REVISION OF SEXUAL OFFENCES LEGISLATION: A CODE FOR NEW SOUTH WALES?

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Rape laws are under review in several countries. Governments have established inquiries and charged committees with the task of recommending changes in their existing rape laws. But does this current wave of reform go far enough? The combination of statute and common law highlights the step by step approach which has been pursued until now in New South Wales in solving new problems in the area of sexual offences. Terry Buddin suggests that New South Wales adopt a code to cover all sexual offences of varying severity, rather than a piecemeal reform of the existing law. He stresses the need to abandon archaic language and the importance of stating in clear terms the offences prescribed. His suggestions are based on a recognition of the value of individual liberty and the law's responsibility in regulating offences against the person.

I INTRODUCTION

A quick glance at the New South Wales Crimes Act 1900 indicates that very few alterations have been effected in the sexual offences area since its enactment. For a piece of legislation born of Victorian times, with the then prevailing social mores, that fact alone is quite startling. There is an irresistible inference that an overhaul of the system is required to reflect the tremendous changes that have taken place in sexual attitudes since 1900.

Significantly, recent years have seen, from a number of different quarters, calls for the reform of rape laws in most jurisdictions which follow the Anglo-American legal tradition. Widespread disaffection with the existing law, both in its substantive and its adjectival aspects, has been voiced by people of both liberal and conservative persuasion.

The crusade for reform has intensified since the controversial 1975 decision of the House of Lords in *D.P.P.* v. *Morgan*.[1] Various governments have already responded to the community pressure that followed that case, both here and in the United Kingdom, by establishing committees charged with responsibility for making recommendations for change. In England itself the Home Secretary set up the Advisory Group on the Law of Rape under the chairmanship of Mrs Justice Heilbron[2] while locally the Victorian Law Reform Commissioner,

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[1] [1976] A.C. 182.

[2] (1975) Cmnd 6352, hereinafter referred to as the *Heilbron Report*.

Mr T. Smith[3] and the South Australian Criminal Law and Penal Methods Reform Committee[4] have both completed reports. Most recently the New South Wales Labor Government has indicated that it, too, intends to introduce legislation aimed at reforming the law of rape and other offences, after due inquiry.[5] The decision to conduct such an inquiry is most welcome and provides an ideal opportunity for a review and overhaul of that entire area of law.

However, this article proposes that we ought to go a great deal further than merely reforming the law of rape, important though that task is. It is urged that now is the appropriate time to review the entire body of law concerning sexual offences in this State with a view to codification. That course should be preferred to the present piecemeal approach to reform in which individual problem areas are dealt with as they arise or, more correctly, when the Government perceives a need so to do.

The present New South Wales law is partly derived from statute and partly from common law and the respective sources are well scattered. These various sources need to be consolidated in one comprehensive code of conduct. Although the arguments in favour of codifying laws regulating human behaviour are well known,[6] it is submitted that no area of the law is of greater importance to the liberty of the individual than that which relates to offences against the person, be they sexual or otherwise.

Accordingly, it is vital that the law be stated coherently to take account of contemporary needs. Obsolete crimes ought to be abolished and archaic expressions should be replaced by terms which are comprehensible in contemporary society. To ensure certainty, specific statements in clear language of the proscribed conduct are required. The Law Commission in England has stated that the code

> must not be so general in terms that it affords little or no guidance to the legal adviser or judge concerned with the facts of a particular case, or so detailed that its complexities are comprehensible only to the expert. An excessive generality encourages a mere lip service to the code, while excessive particularity may prohibit the development of the law.[7]

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[3] His report, Victorian Law Reform Commission Report No. 5, which was released by the Victorian Government on 3 September 1976, was entitled *Rape Prosecutions (Court Procedures and Rules of Evidence)*. As a result of that report the Victorian Government made a number of changes to its legislation. See Rape Offences (Proceedings) Act 1976 (Vic.).

[4] *Special Report—Rape and other Sexual Offences* (1976), hereinafter referred to as the *Mitchell Report*.

[5] The Director of the newly created Criminal Law Review Division, Mr Roger Court, was given responsibility for that task. A Consultative Committee, of which the author was a member and for which this article was originally drafted, was established to assist the Director.

[6] See *e.g.*, Wechsler, "The Challenge of a Model Penal Code" (1952) 65 *Harv. L. Rev.* 1097.

[7] Law Commission, *Seventh Annual Report 1971-1972* para. 3.

As the history of the New South Wales Crimes Act suggests, laws once enacted tend to become entrenched. If a further revision is not to occur for another three-quarters of a century then the task of reform must be performed with some vigilance.

As a result, it should be noted that the main concern of this article is the provision of an outline for a model sexual offences code based on regulatory principles which are thought to reflect the aims of the criminal law. As a background to that primary endeavour and also in an attempt to clarify any lingering doubts that may exist, it is necessary to review the present scheme of sexual offences.

II PRESENT SCHEME OF SEXUAL OFFENCES

Before embarking on the vital exercise of rationalisation and reclassification of sexual offences, it will be necessary to state briefly the elements of the significant substantive offences currently in existence.

1. *Rape*

The crime of rape[8] has prompted this particular review of the law relating to sexual offences and it remains unquestionably one of the most controversial areas of criminal law.[9]

Rape is not statutorily defined, the Crimes Act merely providing that the punishment for those convicted of the offence is penal servitude for life.[10] This, together with the definition of carnal knowledge in section 62, enables one to draw the inference that the New South Wales legislature intended to adopt the common law definition which, broadly speaking, is that rape is non-consensual carnal knowledge. Carnal knowledge is deemed to be complete upon proof of vaginal penetration. Other methods of penetration, while they may amount to offences, do not constitute the crime of rape.

An essential part of the *actus reus* is lack of consent on the woman's behalf and because it is part of the *actus reus* the Crown has the duty of proving such lack of consent.[11] Of course, consent may be only apparent and can be vitiated in a number of ways.[12] First, section 63

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[8] The crime of rape, it is said, is designed to protect a woman's physical integrity, her peace of mind and freedom of movement without fear of sexual attack. However, feminists would reject this traditional rationale for the existence of rape laws. They argue that such laws are designed to bolster a masculine pride in the exclusive possession of a sexual object and that they also focus the male's aggression against the rapist because the male fears the loss of his sexual partner or fears having his sexual possession decrease in value. See *e.g.*, Le Grand, "Rape and Rape Laws: Sexism in Society and Law" (1973) 61 *Calif. L. Rev.* 919, 924-927.

[9] The editorial of a recent edition of the Australian Law Journal was devoted to reform of the law of rape: (1976) 50 *A.L.J.* 605.

[10] Crimes Act 1900 (N.S.W.) s. 63.

[11] It now seems clear that the intercourse must be "without her consent" rather than "against her will". As to the terminological difficulties implicit in the latter standard, see Smith and Hogan, *Criminal Law* (3rd ed., 1973) 326.

[12] For a discussion of the consent standard see text accompanying notes 127-130 *infra.*

itself indicates that threats or terror will vitiate consent and, accordingly, such consent will be no defence to a charge of rape.[13] Secondly, if the woman is deemed incapable of giving consent because she suffers from impaired intellect, that too will be regarded as a vitiating element, even if she submits to intercourse without demurring.[14] Thirdly, as a matter of principle the same considerations should apply to a girl who is too young to understand the nature of the act. It is illogical to speak of such a person in terms of whether or not she consented, but it appears that there is no fixed age limit below which consent is impossible for the purposes of the law of rape.[15] Finally, consent obtained by fraud, misrepresentation or impersonation is only apparent and not real consent.[16] So the consent obtained must include an awareness as to what is about to take place, the identity of the man and the character of what he is doing.[17]

The Crown must also prove the mental element of the offence. Obviously the intention of the accused at the time of the intercourse is highly relevant. Early authorities suggested that the only relevant intention was an intention to have sexual intercourse. The accused's state of mind with respect to whether the woman was consenting or not was thus regarded as irrelevant.[18] However that view has not been followed in recent cases and indeed the rule was reformulated in 1970 by the New South Wales Court of Criminal Appeal in *R.* v. *Sperotto*[19] in the following words:

> In all crimes at common law a guilty intention is a necessary element and with the crime of rape this intention is to have carnal knowledge of the woman without her consent. In order to convict the accused of the crime of rape and, subject to what is hereinafter said, to establish this intention on his part the Crown must prove beyond reasonable doubt that when the accused had intercourse with the woman either (i) he was aware that she had not consented, or (ii) he realised that she might not be consenting and was determined to have intercourse with her whether she was consenting or not.[20]

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[13] For an analysis of potential problems in this area, see Howard, *Australian Criminal Law* (3rd ed., 1977) 159-161.

[14] See generally, *R.* v. *Fletcher* (1859) 8 Cox C.C. 131; *R.* v. *Lambert* [1919] V.L.R. 205; *R.* v. *Lynch* (1930) 30 S.R. (N.S.W.) 420; *R.* v. *Morgan* [1970] V.R. 337.

[15] *R.* v. *Harling* [1938] 1 All E.R. 307; *R.* v. *Howard* [1965] 3 All E.R. 684.

[16] Crimes Act 1900 (N.S.W.) s. 66. Victoria has no equivalent to s. 66 and the gap in that State's legislation was demonstrated by the celebrated case of *Papadimitropoulos* (1957) 98 C.L.R. 249. S. 66 deals specifically with personation of husbands. *R.* v. *Galliene* (1963) 81 W.N. (Pt 1) (N.S.W.) 94. See also Scutt, "Fraud and Consent in Rape: Comprehension of the Nature and Character of the Acts and its Moral Implications" [1976] *Crim. L. Q.* 312.

[17] *R.* v. *Flattery* (1877) 2 Q.B.D. 410; *R.* v. *Williams* [1923] 1 K.B. 340; *R.* v. *Harms* [1944] 2 D.L.R. 61.

[18] *R.* v. *Bourke* [1915] V.L.R. 289.

[19] (1970) 92 W.N. (N.S.W.) 223.

[20] *Id.*, 226.

