual Offences Act, 1956. No other private consented homosexual act between adults was punishable until 1885, when Labouchere persuaded Parliament to punish any other act of 'gross indecency' of one man with another, 'whether in public or private' (now S.13 of the Act).

Henry VIII's Act is hard to understand save in the context of medieval Church thinking. This has been illuminatingly studied by Dr. Sherwin Bailey.[6] According to him, the ancient Hebrews' long-standing abhorrence of male homosexual practices, intensified by familiarity with the pederasty of the Hellenistic world, led various Jewish apocryphal writers to reinterpret the old story of Sodom (which originally had a quite different moral) as an awful warning against unnatural lusts. This revised legend was firmly accepted by the early Christian Fathers as strengthening their own stand against all forms of sexual laxity. 'Sodomites' became one of the many scapegoats, along with loose-livers of all sorts, sorcerers, idolaters, heretics, and eventually Jews too, who were blamed for all the disasters the medieval mind could not understand—floods, earthquakes, blights, famines, epidemics, and much else. Eventually the Theodosian and Justinian legal codes of the later Roman Empire (between 390 and 544 A.D.) prescribed 'the avenging flames' for homosexual sinners—but only if they refused to repent and renounce their ways. These codes, with the legend of Sodom, dominated the Church in the centuries when it, rather than the State, regulated the faith and morals of the laity through its own courts. In practice, Dr. Bailey maintains, the ecclesiastical courts acted more in the spirit of St. Paul's teaching that active homosexuals, like adulterers, fornicators, drunkards, and other dissolute sinners, should not 'inherit the kingdom of God'. They

[5] *Op. cit.*, ii, p. 8.
[6] 'Homosexuality and the Western Christian Tradition', 1955.

punished homosexual sinners, like others, with shaming and penance. ' In England at least ' they did not relinquish unrepentant sodomists to the secular power for execution. Spiritual disciplining of the immoral without recourse to secular authority is, he holds, the Church's true but forgotten tradition. It was secular authority which took ' the retrograde step ' of reintroducing punishment of sodomy as a crime triable by secular magistrates.

Applied to England, Dr. Bailey's thesis may be accepted in essentials. Until 1533 sodomy was unquestionably an ecclesiastical offence only; and under ecclesiastical jurisdiction no one—so far as is known—suffered capital punishment for the offence. Henry VIII's Act, paraphrasing ' Leviticus ', certainly stepped back in spirit from the New Testament to the Old. Yet it is also true that from that day until quite recently there is no record of the Church's spokesmen protesting against the imposition of an unjust law contrary to the Christian spirit and the Church's own traditions. (Dr. Bailey agrees that ' the Church cannot be exonerated from all responsibility for our present attitude to the homosexual '). And, outside England, it is less certain whether the Church's traditional attitude was as straightforward as Dr. Bailey suggests. He may perhaps underestimate the extent to which, in a Continent racked far more than England ever was by heresy, inquisition, and the ambitions of princes and prelates, charges of sodomy (as of heresy or witchcraft) were used to smear men's characters by their enemies. In modern times, Casement and Roehm were executed for treason, but irrelevant accusations of homosexuality were employed to arouse prejudice against them. Likewise, in the early 14th century, the liquidation of the Knights Templar was effected by accusing them of every manner of heretical and sexual iniquity, including sodomy. The true purpose of the operation, the first great triumph of the Inquisition, engineered by the impecunious Philip IV of France and his semi-puppet Pope Clement V, was to seize the great wealth of the Order. Under torture most of the Templars confessed, and most were put to death.[7] And in 1376 the English ' Good ' Parliament, voicing the long-standing grievances of London's traders against their foreign rivals petitioned the King to banish all ' Lombard brokers ', alleging that they were usurers, that many were in fact Jews, Saracens, or spies, and that they had introduced sodomitical practices which would destroy the realm.[8] Dr. Bailey

[7] See H. C. Lea: ' History of the Inquisition of the Middle Ages ', 1906, iii, pp. 266 and 298f.; and Sir John Macdonell: ' Historical Trials ', 1927, ch. ii.