Very awkward questions arise when the accused asserts that he believed that he had the woman's consent, particularly if it subsequently appears that his belief was mistaken. Accordingly, the problems associated with establishing *mens rea* are canvassed at greater length later in this article.[21]

2. *Carnal Knowledge*

There are a number of carnal knowledge offences. Sexual intercourse with specified categories of women is prohibited and, generally speaking, consent is no defence to these offences, most of which may now be tried *in camera*.[22] For example, section 67 creates the offence of carnal knowledge of a girl under 10 years of age. A person charged under section 67 may alternatively be convicted of attempting to commit the offence by virtue of section 68. It is an offence under section 71 to have carnal knowledge of a girl who is of or above the age of 10 years but who is under 16 years and section 72 renders a person liable for attempting to commit the offence prescribed by section 71. If a section 71 or section 72 offence is alleged, consent will be a relevant consideration if the girl is over 14 years of age and the defendant can adduce evidence to support a reasonable belief on his behalf that the girl was 16 years of age or over.[23]

It is an offence to carnally know or attempt to carnally know a female who is an idiot or an imbecile but it seems that the defendant must be aware of the woman's mental defectiveness. Finally, section 73 provides for an offence in situations in which a school-master or other teacher, or a father or step-father has carnal knowledge of his pupil, daughter or step-daughter if she is under the age of 17 but is of or above the age of 10 years.[24]

3. *Indecent Assault*

The present law distinguishes between different types of indecent assault and this differentiation is based purely upon the sex of the victim.

(a) *Upon females*

Section 76 provides:

> Whosoever assaults any female and, at the time of, or immediately before or after such assault, commits any act of indecency upon

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[21] See text accompanying notes 131-145 *infra*. The problem of whether or not the woman consented is usually the primary issue for determination in rape cases, whereas questions of identity and whether intercourse in fact occurred rarely arise.

[22] Crimes Act 1900 (N.S.W.) s. 77A. In addition, the judge is empowered to forbid publication of evidence in trials of the offences mentioned in s. 77A under s. 578(1) of the Crimes Act and it is a summary offence to breach any order made under s. 578(1), in respect of which a penalty of $2,000 is provided in s. 578(2).

[23] Crimes Act 1900 (N.S.W.) s. 77. See also *Sparre* v. *R.* (1942) 66 C.L.R. 149.

[24] Insofar as there is a prohibition on a father carnally knowing his daughter there appears to be an overlap with the offence of incest in s. 78A.

> or in the presence of such female, shall be liable to imprisonment for four years, or, if the female be under the age of sixteen years, to penal servitude for five years.[25]

It is not essential that there should be two independent acts, that is, an act of assault and one of indecency. Any assault which itself amounts to an act of indecency will suffice.[26] Kissing a girl against her will, accompanied by a suggestion that sexual intercourse or sexual activity should follow, will amount to an indecent assault.[27]

Generally speaking under section 77 if the girl is under the age of 16, consent will be no defence but, where consent is a defence, if the facts of the case are such that the jury may reasonably infer consent then there should be a direction from the judge that the onus of negativing consent is on the prosecution.[28]

To constitute an indecent assault, as with any other assault, an act must be done by the defendant to another person causing that person to apprehend that the defendant is about to do something to him or her.[29] Some authorities, indeed, have suggested that there can be no assault unless there is a hostile act[30] but more recently the English Court of Criminal Appeal in *R.* v. *McCormack*[31] chose not to follow that approach.

(b) *Upon males*

Section 81 provides: "Whosoever commits an indecent assault upon a male person of whatever age, with or without the consent of such person, shall be liable to penal servitude for five years." Section 81A makes it an offence for a male to procure an act of indecency by another male, whilst section 81B prohibits a male from soliciting another male. It is thus apparent that a female may commit a section 81 offence but only males may commit section 81A or section 81B offences.[32]

Consent is irrelevant to a charge under section 81 and the Crown, as a result, is not required to show any element of hostility on the part of the accused.[33] This rule may be thought to have been qualified by

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[25] S. 76A punishes the commission of an act of indecency or incitement to indecency *simpliciter*, with two years imprisonment.

[26] *R.* v. *Sorlie* (1925) 42 W.N. (N.S.W.) 152.

[27] *R.* v. *Leeson* (1968) 52 Cr. App. R. 185.

[28] *R.* v. *Donovan* [1934] 2 K.B. 498; *cf. R.* v. *May* [1912] 3 K.B. 572.

[29] In *Fairclough* v. *Whipp* (1951) 35 Cr. App. R. 138 the defendant was acquitted of the charge of indecently assaulting a 9 year-old girl whom he had invited to touch his penis. The basis for the decision was apparently that an invitation to somebody to touch the invitor could not amount to an assault.

[30] *R.* v. *Burrows* (1952) 35 Cr. App. R. 180; *D.P.P.* v. *Rogers* (1953) 37 Cr. App. R. 137.

[31] [1969] 3 All E.R. 371.

[32] *R.* v. *Hare* [1934] 1 K.B. 354.

[33] *R.* v. *B. and L.* (1954) 71 W.N. (N.S.W.) 138.

the decision in *R.* v. *Mason*.[34] The defendant was a 39 year-old woman who had been charged on several counts of indecent assault with a number of young boys aged between 14 and 16. She had had intercourse with them over a period of time on various occasions, sometimes the overtures coming from her and on other occasions from the boys. The trial judge dismissed the charges because there was no evidence of an assault in that there had been no indication of any force being used or of any hostile acts against any of the boys. Nevertheless, it is submitted that *Mason* is of doubtful authority in the light of the subsequent decision in *McCormack*.[35]

4. *Unnatural Offences*

The most striking feature about the offences found under the above classification[36] is the nomenclature used to describe them. The generic expression used indicates that each of the offences is against the order of nature and if any reinforcement of that theme were necessary it may be found in the pejorative use of the adjective "abominable" to indicate just how heinous the offence of buggery is thought to be.[37]

Section 80, which deals with attempted buggery, specifically states that consent is no defence. The fact that there is no similar reference to consent in section 79 should not be taken to imply that consent is therefore relevant to the completed offence. In any event it is not necessary to prove that the offence occurred against one party's consent, for both parties are regarded as being equally liable and each is treated as a principal offender.

5. *Abduction and Incest*

These two offences raise special problems and accordingly they will be given separate treatment somewhat later in this article.

III REGULATORY PRINCIPLES—A BASIS FOR LEGISLATION

Having stated earlier in general terms the reasons for review and consolidation or codification of sexual offences, it is now necessary to state the principles which will enable us to decide what types of sexual conduct deserve proscription. Even as the first tentative steps are taken in pursuing that objective, it will become increasingly apparent that the aims of the criminal law will have to be identified and evaluated.

A threshold question immediately arises. What is the scope of the concept of a "sexual offence"? There is no unaminity about what is meant by the term. The practices related to prostitution demonstrate

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[34] (1968) 53 Cr. App. R. 12.
[35] [1969] 3 All E.R. 371.
[36] Crimes Act 1900 (N.S.W.) ss 79-81.
[37] S. 79 provides: "Whosoever commits the abominable crime of buggery or bestiality, with mankind, or with any animal, shall be liable to penal servitude for fourteen years." See also *R.* v. *Allen* (1848) 3 Cox C.C. 270.

the difficulties of classification that can arise. Arguably, prostitution involves sexual gratification and exploitation which may be thought to be sufficiently offensive to be a proper subject of legal regulation. Alternatively, prostitution has a dimension which relates to the pursuit of financial gain and the fact that sexual activities are the source of such pecuniary gain may be considered irrelevant.

One radical suggestion has exacerbated rather than alleviated the existing problems of definition. The Sexual Law Reform Society in England has indicated that it would favour the total elimination of the separate category of sexual offences from the law.[38] The Society contends that the labelling of certain offences as "sexual" creates an atmosphere of tension and prejudice which surrounds the disposition of a particular case from the time the alleged offender is brought to trial, including his experiences in custody.[39] The proponents of this view have no illusions that such a change of classification would drastically alter public attitudes, but content themselves with the belief that it would fulfil an essential educative function in the community at large. The focus of the inquiry, they contend, ought to be solely upon the invasion of bodily integrity and, accordingly, it is argued that all sexual offences could be appropriately subsumed under the pre-existing *assault* offences. The suggestion, it is submitted, overlooks the very significant fact that the offences in question are simultaneously crimes involving both violence to and sexual interference with the person, and for that reason deserve a different classification from ordinary assault cases.[40]

To understand the regulatory role to be performed by the criminal law[41] it is helpful to state positive principles which should provide the basis for legislation. Freedom of choice is a cherished notion and in a pluralist society the freedom to choose one's behaviour pattern or life-style ought to be maximised. The result is that there should be a general freedom among those persons who are legally responsible to participate in such sexual activities as they choose, unless such participation in some way leads to identifiable harm to others.[42] The basic

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[38] For a report of the Society's attitudes see Grey, "Criticising Our Sex Laws" (1975) 13 *Journal of Public Teachers of Law* 106; Grey, "Sexual Law Reform Society Working Party Paper" [1975] *Crim. L. Rev.* 323.

[39] Grey, "Criticising Our Sex Laws" (1975) 13 *Journal of Public Teachers of Law* 106, 108.

[40] *Mitchell Report*, 10.

[41] The criminal law not only purports to, but does in fact, regulate conduct in two different but related ways. First, conduct is passively regulated by delineating right from wrong and by setting standards of behaviour to which in fact most people conform. Secondly, the law threatens and visits punishment upon persons who violate those standards and this may be described as active regulation. See Mueller, *Legal Regulation of Sexual Conduct* (1961) 18.

[42] Grey, "Sexual Law Reform Society Working Party Paper" [1975] *Crim. L. Rev.* 323, 324. The law also necessarily is obliged to control the setting in which sexual activities may occur. The freedom of choice referred to at the outset must

principle is not to be viewed as an absolute—there are of course caveats to be entered. The freedom to choose implies that the individual has the legal capacity or responsibility to exercise that choice or to consent to the activity. If the person is deemed to be too young or too feeble-minded to be capable of consenting, then full responsibility does not exist and the law has a role to play in protecting such persons. Equally, if the activity engaged in is not truly consensual, then the law has a protective function to perform. Finally, sexual activities which result in demonstrable mental or physical damage or suffering to the participants ought to be punishable.[43]

The underlying assumption to date has been that, subject to these exceptions to the general principle, consensual activities engaged in by responsible citizens are not the concern of the criminal law. It ought to be equally clear that the law should make no attempt to legislate for a code of morals or to criminalise any deviation from "normal sexual behaviour". Just as there are divergent views about morality, so too do individuals differ about what may be considered normal. The essence of a pluralist society is tolerance, if not acceptance, of alternative behaviour patterns. This view was eloquently expressed nearly twenty years ago in the celebrated *Wolfenden Report*.[44]

The issue of the interrelationship between law and morality has been the subject of debate for legal scholars since Mill[45] and Stephen.[46] In recent times the cudgels have been taken up in a spirited verbal contest known popularly as the Hart—Devlin debate.[47]

The problem is not purely academic. It is one that the legislature, at least in New South Wales, has not been able to resolve satisfactorily. The criminal law in this State continues to regulate various consensual activities of its citizens even though they are conducted in private. In

include the freedom of any individual to avoid having the activities of others foisted upon him or her. It is submitted that affronts to third parties ought to be punishable where an offence is caused to identifiable members of the public who testify that they have been involuntary witnesses to, or participants in, the offending activity but they must observe the activity and it must have caused actual annoyance.

[43] *Id.*, 324-325.

[44] *Report of the Departmental Committee on Homosexual Offences and Prostitution* (1957) Cmnd 247, paras 13, 61.

[45] Mill, *On Liberty* (1859).

[46] Stephen, *Liberty, Equality, Fraternity* (1874).

[47] Lord Devlin argued that a common morality is a bond holding society together and that accordingly mankind must sacrifice some of its right to unlimited freedom because mankind needs society. Private conduct which threatens the common morality may not be directly harmful to others, according to Devlin, but it is nonetheless a threat to the existence of society and ought therefore to be curtailed; Devlin, *The Enforcement of Morals* (1965) 4-5. Hart disagreed and stated that regulation of private conduct is permissible only if it is necessary to prevent harm to others or to prohibit the infliction of physical or mental harm; Hart, *Law, Liberty and Morality* (1963) 32-34.

fact, as previously indicated, persons engaging in homosexual practices, regardless of the parties' age or consent, are liable to very severe penalties.[48]

Numerous arguments have been advanced to indicate that the existence of criminal penalties for homosexual practices can no longer be tolerated. First, it is contended that there is no justification for the state's interference in a person's private affairs voluntarily engaged in if he is not harming others. Secondly, no harm to the community's secular interests results from citizens of full responsibility engaging in private consensual activities even if their practices are considered to be atypical. Thirdly, the existing law is substantially unenforced and unenforceable because, as with most private and consensual sexual activities, their detection is most difficult. As a practical matter, the law finds it almost impossible to enforce standards of private morality even if it is permissible for it to do so. In any event, it is suggested that compelled behaviour has no claim to moral righteousness.[49] In addition, unenforceable or rarely enforced laws have undesirable side-effects.[50] Rarity of enforcement creates the problem of the arbitrary exercise of police and prosecutorial discretion. The extreme difficulty of detecting the conduct in question can lead to undesirable police practices. The theoretical availability of criminal sanctions creates a situation in which extortion and police corruption may occur.[51] It can also create morale problems within the police force. Individual policemen, particularly if their personal attitudes on the question are settled, may resent performing duties designed to enforce the existing laws, especially if their duty extends to personal involvement in the use of entrapment procedures.

In any case there is nothing to suggest that any goal of criminal punishment is satisfied by convicting and imprisoning homosexual offenders and so doing may be more akin to "throwing Brer Rabbit into the briarpatch".[52] Finally, and significantly, there is substantial evidence that the moral sense of the community no longer exerts strong pressure for the continued use of criminal sanctions for homosexual practices.[53]

It appears that the time is ripe for New South Wales to follow the South Australian example in removing the criminal law from the area

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[48] Note 37 *supra.*

[49] Fletcher, "Sex Offenses: An Ethical View" (1960) 25 *Law and Contemp. Probs* 244, 251-252.

[50] See generally, Packer, *The Limits of the Criminal Sanction* (1968).

[51] *Id.*, 304.

[52] This comment was made in an American case, *Perkins* v. *North Carolina* (1964) 234 F. Supp. 333, 339 (W.D. N.C.) as quoted in Soifer, "Revision of The Law of Sex Crimes in Pennsylvania and New Jersey" (1973) 78 *Dick. L. Rev.* 73, 93.

[53] See Chappell and Wilson, "Changing Attitudes Towards Homosexual Law Reform" (1972) 46 *A.L.J.* 22. The authors conclude on the basis of comparative studies conducted in 1967 and 1970 that community attitudes towards homosexual conduct have become increasingly liberal; *id.*, 23-24.

of consensual homosexual activities.[54] Consensual heterosexual buggery similarly ought to be beyond the purview of the criminal law.[55]

IV RESPONSIBLE PARTIES

Before turning to specific provisions aimed at regulating sexual behaviour, it is necessary to investigate the preliminary problem of legal responsibility. Stated simply, the issue is whether there are any identifiable categories of persons who ought not to be held responsible by the law for their admittedly criminal acts by reason only of their youth or status. Two existing rules guaranteeing immunity to specific groups demand examination.

1. *Young Boys*

It is an irrebuttable presumption of law that a boy under 14 cannot be convicted of rape because he is presumed to be incapable of sexual intercourse.[56] The rule has recently been subjected to considerable criticism both at the legislative level[57] and by the judiciary.[58] For the purposes of sexual offences, proof of penetration alone suffices and the same rule, it is submitted, ought to apply to young men even if they are under the age of 14. Although there may have been no case in which a prosecution has been avoided on account of the offender being under 14, there is no sound reason to retain a presumption that is divorced from reality, for quite clearly young men under 14 are capable of penetration.

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[54] Criminal Law Consolidation Act 1935 (S.A.) s. 68a. Recent legislation in the A.C.T. provides that certain homosexual acts performed in private will no longer be an offence, ss 79-81 of the N.S.W. Crimes Act are rendered inoperative for the purposes of the Territory when the activities are consensual and the parties have attained the age of 18 or in special circumstances have turned 16; Law Reform (Sexual Behaviour) Ordinance 1976 (A.C.T.) ss 3, 5.

[55] In England the law relating to homosexual offences was modified by the Sexual Offences Act of 1967 which partially implemented the recommendations of the *Wolfenden Report* by providing that homosexual relations between two consenting adults aged over 21 in private should no longer be an offence. It is submitted that the category of permissible homosexual behaviour is too narrowly drawn in view of the general principles stated earlier; see text accompanying notes 41-44 *supra*. The category of permissible homosexual behaviour ought to be equated with that of permissible heterosexual conduct. However in England it remains an offence punishable by life imprisonment for a heterosexual couple to have anal intercourse even if they are married. Not only that but heterosexual buggery is still considered to be more serious than homosexual buggery; *R.* v. *Harris* (1971) 55 Cr. App. R. 290. As to the somewhat restrictive test adopted in England in respect of what amounts to an activity conducted "in private", see *R.* v. *Reakes* (1974) *Crim. L. Rev.* 615.

[56] *R.* v. *Groombridge* (1836) 7 C. & P. 582; *R.* v. *Waite* [1892] 2 Q.B. 600.

[57] The South Australian Government at the end of 1976 legislated to abolish the rule on the recommendation of the *Mitchell Report*; Criminal Law Consolidation Act 1935 (S.A.) s. 73(2). In doing so it followed the example of New Zealand, see Crimes Act 1961 (N.Z.) s. 127.

[58] *Reid* v. *Hesselman* (1974) Tas. S.R. 1 *per* Crawford J.

2. *Married Men*

The common law rule that a husband is immune from prosecution for raping his wife, emanates from the statement of principle by Sir Matthew Hale that "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract".[59] The rule is clearly based on the notion of continuous consent.[60] It is submitted that this is a misleading concept as well as being factually unsound. A woman who marries undoubtedly indicates that she will be amenable to mutually satisfying sexual intercourse or activity, but simultaneously she probably understands or believes that she can expressly decline to participate in such activity at any time if she so decides. Since the advent of the Family Law Act 1975 (Cth), if not before, marriage must be regarded as a contract between equal parties, which in turn suggests that each party has full capacity for choice. In that context an absolute contractual obligation seems totally inappropriate.[61] Similarly, to accept the continuous consent notion would be to suggest that marriage abolishes a person's sexual freedom and such an assertion would violate personal integrity. The present law is defective insofar as it implies that the integrity of the individual is subjugated to the general interest of society in protecting marital privacy.

The continuous consent theory also has the effect of denying the criminal law's protection to married women. It has been suggested that "it is only in exceptional circumstances that the criminal law should invade the bedroom".[62] If this means that the criminal law ought to be circumspect in extending its reach, particularly when the privacy of the family unit is the subject of its intrusive intentions, then the proposition's truth is self-evident. Nevertheless, the criminal law, however unfortunately, is consistently called to the bedroom, even if it be the marital bedroom. If a homicide or robbery occurs in a private residence then the law intervenes in the interests of the community regardless of any personal privacy that might be invaded. No one has

[59] Hale, *Pleas of the Crown* (1847) 1, 629. A number of subsequent decisions although qualifying the Hale statement have nonetheless supported the general rule. See *R.* v. *Clarke* [1949] 2 All E.R. 448; *R.* v. *Miller* [1954] 2 All E.R. 529; *R.* v. *O'Brien* [1974] 3 All E.R. 663; *R.* v. *Cogan & Leak* [1975] 2 All E.R. 1059 (which confirmed the rule that a husband may be found guilty of aiding and abetting the commission of a rape upon his wife). See also English, "The Husband Who Rapes His Wife" (1976) 126 *N.L.J.* 1223.

[60] The rule is widespread not only among countries of the British Commonwealth and the United States but in civil law countries such as France and Germany. However there is no immunity in Communist countries such as the U.S.S.R., Poland or Czechoslovakia, nor in such Scandinavian countries as Sweden and Denmark. See generally, Livneh, "On Rape and The Sanctity of Marriage" (1967) 2 *Israel L. Rev.* 415.

[61] Comment, "Rape and Battery Between Husband and Wife" (1954) 6 *Stan. L. Rev.* 719, 722.

[62] *Mitchell Report*, 14.

suggested that the law ought to be otherwise, even if the victim and the suspected killer are spouses. Equally, if the husband assaults his wife, whether in the bedroom or not, then the criminal law provides a remedy in exactly the same way as it would if any other member of the community were the victim.[63] It appears illogical that a woman whose husband assaults her whilst having forcible intercourse with her could institute proceedings in respect of the assault but would have no redress for the accompanying and potentially more serious sexual interference. It is in response to those exceptional cases of the type just described that the criminal law must extend its protection.