[8] ' Ont ore tard menez deins la terre un trop horrible vice q̃ ne fait pas a nomer. Par quoi le Roialme ne poet failler d'estre en brief destruyte, si redde corrigement ne soit sur icell hastivement ordeignez ' (*Rotul. Parl.*, ii, p. 332). The context of trade rivalry which resulted in this unsuccessful petition (and many others), and in a massacre of foreign artisans and traders in 1381, is well described in E. Lipson's ' Economic History of England ', 9th ed., 1947, i, ch. x.

believes that the charges of sodomy against the Templars were justified. Even if he is right, such episodes belong to a 'Christian tradition' best forgotten. Can it be supposed that they stood alone? Was Westermarck wrong in claiming that 'heretics were as a matter of course accused of unnatural vice?' A thorough survey of heresy trials would certainly be needed to validate this claim, which Dr. Bailey questions. But what of inherent probability? Dr. Bailey himself shows how many of the main medieval heresies in fact led on to modes of sexual conduct which the Church could only condemn; how in particular the strange views of the Manichean heretics, diffused from Bulgaria, very probably led some of them into homosexual practices; and how *Bougrerie* became first an abusive term for heresy in general and finally an obscene epithet for the supposed sexual habits of heretics. In the case of alleged witches, 'Malleus Maleficarum', the Church's handbook, advised the inquisitor to ask an accused woman: 'Why she persists in a state of adultery or concubinage; for although this is beside the point, yet such questions engender more suspicion than would be the case with a chaste and honest woman.' In the case of alleged heretics, may it not be plausibly surmised that men were often charged with sexual *Bougrerie* in order to 'engender more suspicion'?

Tudor Legislation

Historians have ignored the Tudor legislation against sodomy, so that neither its motives nor its effects have been investigated. Only the bare facts are easily ascertainable. The Reformation Parliament's Act of 1533 was only 'to endure till the last Day of the next Parliament'. It was temporarily renewed in 1536 and 1539; made perpetual (with other statutes withdrawing benefit of clergy from various felonies) in 1540; and modified in 1548, under Edward VI, by an Act forbidding indictments brought more than six months after the alleged offences, and dropping confiscation of property and 'corruption of blood' as penalties additional to execution. Mary began her reign in 1553 by abolishing all felonies created since the reign of Henry VIII, including buggery, punishment of which she may have intended to leave to reinvigorated Church courts. Ten years later, however, Elizabeth's second Parliament re-enacted in its entirety the original Act of 1553, declaring that since its repeal 'divers evil disposed Persons have been the more bold to commit the said most horrible and detestable Vice of Buggery aforesaid.' The Act has survived ever since by re-enactment in essentials in the measures which consolidated the law of offences against the person in 1828 and 1861 (when the death penalty was dropped) and of sexual offences in 1956.

Why all this happened is not very clear, in particular why the 1533 Act was ever passed. Circumstantial evidence does, however, suggest that that

measure was prompted by reasons of State, not by some homosexual scandal of the day, nor by any high-minded concern of the monarch's advisers for the morals of his subjects. Henry VIII had just finally cut the Church off from Rome, and had just informed Convocation that ' the King's Majesty hath as well the care of the souls of his subjects as their bodies; and may, by the law of God, by his Parliament make laws touching and concerning as well the one as the other.' His Act against sodomy, specifically making Justices of Peace the judges, seems to have been the first—and perhaps the easiest—step in the process whereby the Reformation State, converting sins into crimes, deprived the Church of power to judge what had hitherto been ecclesiastical offences solely; and whereby it terrifyingly asserted ' our most dread Sovereign Lord's ' authority to police the private lives of his subjects. The Act did not stand alone. It was followed, for instance, by measures imposing death for conjuration, witchcraft, and sorcery (1541), on gypsies, and for bigamy or polygamy (1603). To these the Commonwealth added a short-lived law punishing ' the abominable and crying Sins of Incest, Adultery, and Fornication, wherewith this Land is much defiled and Almighty God highly displeased.' [9] The analogy of the Templars suggests a second, possibly the main, reason for the 1533 Act. Three years after it was passed, commissioners were sent to survey the state of the religious houses. They rapidly compiled wildly exaggerated reports accusing the monks and clergy of every manner of crime and immorality, including sodomy. These smearing documents were used to cajole Parliament, after bitter debates, into allowing the King to begin the expropriation of the monasteries—a project he had been contemplating since 1529—and to institute a reign of terror. ' When their enormities were first read in the Parliament House they were so great and abominable that there was nothing but " Down with them " '.[10] And the expropriation Act justified its purpose ' forasmuch as manifest sin, vicious, carnal, and abominable living is daily used and committed ' in the monasteries. Was it mere coincidence that Henry had shortly before not only introduced capital punishment and loss of property for sodomy but expressly denied offenders benefit of clergy?

Whatever the origins of his Act, which has certainly ' stood for a long time ', they are undeniably ' dubious ', very possibly discreditable. Whether in fact the Act was much enforced before the 18th century is not known. It was certainly not used against Nicholas Udall, the boy-beating and

[9] Fornicators were only jailed. But, says Trevelyan, two or three adulterers were actually hanged, after which ' even Puritan juries refused to convict '. He adds that ' the Puritan . . . thought even more strongly than the Bishop that " sin " should be punished, but he thought that he and not the Bishop should punish it ' (' English Social History ', 1944, p. 231).

[10] Latimer: ' Sermons ', ed. Parker Society, 1844–45.

apparently pederastic headmaster of Eton. Accused of unnatural crimes in 1541, he confessed his guilt (? of 'gross indecency' rather than sodomy) to the Privy Council, and passed a spell in the Marshalsea. But he was soon back in favour, obtaining lucrative livings and becoming headmaster of Westminster School about 1554. Later, the homosexual proclivities of both James I and Bacon may have served to shield lowlier sinners from penal sanctions on any wide scale. The trial by his peers in 1631 of the Catholic Earl of Castlehaven on charges of sodomy (he was beheaded on Tower Hill) seems to have been inspired by motives unconnected with his private sexual behaviour.

Georgian Practice

But at least in the 18th and early 19th centuries there was a small and steady stream of trials which were held in an atmosphere of great execration. The great majority of convicted offenders were hanged until the 1830's when capital punishment for sodomy was tacitly abandoned.[11] Thus four of the five sodomists convicted in 1810 were hanged, against only 63 of 471 offenders capitally sentenced for other crimes.[12] Late in the 18th century the flow of prosecutions may well have slackened, because of an increased difficulty in securing convictions. After prolonged indecision about the proofs required for an act of sodomy, or of rape, or of carnal knowledge of a girl under 10, 'the twelve judges' had decided in 1781, by majority, that not only penetration but emission of seed must be proved, so reversing their contrary judgment of 1777. By abolishing the need to prove emission in all such cases, Peel's Act of 1828 facilitated subsequent prosecutions for sodomy. Given the state of law and opinion, blackmail not surprisingly flourished. Men were pilloried, jailed, and hanged for extorting money by false accusations of sodomy. After the trial of one such rogue before Sir John Fielding in 1779, the judges met to discuss the problem at Lord Chief Justice De Grey's house in Lincoln's Inn Fields. 'Lord Mansfield with great energy observed, that it was a specious mode of robbery of late grown very common.'[13]

As the following selection shows, the pattern of cases tried has changed little. (1) In 1811, for 'an abominable offence', a former ensign (who pro-

[11] This abandonment may well have been connected with a growing tendency on the part of magistrates to grant bail to accused men, in the hope that they would flee abroad. Much later the authorities apparently hoped that Oscar Wilde would take this course.

[12] 'Annual Register', 1810, p. 411, quoting a Home Office return.