What objections to the proposal can be anticipated? The possibility exists of a vindictive wife hell-bent on seeking vengeance. The criminal law has already developed safeguards to anticipate the false complaint and there seems to be no reason to doubt that they will prove similarly effective in dealing with a situation in which the complaint is registered by a wife against her husband. Alternatively, it may be argued that the problems of proof, which are always serious in rape cases, will be magnified when a wife accuses her husband and that these problems are likely to make a marital rape rule unenforceable. This argument ignores the fact that it is one thing to make an allegation of rape and quite another to substantiate it in a court of law to the effect that a conviction is obtained. Initially, the victim must convince the police of the authenticity of her complaint. Should the police decide that the incident warrants further proceedings the arduous litigation process is put in motion. The Crown bears the onus of proof in relation to the complaint and must establish to the jury the defendant's guilt beyond reasonable doubt. So far as marital rape is concerned, that onus will no doubt prove to be most difficult to discharge when one bears in mind that the ordinary juror, deeply imbued with the "husband immunity rule", is very likely to treat allegations of marital rape with considerable scepticism. Should the husband assert that he believed, albeit mistakenly, that his wife was consenting to intercourse, the Crown's task will be even harder. Nonetheless, that sort of problem has traditionally been entrusted to juries for their determination and, in any event, the difficulties mentioned do not mean "that the act should not amount to rape where absence of belief in consent is able to be proved".[64]

In conclusion it is submitted that the "husband immunity rule" is an anachronism. To suggest "that a wife is bound to submit to intercourse with her husband whenever he wishes it irrespective of her wishes"[65] is ill-conceived. It is time for us to abandon the attitude that

[63] The Family Law Act 1975 (Cth) s. 114 enables parties to obtain an injunction restraining their spouse from molesting them.

[64] *Mitchell Report*, 15.

[65] *Id.*, 14.

permeated Victorian society of the Forsyte Saga depicted by John Galsworthy:

> The morning after a certain night on which Soames at last asserted his rights and acted like a man, he breakfasted alone. . . The incident was really not of great moment, women made a fuss about it in books, but in the cool judgment of right thinking men, . . . he had but done his best to sustain the sanctity of marriage, to prevent her from abandoning her duty. . .[66]

It is not the law but rather the husband who ought to be adopting a "hands off" policy.[67]

V PROVIDING FOR A SEXUAL OFFENCES CODE

Having already stated the general principles to be applied in regulating sexual activities, it now remains to particularise the types of behaviour which ought to constitute criminal offences. Of concern thus far have been those types of sexual activities which, when mutually agreed to, should be outside the ambit of the criminal law. The presence or absence of consent is, it is argued, the fact that ought to distinguish criminal activities from permissible conduct. The present focus will be upon those non-consensual sexual activities which require regulation, for no commentator or legislature has ever suggested that non-consensual heterosexual practices ought not to be the subject of criminal sanctions. Another distinction needs to be drawn between two different categories of cases in which there is no consent to the relevant conduct. First, there are those cases in which there is no "consent-in-fact", that is, "where the victim at the material time has the full mental capacity to agree to the sexuality but does not do so".[68] The second group of cases are those in which the law deems there to be no consent, either because of the age of the "victim" or because of his or her mental or physical incapacity even though there was factual consent.[69] It is proposed that each set of circumstances be covered by

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[66] Galsworthy, *Forsyte Saga*, Book 1, Part III, Chap. IV, quoted in Livneh, note 60 *supra*, 415 note 3.

[67] South Australia is the first English speaking jurisdiction to ameliorate the effects of the immunity rule. The *Mitchell Report* recommended that the rule be relaxed for spouses only when they were living apart; *id.*, 15. The South Australian Government attempted to abrogate the rule entirely but, after a stormy legislative battle, was unsuccessful and was forced to accept an amendment. The final version states that the husband will not be liable for conviction unless the alleged offence consisted of, was preceded or accompanied by, or was associated with—

(a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;
(b) an act of gross indecency, or threat of such an act, against the spouse;
(c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act; or
(d) threat of the commission of a criminal act against any person. Criminal Law Consolidation Act 1935 (S.A.) s. 73(5).

[68] Brazier, "Reform of Sexual Offences" [1975] *Crim. L. Rev.* 421, 422.

[69] *Id.*, 423.

a different offence on the basis that the objectives of the criminal law differ in the two situations. In the first category, to be referred to as *sexual attack*,[70] those persons whose will is simply overborne are covered, whilst in the other category, to be known as *sexual imposition*, there is no will to be overborne but the law deems it appropriate to intervene in order to protect the victim from exploitation. This role is overtly paternalistic but nevertheless quite justifiable. Whether the offence be sexual attack or sexual imposition, the law should differentiate between acts of *sexual penetration* and those acts which do not amount to penetration but nevertheless involve an assault or an invasion of a person's bodily integrity, which will be named *sexual contact*.

There will therefore be two basic offences, with two alternative levels of criminal activity subsumed within each. It is proposed to examine these two levels of criminal activity first before dealing with the two offences themselves.

1. *Sexual Penetration*

The Michigan legislature has already provided a definition which could be usefully adopted in this State. It is drafted in wide terms to cover

> sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.[71]

There are a number of points to notice about the type of activities that will now be covered by this definition. First, in its terms it is sexually neutral and so a person of either sex who performs or is a party to a

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[70] *Ibid.*

[71] Criminal Sexual Assault Act 1974 (Mich.) s. 520a(h). A recent commentator also concludes that the Michigan legislation is deserving of careful attention by law reformers in this country. See Scutt, "Reforming the Law of Rape: The Michigan Example" (1976) 50 *A.L.J.* 615. The present author is attracted by the new definitional sections of that jurisdiction's Act and urges their implementation here. However, that legislation, neither in its letter nor spirit, is susceptible of wholesale adoption here. It appears that the real purport of the legislation is to avoid, in rape cases, any consideration of the issue of consent. The intention of the legislators appears very laudable, motivated as they no doubt are by a concern to alleviate the plight of the victim by deflecting from her the main focus of the inquiry. Accordingly, a list of objective factors is provided which, it seems, if proven, are presumed to guarantee the guilt of the accused. This approach ought to be rejected. First, any further introduction of objective standards as a means of determining the existence of *mens rea* is totally unwarranted in the light of current developments in the criminal law on that issue. See notes 133-147 *infra*. Secondly, and related to the first point, the insertion of objective criteria into what is essentially a subjective issue, namely the existence or non-existence of consent, is misconceived. That issue can only be resolved by reference to an assessment of the interactions between the two people involved, a process which will often be highly complex. Finally, it is submitted that it is the very issue of consent which enables us to distinguish between sexual conduct which is in some circumstances legal and in other cases illegal. See notes 126-132 *infra*.

prohibited act on any person of either sex will be within the section. It seems that women should not be only equally protected but also equally responsible before the law. To suggest otherwise would be to accept the erroneous premise that women are "weak-willed, naive and easily preyed upon by men who are more clever and always stronger".[72]

Secondly, it ought to be noted that the offence extends to acts of penetration other than vaginal intercourse. This is consistent with the first point insofar as it will not limit offences in a sexually discriminatory fashion. The essence of the offence is the sexual interference by one person on the body of another and to limit the law's protection of individual bodily integrity to one natural orifice is, apart from anything else, to ignore reality. To many people the experience of forced anal or oral intercourse may be considerably more disquieting than vaginal intercourse and for that reason deserving of at least equal punishment. Fear of pregnancy as a consequence of forced vaginal intercourse may have previously been suggested as a justification for placing that offence in a special category. The continuing validity of that argument is doubted in view of the widespread availability of birth control measures.

Thirdly, the definition extends to penetration achieved by foreign objects, that is to say anything other than human organs. The potential for permanent damage resulting from the *unlawful* insertion of various artificial organs is patently obvious. Finally, the definition is sufficiently all-encompassing to cover situations in which the victim of the attack is obliged to perform the act of penetration. The offence of sexual penetration has the advantage of being neither gender specific nor activity specific.[73]

2. *Sexual Contact*

As far as the offence of sexual contact is concerned, once again it is recommended that the Michigan definition should serve as our model. It includes

> [t]he intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate areas of the victim's or actor's intimate parts—for the purpose of sexual arousal or gratification.[74]

The proposed offence would replace those aspects of the indecent assault provisions which as presently defined involve no element of

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[72] Frankel, "Sex Discrimination in The Criminal Law: The Effect of The Equal Rights Amendment" (1973) 11 *Am. Crim. L. Rev.* 469, 473.

[73] The South Australian Government extended its definition of "sexual intercourse" to include oral and anal intercourse. Criminal Law Consolidation Act 1935 (S.A.) s. 5.

[74] Criminal Sexual Assault Act 1974 (Mich.) s. 520a(g). In that sub-section, "intimate parts" refers to "the primary genital area, groin, inner thigh, buttock or breast of a human being".

sexual penetration. The remarks made regarding the sexual penetration discussion are equally relevant here.

3. *Sexual Attack*

The discussion about *sexual penetration* and *sexual contact* offences applies equally to cases of *sexual attack* and *sexual imposition*. The net effect is that the new offence of sexual attack will replace a number of the existing offences, the most notable being rape. Furthermore, aspects of the law of incest, buggery, carnal knowledge and indecent assault will be subsumed within its reach. Because of the considerably wider definition, it seems that the offence ought to bear a name which focuses on the offensive conduct and it is submitted that the word "rape", as popularly understood, has a connotation which is significantly different from the type of activities prohibited in the proposed offence. It has been argued that the alteration of the name by which the crime of rape is known is desirable because a change in nomenclature will render women less reluctant to report the offence as it would not then be so emotionally charged. It is difficult to assess the validity of such a contention but it is highly likely that the alleged victim would still be faced with the same institutional and procedural hazards that she faces now.

4. *Sexual Imposition*

The objective is to encompass within this category of offence all those sexual activities the law deems to be criminal in which there is an element of exploitation on the part of the actor insofar as he or she takes advantage of the victim's incapacity. Two types of incapacity will be examined.

(a) *Mental or physical incapacity*

Of concern here are those persons who are either temporarily incapacitated, mentally defective or physically helpless. A person who is "mentally defective" is, according to the Michigan legislation, one who "suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct".[75] A person who is "mentally incapacitated" is one who is "rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anaesthetic or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent".[76] These two definitions cover a number of situations in which a person takes advantage of a victim's mental incapacity to sexually impose his or her will upon the victim. Included in the definitions are, most obviously, persons who are permanently mentally incapacitated,

[75] *Id.*, s. 520a(c).
[76] *Id.*, s. 520a(d).

many of whom will have been committed to mental institutions. Indeed, it is these persons particularly who are deserving of protection from those who exercise a supervisory function over them, although it is recognised that the range of potential exploiters of these "victims" under consideration is virtually limitless. Anyone who temporarily is rendered mentally incapable is also deserving of protection, particularly if the condition is induced by involuntary intoxication, due to drugs or alcohol. Similar protection ought to be extended to people who are persuaded to consent to sexual relations as a result of some fraudulent action. All false representations, whether they relate to the nature or purpose of the act or the identity of the person performing it, will be catered for. Accordingly, it would seem that the fraudulent medical treatment cases would be covered. Finally, it ought to be noted that the "physically helpless", that is those who are "unconscious, asleep or for any other reason physically unable to communicate unwillingness to an act",[77] also warrant protection.