[13] 'Annual Register', 1779. By the time of Castlereagh's suicide in 1822 (see case (2) below), it had long been a criminal offence to write blackmailing letters threatening to accuse a man of a felony or of 'any infamous crime'. Three years after that tragedy, an Act was passed expressly for the purpose of declaring that the infamous crimes in question were to include attempts, and assaults with intent, to commit rape or 'the abominable Crimes of Sodomy and Buggery'.

tested his innocence to the last) and a drummer ' were launched into eternity ' at the Debtors' Door at Newgate before ' a vast concourse of spectators ', which (according to *The Times*) included the Duke of Cumberland, Lord Sefton, Lord Yarmouth, ' and several other noblemen '. (2) In 1822 the Bishop of Clogher was caught with a soldier in the backroom of a tavern off Haymarket in London. Released on bail, he fled abroad, while the soldier was tried and condemned. This scandal precipitated the suicide of Lord Castlereagh, who deludedly thought himself ' accused of the same crime as the Bishop of Clogher'. (3) At Lancaster assizes in 1806, Isaac Hitchen, aged 62, one of the most affluent citizens of Warrington, and four other apparently middle-aged gentlemen were convicted of ' unnatural crimes ' with other men, who had turned Crown evidence to save their lives. According to the 'Annual Register ', ' they regularly assembled at the house of Hitchen, on Monday and Friday evenings; and they called one another *brother*.' The judge advised them ' in the most impressive manner . . . to prepare to meet the fate which the laws of their country had affixed to their heinous offences.' Hitchen and one other were respited. The rest were hanged, ' in a state of the greatest agitation . . . on the new drop, erected at the back of the Castle.' (4) In January 1777, says the 'Annual Register ', His Majesty in Council refused to respite Thomas Burrows, convicted at the Old Bailey ' for committing an unnatural crime at a house in a court in Drury-lane, on a person who, with about 14 others, had assembled there for the like abominable purposes.' Just before Burrows was ' turned off ' at Tyburn, he threw a paper into the crowd declaring ' I am as innocent as the child unborn of the the crime which I am about to suffer for ', and praying God to forgive his prosecutors. (5) In 1726 Margaret Clap was pilloried and jailed ' for keeping a sodomitical house off Holborn '. Forty of fifty men were caught there one Sunday evening ' making love to one another, as they called it '.[14] (6) In 1761 a young woollen draper of Cornhill, London, was pilloried and nearly lynched for attempted sodomy with a boy in a court off Lombard Street. (7) In 1763 two men, pilloried for committing ' unnatural offences ' together (evidently not sodomy), were killed by a mob at Bow. A similar incident in 1780 so stirred Parliament that an official action—which failed—was brought against the Under-Sheriff of Surrey for neglect of duty in failing to restrain the mob. (8) In 1833 William Bankes, M.P. for Dorset, was accused of indecency in a public lavatory outside Westminster Abbey, but acquitted after testimonies from the Duke of Wellington, the Master of Harrow, and others. But in 1841, charged with indecent exposure in Green Park, he jumped his bail and fled abroad.[15]

[14] H. Montgomery Hyde: ' The Trials of Oscar Wilde ', 1948, p. 379.
[15] Hyde: *op. cit.*, p. 381.