Where the victim is either physically or mentally incapable, be it temporary or permanent, it ought to be an offence if sexual relations occur when the actor knows that the victim is mentally incapacitated, mentally defective or physically helpless or where the actor is recklessly indifferent to the victim's incapacity.[78] The *actus reus* would there consist of having sexual relations with someone who is rendered incapable of appraising or controlling his or her conduct. It is submitted that the "control" standard is to be preferred to the "consent" standard because in most cases "the victim cannot realistically be said not to have consented to the act. In effect [his or] her conduct is volitional although it is unreasoned".[79]

It should be realised that not all sexual activities of mentally incapacitated persons need to be restricted and indeed to do so would be an infringement of their individual integrity. The criminal law ought only to intervene where the person's incapacity prevented him or her from giving a true consent to the sexual activity.[80]

(b) *Incapacity due to immaturity*

It is generally agreed that the criminal law should at some stage protect young persons from their own immaturity because they are likely to exercise poor judgment about the nature and desirability of sexual activity. So far as the immature are concerned, their factual consent to sexual relations will not constitute consent in law and anyone engaging in sexual relations with such a person will be criminally responsible, the consent of the young person being treated as irrelevant.

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[77] *Id.*, s. 520a(e).
[78] *Id.*, s. 520b(1)(d)(i).
[79] Soifer, note 52 *supra*, 80.
[80] *Mitchell Report*, 23-26.

Figures indicate that many victims of sexual assaults are under the age of 16.[81] Of those undoubtedly a large number suffer at the hands of sexual predators or "child-molesters", whilst many others are engaged in what an English judge last year described as "a thoroughly satisfactory experience".[82] This poses a dilemma for the legislature—when ought it to recognise that young persons are sufficiently mature to be able to consent to sexual relations? It is recommended that the so-called "age of consent" be lowered from the present age of 16 to 14. Drawing a line at a particular age is admittedly arbitrary but the suggested reform is urged for the following reasons.[83] First, the present age has little biological justification and has no practical reality since many young people under that age have had sexual experience.[84] Secondly, it seems that the law is being consistently flouted and is rarely enforced.[85] Thirdly, contemporary mores tend to indicate that the theory of denying young persons "a taste of the forbidden fruit" is an outmoded concept. Fourthly, to lower the age to 14 would be consistent with the law's recognition that persons of that age have the capacity, in certain situations, to control their own bodies.[86]

The effect of the recommendation can be briefly summarised. Young persons on attaining the age of 14 will be deemed capable of giving consent to sexual relations.[87] Below that age a carbon copy of the

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[81] The Cambridge Department of Criminal Science in its survey discovered that 82% of the victims of sexual assaults were children under the age of 16; Cambridge Department of Criminal Science, *Report on Sexual Offences* (1957). See generally, McGeorge, "Sexual Assaults on Children" (1964) 4 *Med., Science and Law* 245.

[82] The judge made these remarks when he conditionally discharged a 22 year-old man who had pleaded guilty to having consensual intercourse with a 15 year-old girl. Quoted in Willis, "Sexual Offences Law in South Australia: A Special Report" (1976) 2 *Legal Service Bulletin* 42, 45.

[83] The suggestion that the appropriate time for determining the "age of consent" is upon the young person's reaching puberty is rejected because, whilst it is recognised that the young person *may* thenceforth be better equipped to handle sexual problems physically and psychologically, that consequence will not necessarily follow in every case. The age of puberty may vary significantly between different individuals and this could easily create problems. In any event, the criminal law really depends on consistent codes of conduct being drawn and maintained.

[84] One recent American study revealed that 37% of all young people had had experience of sexual intercourse by the time they reached 16. See Sorensen, *Adolescent Sexuality in Contemporary America* (1973).

[85] Grey, note 42 *supra*, 326.

[86] For certain limited purposes the law recognises that the young person has the capacity to consent to medical and dental treatment; Minors (Property and Contracts) Act 1970 (N.S.W.) s. 49(2).

[87] There is one caveat to the general rule which will be discussed shortly. In cases in which an adult stands in a "position of authority" *vis-à-vis* the young person then the age of consent ought to be 18 and not 14. See text accompanying notes 112-115 *infra*. The *Mitchell Report* concluded that the possibility of exploitation of young persons rose in direct proportion to the disparity in age between the parties. Accordingly, the recommendation was that there ought to be no alteration in the "age of consent" except for cases in which young persons, aged 14 or 15, had relations with someone not more than 5 years older than themselves; *Mitchell Report*, 19-22.

sexual imposition offences in respect of the physically or mentally incapable ought to be reproduced, maintaining once again the distinction between penetration and contact. The appropriate *mens rea*, as before, would be the knowing or recklessly indifferent exploitation of a person by reason of his or her immaturity. Along with the defences normally available there ought to be included in this instance specific provision for the possibility of the actor's mistake about the victim's age.

VI TWO SPECIAL PROBLEMS—INCEST AND ABDUCTION

1. *Incest*

(a) *The current legal position*

Incest was long recognised by the ecclesiastical courts as an offence but was not made a statutory crime until 1924 in New South Wales.[88] The offence involves heterosexual intercourse between persons who are within the degrees of consanguinity specified in the Act.[89] The range of relationships includes illegitimate as well as legitimate relationships but does not extend to step-parents and step-children.[90] For the purposes of this offence, an adopted child's relationship with his adoptive parent is treated in exactly the same way as is his relationship with his natural parents.[91]

The offence of incest may be committed by either a male or a female but apparently only a male can be found guilty of attempted incest.[92] The Attorney-General's sanction must be obtained before a prosecution for incest may be commenced and all proceedings are held *in camera*.[93] The effect of a conviction is that a male offender is divested of any authority over the female concerned.[94] An alternative verdict is available for a jury to return should it find a male charged with rape or attempted rape not guilty of those offences but guilty of incest or attempted incest.[95] A special statutory defence provides that it shall not be an offence if the person charged did not know of the nature of the relationship between himself and the other party.[96]

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[88] Crimes Act 1900 (N.S.W.) ss 78A-F.

[89] S. 78A states: "Whosoever, being a male, has carnal knowledge of his mother, sister, daughter, or grand-daughter, or being a female of or above the age of sixteen years, with her consent permits her grandfather, father, brother or son to have carnal knowledge of her (whether in any such case the relationship is of half or full blood, or is or is not traced through lawful wedlock) shall be liable to penal servitude for seven years."

[90] *R.* v. *Firth* [1914] V.L.R. 658.

[91] Adoption of Children Act 1965 (N.S.W.) s. 35(4).

[92] Crimes Act 1900 (N.S.W.) s. 78B.

[93] *Id.*, ss 78F(1) and (2).

[94] *Id.*, s. 78D.

[95] *Id.*, s. 78E.

[96] *Id.*, s. 78C(1).

That branch of law known as family law also takes an interest in preventing incestuous relationships by prohibiting particular categories of people from marrying each other. Ancestor-descendant and brother-sister relationships are prohibited and marriages between people in the relevant categories are void[97] and persons who are parties to or solemnise such marriages are liable to criminal penalties.[98] The relaxation of the rules relating to forbidden marriages under the Marriage Act 1961 (Cth) means that the criminal law and the family law are now complementary in that they are both concerned with the same types of relationships. The consequence has been the removal of the anomalous situation in which an uncle and his niece or an aunt and her nephew or cousins were prohibited from marrying but were permitted to have intercourse.[99]

(b) *Reasons for the prohibition*

Commentators in a number of different disciplines have speculated about the incest taboo and a variety of reasons have been offered to justify its existence.[100] One such reason is the suggested desire to preserve the traditional family structure. It is said that "incest produces a confusion of roles within the family, the father or brother becomes husband or lover as well as father or brother".[101] The consequences for the family unit may admittedly be quite serious but nevertheless it is clearly inappropriate to use the processes of the criminal law to preserve the family unit. The solution to the problem of family disintegration lies outside the ambit of the criminal law for preservation by coercion has never proved to be a satisfactory remedial method. Rather the answer must be sought through education programs[102] or in the provision of adequate community services.[103]

Another explanation is biologically based. Proponents of the so-called eugenic argument maintain that inbreeding causes biological degeneration because two closely related parents are more likely to pass on their defective recessive traits to their offspring thereby increasing the possibility that their children will be defective. Considerable disagreement is evident in the literature but geneticists seem to be agreed that inbreeding intensifies the inherited traits be they good or bad.[104] In

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[97] Marriage (Amendment) Act 1976 (Cth) ss 23(1) and (2).

[98] *Id.*, ss 96, 99.

[99] The anomaly remains in New Zealand, see Hewitt, "Inbreeding, Incest and Marriage in New Zealand" [1976] *N.Z.L.J.* 12.

[100] The literature on the subject is voluminous. See *e.g.*, Mannheim, *Criminal Justice and Social Reconstruction* (1946); White, "The Definition and Prohibition of Incest" (1948) 50 *American Anthropologist* 416; Guttmacher, *Sex Offences* (1951); Karpman, *The Sexual Offender and his Offences* (1954).

[101] Hughes, "The Crime of Incest" (1964) 55 *J. Crim. Law, Criminology, Political Science* 322, 327.

[102] *Mitchell Report*, 30.

[103] McGeorge, note 81 *supra*, 253.

[104] White, note 100 *supra*, 417.

view of the scientific findings it is submitted that the *Mitchell Report* was correct in its opposition to the retention of the crime for eugenic reasons alone, particularly as the law neither prevents procreation nor requires sterilisation in other cases where unhealthy traits may well be inherited.[105]

Having rejected the two traditional theories for the retention of the offence, it is necessary to re-examine the discussion about the aims of the criminal law and the regulatory principles to be followed in implementing those aims. The answer to the present dilemma is, it is submitted, to be discovered by simply noting again that protection ought to be extended to those who, by reason of incapacity, be it age or otherwise, are not to be regarded as legally responsible for their participation in sexual activities.[106] For those persons the criminal law ought to provide sufficient safeguards from exploitation and corruption "particularly where they are too immature to make rational decisions or are in a state of physical, relational or economic dependence".[107] Statistics show that young children are the proper object of concern for, as one English study indicated,[108] 60 per cent of incest victims were aged between 10 and 16.[109]

(c) *Reform*

It seems difficult on this basis to justify the retention of the crime of incest in its present form. It is submitted that the conduct presently covered by the law of incest which remains offensive ought to be re-classified so that it can be encompassed within the proposed sexual offences code. Accordingly where the offensive conduct consists of activities involving a person under the age of 14, in situations which would presently be treated as incestuous, that conduct would be subsumed under the proposed offence of *sexual imposition.* As has been suggested, anybody engaging in sexual activities with an underage person will be guilty of an offence, the exact nature of the offence depending on whether penetration or merely contact was achieved. The effect of the present recommendation is that the relationship, if any, between the parties will be irrelevant to the legislature in fixing the maximum punishment although of course it would remain within the judge's discretion to treat it as a relevant factor when sentencing.[110] So

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[105] For example, in those cases in which the parents are imbeciles or in some way feeble-minded; *Mitchell Report*, 30.

[106] See text accompanying note 43 *supra.*

[107] Card, "Sexual Relations with Minors" [1975] *Crim. L. Rev.* 370, 371.

[108] Hall Williams, "The Neglect of Incest: A Criminologist's View" (1974) 14 *Med., Science and Law* 64, 66.

[109] Incest is a crime the incidence of which is extremely difficult to estimate but apparently the volume of incest offences accounts for just over 2% of sexual offences against women known to the police; Hughes, note 101 *supra*, 325.

[110] As an alternative to incarceration, it may be that social welfare agencies and community aid services will be able to play an increasingly important role in

far as people over the age of 14 are concerned the general principle has been that their activities are of no concern to the criminal law so long as the participants mutually consent to those activities and that the activities result in no harm to others or damage to the participants.[111] Accordingly, it is submitted that consensual activities between such persons, who currently stand in an incestuous relationship to one another, ought not to be within the purview of the criminal law. The general principle is extended to such people because, as has been demonstrated, there is no justification for the retention of the crime of incest in respect of them or their activities.

However, it is submitted that the age of consent ought to be 18 for persons who stand in a special relationship to each other for the possibilities of exploitation and the problems associated therewith justify the provision of a wider protection for the young persons concerned.[112] The expression "special relationship" in its terms ought to be drawn sufficiently widely to encompass within its ambit all those people who stand in a position of authority *vis-à-vis* a young person and who might as a result of that position be able to exploit the person sexually. The Michigan Code once again provides a definition which could be used by the local legislature as a model. It includes situations in which

> . . . the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.[113]

The proposal, it should be noted, would have two aspects. If the parties were members of the same household or were related in the way specified, then it would be an offence for sexual relations to occur between them and consent would be treated as irrelevant. The definition, it is submitted, is sufficiently wide to encompass a natural parent, adoptive parent, step-parent or foster parent, guardian or even an older sibling of a young person under the age of 18. Alternatively an offence would lie if a person in a position of authority were to use that position to obtain the victim's consent to sexual relations. People who would be expected to occupy such a position of authority would include school-teachers, probation officers, child-welfare officers, or even clergymen. The difference between the two types of offence how-

assisting families which represent something of a social problem. Perhaps with increasing expertise amongst social workers and with a developing perception, from members of the families in question, of their problems, cases of domestic abuse and incest may in the future be anticipated and even prevented.

111 See text accompanying notes 42 and 43 *supra.*

112 See note 87 *supra.*

113 Criminal Sexual Assault Act 1974 (Mich.) s. 520b(1)(b).

ever is quite significant. In the latter case the Crown would be obliged to prove the accused used his or her position to coerce the victim into submission. Accordingly, if a 17 year-old high school student and his or her teacher testified that sexual activity between them was a mutually desired occurrence, then it should be clear that no offence could be established if their evidence were believed.

The emphasis ought to be upon the potential abuse of a relationship of trust or dependency rather than arising simply from any blood connection that may exist, although in many cases the blood relationship will be the reason for the existence of the offender's position of authority over the victim. The age of 18 would appear to be the logical stage at which the criminal law should withdraw its protection for that is the age at which a young person attains majority and *de facto* dependence on parent or "person in authority" would no doubt normally end then also.[114]

To summarise briefly the proposals then, it is first recommended that the crime of incest as such should be abolished. Consensual sexual activities between family members, both of whom have attained the age of 18, would no longer be the subject of criminal sanctions. Persons who stand in the statutorily defined special relationship to one another would remain within the purview of the criminal law until the younger person had reached the age of majority, even though he or she had attained the age of 14, which would in all other cases be regarded as the age of consent. Should sexual relations occur between persons who were in this special relationship to one another then, in the circumstances described, the offender would be liable to punishment for *sexual imposition*,[115] although punishment would be less severe than it would be for any person having sexual relations with an under-age person who is, of course, also liable to punishment for sexual imposition.

2. *Abduction*

(a) *Existing law*

The abduction sections of the Crimes Act are notable in that they all relate to offences against women and this distinguishes them from other crimes with which they share common elements, namely kidnapping and false imprisonment, which are sexually neutral in their terms. The element common to all the abduction offences is the interference with the personal liberty of a female either by carrying her away or by detaining her against her will or the will of someone having the custody of her. The requisite *mens rea* is an intention on the offender's part either to obtain access to her property or to have sexual relations with her.

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[114] Card, note 107 *supra*, 376.

[115] The distinction between penetration and contact will be maintained for the activities in question but there should be no differentiation between heterosexual and homosexual conduct.

The general offence is created by section 86 of the Crimes Act which is drafted in the following archaic terms:

> Whosoever, from motives of lucre, takes away, or detains, against her will, a female of any age who has an interest in property or is a presumptive heiress or next of kin to any one having such interest, with intent to marry or carnally know her, or to cause her to be married, or carnally known, by any person, shall be liable to penal servitude for fourteen years.

The other offences (sections 87-90), using similar terminology, differ only in that they are more specific. In section 87, for example, the offence arises from the removal of a female, who must be under the age of 21, "out of the possession and against the will of any person having the lawful charge of her".

Quite apart from the offensive inference about proprietary control that parents or guardians presumably have over young women in their custody, these offences may be questioned on the grounds of social utility. It seems on a literal construction of the sections under review, that if two young lovers took off for a week's holiday together even though the girl, aged 20, knew that her father wanted her to stay at home and study for her exams, then that *prima facie* would be an abduction. Even if the couple simply went to the cinema for the evening without the permission of the young woman's father, it would apparently be sufficient to constitute the offence for the young man merely to intend sexual intercourse without actually achieving his purpose. An interesting point for speculation remains the situation in which the roles in the above hypothetical situations were reversed. Suppose that the young woman was the one who suggested the holiday, the elopement or merely an evening out. If, as appears, no offence would then exist it is submitted that the differential result, sexually discriminatory as it is, can not be justified.

(b) *Reform*

It is difficult now to support the continued existence of the separate offence of abduction. No doubt the original objective was to protect women with considerable fortunes from the impecunious grasp of unscrupulous Don Juans who were likely to take advantage of them. The possibility of such exploitation is no longer the concern of the criminal law whilst, equally clearly, the situation in which a person is forcibly detained against his or her will remains within its ambit. That being so it is proposed that the separate offence of abduction be abolished and the conduct[116] which remains offensive be subsumed under the general offence of kidnapping.[117]

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[116] See Yeager, "Crimes Against the Person: Homicide, Assault, Sexual Abuse and Kidnapping in the Proposed Iowa Criminal Code" (1975) 60 *Iowa L. Rev.* 503, 526.

[117] Crimes Act 1900 (N.S.W.) s. 90A.

VII GRADATION OF SEXUAL OFFENCES

At present the offence of rape embraces a wide variety of offences, all of which are punishable by the same maximum penalty of penal servitude for life. It appears however, that there exist a diversity of sexual activities which *prima facie* all amount to rape, some of which are extremely serious whilst others are significantly less so. The circumstances in which rape occurs vary markedly and include rape achieved by violence and/or physical injury to the victim, pack rape, institutional rape, marital rape and "date rape" to name but a few.

It would seem to be implicit in a rational code providing for sexual offences that types of conduct which vary materially from each other should not be treated as one offence for the simple reason that different conduct should be treated differently.[118] Accordingly the legislature ought to recognise that these differences exist by grading offences according to their seriousness and by providing a penalty appropriate to the crime in question. As the present statute makes no attempt to give the court any guidelines in pronouncing sentence in these cases the trial judge must draw on his or her own standards, experience and prejudice in fixing the sentence.[119] In many cases the sentencing judge's attitudes will mirror those of the community at large and indeed there may be consistency in sentencing patterns amongst various judges,[120] but it is equally possible that an occasional judge may pass sentences based on unique personal standards.

The individual judge may feel a particular revulsion, for example, towards rapes committed by visiting Asian seamen and may impose a sentence of unnecessary harshness to deter other potential rapists of the same ethnic and vocational group. To avert this possibility, courts ought to be provided with objective guidelines for matching the crime with the offensiveness of the actor's conduct.

Gradation of offences may also serve to reduce the jury's dilemma because, with a number of offences available, the legislature could make provision for alternative verdicts. This would present the jury with a range of options and would simultaneously reduce, if not eliminate, the problems associated with the "all or nothing" verdict. Before 1955, rape remained a capital offence and juries were forced to choose between a conviction with all the possible consequences that it entailed, or acquittal. With so much at stake for the defendant it could be readily understood that juries were unwilling to convict, even if the victim's testimony was believed, in all but the most serious cases.

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[118] Dworkin, "The Resistance Standard in Rape Legislation" (1966) 18 *Stan. L. Rev.* 680, 681.

[119] Newton, "Factors Affecting Sentencing Decisions in Rape Cases" (1976) Australian Institute of Criminology.

[120] Barber, "Judge and Jury Attitudes to Rape" (1974) 7 *Aust. & N.Z. J. Criminology* 157.

The effects of the dilemma were presumably felt by all those involved in enforcing the rape laws and prosecutors in particular, both at the police and Crown level, undoubtedly became very circumspect about laying charges or proceeding with cases unless the chances of conviction were high. This official reluctance was, in turn, probably transferred to victims who became less likely to make a complaint.

The problem of gradation is one of devising a grading system that distributes the entire group of offences rationally over the range of available punishments and, of course, it has to be drafted in sufficiently wide terms to anticipate future and as yet unforeseen possibilities. What then are the circumstances of aggravation that demand higher penalties? Reference has been made previously to the distinction between cases of *sexual attack* and those of *sexual imposition* and within each of these categories to the difference between offences of *sexual penetration* and those of *sexual contact*. The circumstances of aggravation should, of course, apply to all categories. The first aggravating circumstance would consist of the accused's committing any other felony in connection with the sexual conduct. So, for example, if the attacker robbed his or her victim in addition to the sexual attack then that ought to be a more serious offence. If the attack should result in physical injury to the victim then that also should be graded as an offence deserving of a more severe penalty.