Victorian Aftermath

Of the second penal law, the section added to the Criminal Law Amendment Act, 1885, to punish 'gross indecency' between men, the judgment of Sir Travers Humphreys[16] seems unchallengeable: 'I have prosecuted, defended, and tried too many blackmailers to entertain any doubt that the section has materially assisted such persons to carry on their nefarious trade.' Its origin is as dubious as that of the 1533 Act. For all his political radicalism, the enigmatic Henry Labouchere, founder of *Truth,* who got the section added to a statute dealing with prostitution and the female age of consent, held the strongest views about homosexuality, according to Hesketh Pearson.[17] He almost certainly intended exactly what the section says. Ten years later, according to Pearson, he regretted that Oscar Wilde had been jailed for only two years—the maximum his section allowed. He had wanted to prescribe seven years, but had been privately advised by the Home Secretary and Attorney-General not to go beyond two. (In fact, as presented to Parliament, his clause had specified one year. This was raised to two on an undebated Government motion). Labouchere also wrote: 'I took the clause *mutatis mutandis* from the French Code'—an astonishing statement, since French law did not extend to homosexual acts between adults. As presented to Parliament, his clause was entitled 'outrages on public decency'; yet it penalized private acts as well. As explained by him to Parliament—in a single sentence—the clause was to remedy the situation whereby 'an assault of the kind here dealt with' could not be punished unless the victim were under 13.[18] This is even more astonishing, both because the clause was not restricted to cases of assault and because the Offences against the Person Act, 1861, already punished, with up to ten years' penal servitude, 'any indecent Assault upon any Male Person' (now S.15 of the Sexual Offences Act, 1956). In the small hours of an August night, just before the summer recess, a thinly attended Commons accepted the clause in a few minutes without any discussion. Did they grasp what they were really doing? On the most famous trial made possible by Labouchere's section, the last word belongs to W. T. Stead, the 'anti-vice' campaigner who did most to get the 1885 Act (though not Labouchere's section) adopted. 'If Oscar Wilde, instead of indulging in dirty tricks of indecent familiarity with boys and men, had ruined the lives of half a dozen innocent simpletons of girls, or had broken up the home of his friend by corrupting his friend's wife, no one could have laid a finger upon him. . . . If all persons guilty of Oscar Wilde's offences were to be clapped into gaol, there would be a very surprising exodus

[16] 'A Book of Trials', 1953, pp. 34–5.
[17] 'Labby', 1936, pp. 242–3.
[18] House of Commons, 6th Aug. 1885.

from Eton and Harrow, Rugby and Winchester, to Pentonville and Holloway.' [19]

The Labouchere episode of 1885 had a striking parallel in 1921, the outcome of which was totally different. Even later on another August night, discussing another protection of women Bill passed on from the Lords, a thinly attended Commons adopted a last-minute amendment, sponsored by a small 'anti-vice' group, to penalize female homosexual conduct by subjecting it to Labouchere's section of the 1885 Act. A week later, knowing the Bill (which they wanted) would founder if they disputed a Commons decision so late in the session, the Lords deliberately killed the Bill rather than accept the new clause. The Archbishop of Canterbury found it 'practically impossible to give any cordial support' to the clause. The Earl of Malmesbury (formerly Director of Public Prosecutions) said it would 'enormously . . . increase the chance of blackmail without in the slightest degree decreasing the amount of this vice'. The Lord Chancellor found it 'most highly disputable upon its merits', and declared the Government could not accept it.[20]

Conclusion

This survey suggests that the Tudor law originated in the harnessing of ancient superstitions for extraneous purposes of power politics, and the Victorian law in a confusion, if not a deception, of Parliamentary thinking. It also provokes many questions. One influence which has kept these laws alive is what Oscar Wilde called 'the rage of Caliban, on seeing his own face reflected in the glass.' If this were the chief influence, would 350 years have elapsed before punishment was extended from sodomy to other male homosexual acts, and 400 before it was attempted to punish female acts too? How much does the preservation of these laws owe to the great weight Protestant thought attached to Old Testament texts after the Reformation? Is opinion more tolerant towards lesbianism, which St. Paul equally condemned, partly because Old Testament writers ignored it, partly—perhaps in consequence—because lesbianism has never been legally penalized? May not the main resistance to law reform today derive simply from the stereotyped hostile response which has become conventional owing to the mere fact of the law's antiquity? By neglecting history and sociology, the Wolfenden Committee could not discuss such questions. But what they did say 'between the covers of a blue book can never again be quite as shocking as before they said it';[21] and in that there is cause for gratitude.

[19] Quoted in Hyde: *op. cit.*
[20] House of Lords, 15th Aug., 1921.
[21] Barbara Wootton, *Twentieth Century*, Jan. 1958.