Similarly, if the attacker is armed with a weapon and the victim reasonably apprehends its use, then that also should be treated as a circumstance of aggravation. The presence and/or participation of more than one attacker ought likewise to convert the offence into something more serious because a gang sexual attack can be a particularly humiliating and degrading form of sexual abuse.[121]

These factors are themselves based on common sense and are already questions of considerable significance for courts, for each of these circumstances or a combination of them are relied upon by the prosecution to lend objective support to the allegation that a victim in a sexual offence case did not consent. However, circumstances of aggravation really ought to have nothing to do with the issue of consent. If there is thought to be a correlation between their presence and the absence of consent it is very easy, but nevertheless facile, to take the next step and contend that the absence of aggravating circumstances of the type described, indicates that there was no lack of consent. Non-consensual sexual attack cases occur even though no objectively determined aggravating circumstances accompany the

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[121] Woods, "Some Aspects of Pack Rape in Sydney" (1969) 2 *Aust. & N.Z. J. Criminology* 105; Barber, "An Investigation into Rape and Attempted Rape Cases in Queensland" (1973) 6 *Aust. & N.Z. J. Criminology* 214; Wallace, "Rape, Pack Rape and Other Violent Sexual Offences Especially Committed by Juveniles" (1975) 8 *Aust. J. Forensic Sciences* 2.

attack. Cases of sexual attack *simpliciter* perhaps can be considered less serious forms of sexual attack and so deserving of less severe punishment, but their existence must be recognised in a sexual offences code.

Accordingly, at the lowest rung of the ladder of gradation in each offence, that is of *sexual attack* and *sexual imposition*, and within each category of penetration and contact respectively, the commission of the offence without any of the circumstances of aggravation ought to attract the least severe penalty of all.[122] A useful model for determining what aggravated conduct would occupy which rung on the ladder of graded offences would be the robbery sections of the New South Wales Crimes Act (sections 94-98). Robbery *simpliciter* is the least serious offence with a range of offences separating it from the most serious offence of armed robbery or robbery in company in which wounding occurs. A similar scale of offences could be provided in each of the proposed categories of sexual misconduct.

In conclusion, it can be said that the imposition of a uniform penalty was understandable in an era when the major aspect of the crime of rape was the violation of the woman's virtue. The sexual attack in contemporary society is still particularly degrading because the victim is forced to submit to an act of an intimate nature but gradation of offences helps to focus the inquiry where it properly belongs—on the culpability of the actor and on his or her intentions, rather than the ultimate consequence of his or her actions.[123]

VIII A STATUTORY DEFINITION FOR SEXUAL OFFENCES

Earlier it was noted that the Crimes Act provides no statutory definition for the offence of rape but that the common law definition, of non-consensual intercourse, was usually employed by the courts.[124] In a code, which is designed to specify criminal behaviour, failure to describe the requisite guilty intent that is to be punishable, would be a serious omission. Quite apart from that, the legislature ought to resolve the inconsistencies highlighted by the conflicting authorities of *D.P.P.* v. *Morgan*[125] and *R.* v. *Sperotto*.[126]

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[122] For a significant empirical study of rape offences including the penalties imposed, see N.S.W. Bureau of Crime, Statistics and Research, *Rape Offences* (1974). For a useful historical perspective of the problems involved, see Viano, "Rape and the Law in the United States: An Historical and Sociological Analysis" (1974) 2 *Int. J. Criminology & Penology* 317. For a recent inter-disciplinary study, see Chappell, "Cross-Cultural Research on Forcible Rape" (1976) 4 *Int. J. Criminology & Penology* 295.

[123] Note, "Recent Statutory Developments in the Definition of Forcible Rape" (1975) 61 *Va. L. Rev.* 1500, 1529.

[124] See text accompanying note 10 *supra.*

[125] [1976] A.C. 182.

[126] (1970) 92 W.N. (N.S.W.) 223.

1. *The Issue of Consent*

Any attempt to produce a statutory definition for any of the sexual offences contemplated in the proposed code would be incomplete without reference to the vexed problem of consent. Consent, it is said, involves three different concepts: "a physical power, a mental power, and a free and serious use of them. . ."[127] In most situations the consent standard is unlikely to lead to injustice. It will be fairly easy for the court to begin with a presumption of lack of consent (or non-consent) on the victim's behalf when he or she is attacked in a dark alley by a stranger or when he or she is asleep at the moment of penetration or when he or she is a young person aged, say, only 8 years. Difficulties do arise in cases in which the presumption may not be so readily relied upon, such as where the parties have had a pre-existing sexual relationship or situations in which the parties were clearly enjoying each other's company. In those situations it is highly likely that the courts, prosecutors and juries will begin introducing objective criteria to help them determine what is essentially a subjective issue, namely whether the victim consented to have sexual relations with the accused.[128] One commentator goes so far as to suggest that a completely objective standard, the resistance standard, ought to be introduced to replace the consent test.[129] This notion should be rejected since the proper focus of the criminal law's attention ought to be, insofar as it is possible, upon the intentions and behaviour of the accused rather than upon the conduct of the alleged victim.

The basic problem to be resolved is how the dividing line between sexual intercourse and rape is to be drawn. Often that will be a most difficult task. Apart from the cases in which the parties were previously familiar with one another there are other situations in which the dividing line will be far from clear. One of the parties may be an ambivalent sexual participant and in that event it is impossible to suggest that consent or non-consent is an active state of mind which

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[127] Jowitt, *Dictionary of English Law* (1959), cited in Scutt, "The Standard of Consent in Rape" [1976] *N.Z.L.J.* 462, 463.

[128] This trend has indeed been advocated by the judiciary on occasions. See *R.* v. *Hinton* [1961] Qd.R. 17; *R.* v. *Richards* [1965] Qd.R. 354.

[129] Dworkin, note 118 *supra*. That writer advocates that the degree of resistance should be the test in determining whether "a protected interest has been violated"; *id.*, 684. The resistance standard would, it is contended, eliminate the uncertainty attached to the consent standard and allow the offences of rape to be categorised and arranged according to their seriousness to the woman involved and society as a whole. However, it is questionable whether the level of resistance can be an accurate gauge of the severity of the consequences to the victim. Resistance is measured in terms of its reasonableness in the circumstances. But, of course, the victim whose resistance is not reasonable in the circumstances may well suffer just as severely as his or her reasonable counterpart. The resistance standard does not, it is ventured, eliminate uncertainty and it suffers from the problems inherent in any attempt to categorise the victim's behaviour without considering the conduct of the offender and its consequences for the victim.

can be interpreted. The likelihood of misinterpretation by the other party is correspondingly high with particularly awkward problems arising if either or both of the participants have consumed alcohol.[130] The dilemma thus posed for the courts is readily understood. They are charged with the unenviable task, many months later, of assessing the parties' conduct in situations in which that behaviour is frequently ambiguous.

Despite the difficulties inherent in the consent standard, there can be no suggestion that it ought to be replaced. The sexual offences presently provided for and those contemplated, raise a unique problem in criminal law for they involve, in the main, an act of sexual intercourse which, in other circumstances, is an act of mutual pleasure and gratification. The very fact that that act may be forced upon an unwilling person provides the reason for its criminality. The only factor that distinguishes the two situations is the consent or lack of consent on the part of the participants.

2. *Mens Rea*

It is clear that non-consensual intercourse, the *actus reus* of the crime, must be proved by the Crown.[131] The Crown of course also has to prove beyond reasonable doubt the necessary guilty intention. What is it?

It is suggested that New South Wales should follow the South Australian example and specifically provide for a statutory definition of the *mens rea* required for sexual offences.[132] There, the offence, as a result of their recent legislative amendments, is now complete when:

> [a] person who . . . has sexual intercourse with another person without the consent of that other person
>
> (a) knowing that that other person does not consent to sexual intercourse with him [or her]
>
> or
>
> (b) recklessly indifferent as to whether that other person consents to sexual intercourse with him [or her].[133]

The necessity for such a statutory definition will be better appreciated in the light of the conflict between *Morgan*[134] and *Sperotto*. In *Morgan*, the facts of which are sufficiently well known to avoid repetition here,

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[130] See, *e.g.*, *R.* v. *Lang* (1975) 62 Cr.App.R. 50.

[131] *Papadimitropoulous* (1957) 98 C.L.R. 249.

[132] As to the problem of the *mens rea* required for rape, see generally, Morris and Turner, "Two Problems in the Law of Rape" (1954) 2 *U.Q.L.J.* 247; O'Connor, "The Mental Element in Rape" (1975) 49 *A.L.J.* 12; Williams, "The Mental Element in Crime" (1975) 125 *N.L.J.* 968.

[133] Criminal Law Consolidation Act 1935 (S.A.) s. 48(1).

[134] For general comments about the case see Brett, "Did the Victim Consent or Was She Raped?" [1975] *A.C.L.D.* 85; Roden, "That Unreasonable Mistake" [1975] *A.C.L.D.* 109; Russell, "The Necessary Intent in Rape" (1977) 8 *Syd. L. Rev.* 196.

it was held that if an accused honestly believes, although mistakenly, that the woman was consenting to the act of intercourse then his belief negatives the mental element of the offence. The majority of the House of Lords held further that this mistaken belief on the part of the accused need not be reasonable.[135] However, in *Sperotto*,[136] the New South Wales Court of Criminal Appeal adopted a different approach insofar as it required that the mistaken belief must be reasonably held. The *Morgan* decision is clearly the correct one in terms of legal logic because the requirement that a mistaken belief as to consent must be based on reasonable grounds in order to excuse the defendant is wholly incompatible with the requisite *mens rea* for the offence,[137] for, in the words of Lord Fraser,

> [i]f the defendant believed [even on unreasonable grounds] that the woman was consenting to intercourse then he cannot have been carrying out an intention to have intercourse without her consent.[138]

Where a conflict exists on a point of principle as important as the one under discussion, it ought to be clarified by the legislature. It is suggested that there be two limbs to the statutory definition to include two levels of criminal responsibility, knowledge and recklessness.[139] By introducing the element of knowledge into the required *mens rea*, it means that the relevant time to examine the accused's mind is at the moment of penetration.[140] The alternative requirement of recklessness is an equally important one which owes its existence most clearly to

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[135] Their Lordships did have some difficulty in distinguishing *R.* v. *Tolson* (1889) 23 Q.B.D. 168 which required that a mistaken belief must be held on reasonable grounds. Lord Cross and Lord Fraser stated that, because bigamy is a statutory offence with the *mens rea* included, it can be distinguished from rape, a common law offence; [1976] A.C. 182, 199-200, 238. Lord Hailsham felt that the *mens rea* required for rape is different from that required for bigamy and that its meaning for one offence ought not to be imported into another offence; *id.*, 213-214. Perhaps it would have been easier if the House of Lords had overcome the "*Tolson* problem" by saying that, since the question of reasonableness was not in issue in *Tolson*, what was said in the case about it was *dicta* only and therefore not binding.

[136] See also *R.* v. *Taylor* (1967) 85 W.N. (Pt 1) (N.S.W.) 392; *R.* v. *Flaherty* (1968) 89 W.N. (Pt 1) (N.S.W.) 141.

[137] This conclusion does not mean that the reasonableness of the defendant's belief is now irrelevant. It is wrong to suggest that a defendant is entitled to an acquittal on a rape charge merely because he asserts his belief that the woman was consenting. The defendant must convince the jury of the genuineness of his belief and to that end the reasonableness of the grounds on which the belief was allegedly held will be an extremely important piece of evidence.

[138] [1976] A.C. 182, 237.

[139] Note 123 *supra*, 1534.

[140] The South Australian Supreme Court took this approach in a case which was decided a little earlier than *Morgan* but which caused little or no controversy although the same decision was reached; *R.* v. *Brown* (1975) 10 S.A.S.R. 139. Victoria now seems to lean in favour of that approach as a result of the recent decision in *R.* v. *Maes* [1975] V.R. 547.

Morgan.[141] First, its inclusion strengthens and clarifies the law of rape in that the net of criminal intent is cast to gather within its reach a number of persons who previously were merely suspected of deserving punishment for the offence.[142] Secondly, it adds rationality to the established principles of criminal law by equating the *mens rea* for rape with that of other serious crimes such as murder.

Finally, it remains to be said that the introduction of the notion of the "defence" of honest and reasonable mistake into this area of the law is confusing rather than illuminating.[143] It is unhelpful because it is only in respect of offences which do not require *mens rea* that the doctrine has been accepted by the courts.[144] That concept has been confused with the assertion by the accused of his mistaken belief in certain facts which, if true, would exculpate him. It is that latter issue which is relevant to rape cases. When the accused contends that he had a mistaken belief that the woman was consenting he is simply attempting to deny that he had the necessary *mens rea* for the crime. If the jury accepts his evidence then he is entitled to be acquitted because the existence of the mistaken belief is inconsistent with the requisite mental element.[145]

IX FUTURE PERSPECTIVES

This has been an attempt to lay down guidelines for the implementation of a code which specifies the types of sexual activity which are sufficiently offensive to attract the sanctions of the criminal law. A number of other activities, which may not be explicitly sexual in the sense that there has been no sexual contact or penetration, may nonetheless relate to the unwanted display, or exploitation of sex. To some extent these subsidiary activities may necessarily be the subject of criminal penalties. At present extensive legislation exists to control these activities and offences relating to obscenity, public indecency or

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[141] The *Heilbron Report*, para. 77 suggests that, for the first time, in *Morgan* the courts have clearly stated that recklessness is a sufficient ingredient of the *mens rea* required for a conviction.

[142] The court in *Sperotto* had already clarified this issue for N.S.W. purposes; (1970) 92 W.N. (N.S.W.) 223, 226.

[143] Roden, note 134 *supra*, 111.

[144] *R.* v. *Brown* (1975) 10 S.A.S.R. 139; *Mitchell Report*, 7.

[145] Of course, if the jury finds that he did have the guilty intent then his assertion of mistaken belief will be effectively negatived for if he has intercourse knowing that she did not consent, there is no room for a mistaken belief and if he was reckless as to whether or not she consented, then he could not have held any genuine belief at all; *Heilbron Report*, para. 56. There are many properly recognised defences which deserve attention. Suffice it to mention but one, namely, drunkenness, as to which particular notice ought to be paid to the problems surrounding the decision of the House of Lords in *D.P.P.* v. *Majewski* [1976] 2 All E.R. 142. For comments on that controversial case, see Farrier, "Intoxication: Legal Logic or Common Sense" (1976) 39 *M.L.R.* 578; Williams, "Intoxication and Specific Intent" (1976) 126 *N.L.J.* 658.

exposure and prostitution,[146] are not only well-entrenched but far-reaching.

Suffice it to say that any government wishing to rationalise the approach it is going to adopt in respect of sexual behaviour ought to include these problems within its review.[147] In doing so it should bear in mind the exhortation made earlier,[148] that the guiding principle in this context ought to be that the law should penalise only those activities where affronts are caused to identifiable members of the public who testify as to the harm that they have suffered as a consequence.[149]

This treatment has been directed only to the substantive aspects of sexual offences. Outside the scope of this article lies an enormous array of difficulties arising from the present adjectival law. The methods by which, and the forum in which, evidence is taken in sexual offences cases, is a matter deserving of close scrutiny. The number of questions that remain to be answered will bear sufficient testimony to the range of problems that lie ahead. Should the victim be enabled to give affidavit evidence to save her the ordeal of having to relate in open court embarrassing and distressing details of an experience she would rather forget? Perhaps if that is thought to be unduly radical, should she be permitted to adopt that procedure at the committal proceedings only?[150] To what extent, if at all, should the victim be cross-examined about her previous sexual experience? Not at all? Only if she and the accused have had a previous sexual experience? In all cases with the

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[146] The offences which are ancillary to the practice of prostitution are probably regarded as the most serious of those in the group of offences mentioned. See Crimes Act 1900 (N.S.W.) ss 91A, B, D (which relate to procuring of persons for prostitution and employment in brothels). See also s. 81B which relates to the solicitation of males.

[147] The N.S.W. Government conducted a public Seminar entitled "Victimless Crimes" at the Seymour Centre in Sydney in February 1977. It did so in an attempt to monitor public opinion and to anticipate reactions to its plans to de-criminalise certain so-called "victimless crimes", including prostitution and homosexuality. See *National Times*, 20-27 February 1977 7. Quite clearly the Government means to deal with those particular problems in a context other than its platform for sexual offences reform. Whilst that may be appropriate so far as prostitution is concerned, it is plainly not so in relation to homosexuality. Homosexual practices are at the very core of the problem of what sexual conduct ought to be considered as criminal. Although political expediency may require that the Government consider homosexual law reform in the same breath as reform in the areas of drunkenness, vagrancy and marijuhuana use, logic and rationality demand that the issue be resolved along with other proposals for the reform of sexual offences legislation.

[148] Note 42 *supra*.

[149] For a sample of the literature on offences relating to prostitution, see Hall Williams, "The Street Offences Act, 1959" (1960) 23 *M.L.R.* 173; Hall Williams, "Sexual Offences: The British Experience" (1960) 25 *Law & Contemp. Probs* 334, 343; Bullough, *The History of Prostitution* (1964).

[150] In South Australia the defendant, or his counsel, can only call the alleged victim of a sexual offence to give oral evidence at the preliminary hearing with the Justice's permission; Justices Act, 1921 (S.A.) ss 106a, b.

trial judge's leave, subject to a test of relevance? To what extent should there be any need for corroboration of her testimony? To what extent should evidence of the victim's complaint be admissible?[151]

It is equally important in all the furore about the need to extend greater protection to the victim of a sexual offence (the importance of which ought never to be under-estimated) to remember that the rights of the accused need to be safeguarded as well. In fact, insofar as there have been suggestions that the defendant in a rape trial ought to be placed in a different position from defendants in other criminal matters, they ought to be totally rejected. It is only in this light that the issue of the defendant's present right, and its continued existence, to give an unsworn statement from the dock can be examined.[152]

Another significant issue relates to the problem of open courts. Does the administration of justice demand that all courts, including those dealing with sexual offences, be open to the public? Should the courts be closed when the victim is a small child? What restrictions, if any, ought to be placed on the publication of proceedings of a trial involving a sexual offence? Should the name of the victim be suppressed? Finally, should the same restrictions or protections that are afforded the victim be extended to the accused?

Procedural problems similarly abound. What criteria ought to be adopted in determining whether a defendant in a sexual offence case should be allowed bail? Should the composition of juries be regulated to ensure that a specific number of jurors in any such case are of a particular sex?[153] Other procedural difficulties tend in a sense to be institutional. As with any serious crime there remains with the police a residue of discretion in making the decision whether the alleged offence, after it has been reported should be further investigated.

Supposing that that preliminary step has been taken there remains a second discretionary power vested in the legal hierarchy—whether, after the apprehension of the alleged offender, he should be prosecuted. Police questioning is certain to be tough and uncompromising for it is part of their responsibility to ascertain the truth. In addition to the police investigation, the victim is required to undergo a medical examination which consists of an examination of her clothing, and the extent of any injuries, both external and internal. The presence or absence of injuries is regarded as being a highly relevant factor by the police in deciding whether or not to prosecute. Quite clearly the victim

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[151] This problem was discussed by the High Court in *Breen* v. *R.* (1976) 50 A.L.J.R. 534. For a short comment on this case see (1977) 51 *A.L.J.* 43.

[152] Crimes Act 1900 (N.S.W.) s. 405.

[153] The Heilbron Committee recommended that there should be a minimum of four men and four women on the jury in all rape trials; *Heilbron Report*, para. 188. However the Mitchell Committee recommended no change in the methods of jury selection after examining the composition of juries in all rape cases in South Australia for the preceding 10 years; *Mitchell Report*, 55.

is subjected to a considerable ordeal, not only as the victim of the sexual offence, but because as the victim she will normally be indispensable once the process of investigation begins. That scenario provides a most awkward dilemma. How can the victim's ordeal be ameliorated simultaneously with the necessity for the investigative authorities to obtain evidence which will enable them to secure a conviction? Should a special Police Squad be established solely to deal with sexual offences? Should police and medical personnel be specially trained so that they would become better equipped to deal with the victims of sexual offences? Is it likely that the present institutional hazards constrain many victims from reporting such crimes?

The answers to these, and a myriad of other questions, are not easily provided. The solution requires considerable thought and particular care, for its consequences will have fundamental importance for the community. However, to begin with it is imperative to produce a rational code of sexual offences which will be the subject of criminal sanctions. It is only when that task is completed that the problems just outlined can be tackled.[154]

[154] For assistance in the resolution of these ancillary problems, reference ought to be made to the recommendations of the Victorian Law Reform Commissioner, Mr T. Smith; see note 3 *supra*.