The Law Commission

Working Paper No 57

Codification of the Criminal Law

Conspiracies relating to Morals and Decency

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It does not represent the final views of the Law Commission.

This paper is published at the same time as a consultative document prepared by a Home Office Working Party on Vagrancy and Street Offences. Where the Working Party's treatment of certain topics makes it unnecessary for these to be dealt with in this Working Paper, reference is made to their paragraphs. For the convenience of those we wish to consult, a copy of the Home Office consultative document is being sent with this Working Paper.

The Law Commission would be grateful for comments on this Working Paper before 31 March 1975.

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Table of Contents

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CONSPIRACIES RELATING TO MORALS AND DECENCY

I. INTRODUCTION

Conspiracy

1. In Working Paper No. 50[1], the Working Party assisting us in the task of codifying the general part of the criminal law examined the inchoate offence of conspiracy. They provisionally proposed that the offence of criminal conspiracy should be limited to cases where the object of the agreement alleged against the accused was the commission of a criminal offence. We provisionally agree with this recommendation[2]. In a previous examination of conspiracy a sub-committee of the Criminal Law Revision Committee reached the same conclusion.

2. Conspiracy is not now so confined. The present law extends to agreements to commit any "unlawful act". The precise limits of what amounts to an unlawful act for this purpose are subject to much uncertainty and this uncertainty combined with the width of the offence has given rise to criticism. The Working Party, however, foresaw that it would be necessary to enquire whether there are activities which, under the present law, can be caught only by a charge of conspiracy, and which ought to remain subject to the sanctions of

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1. Working Paper No. 50, "Inchoate Offences".
2. See Working Paper No. 50, Law Commission's Introduction p.v *et seq*.

the criminal law if their proposal were implemented. Whilst it was recognised that this area of conspiracy was difficult to sub-divide the Working Party suggested that it should, for purposes of examination, be divided into six parts[3]. Conspiracies relating to morals and decency formed the third of these parts.

3. In a necessarily very brief account of this area of the law of conspiracy the Working Party concluded that it was necessary, in the light of the cases of Shaw v. D.P.P.[4] and Knuller v. D.P.P.,[5] to examine the offences of conspiracy to corrupt public morals and conspiracy to outrage public decency. The Working Party accepted that, even without a conspiracy charge, it was an offence to do any act "in public" which outrages public decency, but treated corrupting public morals as conduct requiring the element of agreement to render it criminal. If, however, there is, in fact, a substantive offence of corrupting public morals, the limited examination of this area of conspiracy envisaged by the Working Party is clearly unnecessary; if outraging public decency and corrupting public morals are substantive common law offences then the restriction proposed for conspiracy would leave no gap in the law. We ask first, therefore, whether these two offences have an existence irrespective of any conspiracy.

Corrupting public morals

4. In Shaw it was argued by the prosecution that the conviction of the defendant on a charge of conspiracy to corrupt public morals could be supported "on two alternative grounds: (1) that conduct calculated and intended to corrupt

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3. Working Paper No. 50., p. 5 and p. 10 et seq.
4. [1962] A.C. 220, referred to hereafter as Shaw.
5. [1973] A.C. 435, referred to hereafter as Knuller.

public morals is indictable as a substantive offence and consequently a conspiracy to this end is indictable as a conspiracy to commit a criminal offence; alternatively (2) a conspiracy to corrupt morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury"[6]. In dismissing the appeal, the Court of Criminal Appeal rested their decision on the first of these grounds. "It is", said Ashworth J., giving the Court's judgment, "an established principle of common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable misdemeanour."[7] However, the House of Lords held that the conviction could be supported on the second ground and did not decide the case on the first ground. But Lord Tucker said that he was not to be taken as rejecting it[8].

Outraging public decency

5. In Knuller[9], the second count in the indictment was one of conspiracy to outrage public decency. The defendants' appeal against their conviction succeeded but for widely differing reasons. Despite the fact that, until a very late stage in the argument in the House of Lords, it was apparently conceded that the offence of conspiracy to outrage public decency existed, Lord Reid and Lord Diplock allowed the appeal on the ground that the offence of conspiracy to outrage public decency was an offence unknown to the law[10]; it followed that, in their opinion, no generalised substantive offence of outraging public decency existed. Lord Simon of Glaisdale and Lord Kilbrandon allowed the appeal on the ground of misdirection but both held that the offence of conspiracy to outrage public

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6. [1962] A.C. 220, 289-290 per Lord Tucker.
7. Ibid., 233 (C.C.A.).
8. Ibid., 290.
9. [1973] A.C. 435.
10. Ibid., at 457 and 469 et seq.

decency existed[11]. Lord Simon and Lord Kilbrandon went further and held specifically that a substantive common law offence of conduct outraging public decency existed. Lord Morris (dissenting, because he held that there was no misdirection) was of opinion that the appellants' counsel had accepted that there was an offence of conspiracy to outrage public decency and he did not specifically consider whether or not a substantive offence existed[12]. He did, however, cite with approval Mayling[13] where a conviction for outraging public decency irrespective of conspiracy had been upheld by the Court of Criminal Appeal.

6. Whilst it would, we think, be open to the House of Lords, without invoking its power to overrule its own previous decisions[14], to hold that the substantive offences of corrupting public morals and outraging public decency do not exist, authority at present seems to show that they do. If, therefore, in this area, a conspiracy charge adds nothing to the width of the offences covered, their examination in the limited field envisaged in Working Paper No. 50 would be unnecessary. In view, however, of the dissenting opinions expressed in the House of Lords, there must be some doubt as to whether the substantive offences would, in fact, be held to exist. We believe that this doubt is one shared by the practising profession, and that the general offences of corrupting morals

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11. Ibid., 493 and 497.

12. Ibid., 467.

13. [1963] 2 Q.B. 717.

14. Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234. The relevant part of this statement reads -

> "Their Lordships...recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the...especial need for certainty as to the criminal law."

and outraging decency are usually only charged as the unlawful object of a conspiracy. Even, therefore, as a part of our examination of conspiracy, consideration should be given to these offences.

The position as to common law offences

7. Item XIV of our First Programme of Law Reform[15] contemplated an examination of "Common Law Misdemeanours; Crime of Conspiracy". We recommended that the examining agency should be the Criminal Law Revision Committee. The Home Secretary referred the subject of common law misdemeanours to the Criminal Law Revision Committee and a sub-committee of that body gave it preliminary consideration, but it was then decided that the crime of conspiracy should be considered by the Law Commission's Working Party. Our Second Programme[16], in Item XVIII, proposed a comprehensive examination of the criminal law with a view to its codification, allocated responsibility for certain early stages in this long task and announced the intention of mapping out the later stages as work progressed. It did not, however, make specific reference to Item XIV in the First Programme.

8. It has now been decided that an exercise aimed at considering all the common law offences in one group would be inappropriate and unsystematic. It will be far better to consider them and replace them by legislation in their own individual contexts and as part of the study of that branch of the law with which each is concerned. It has, therefore, been agreed that we should undertake an examination of the common law offences relating to morals and decency in the context of our examination of the crime of conspiracy. We are primarily concerned with offences which do not fall within the category of sexual offences as they are commonly understood. Those offences will be the subject of a separate study[17].

15. (1965) Law Com. No. 1. p. 13.

16. (1968) Law Com. No. 14. p.6.

17. See the Law Commission's Second Programme of Law Reform, (1968) Law Com. No. 14, Item XVIII.

Limits of our examination

9. We must, at the outset, make it clear that we are not, in this paper, considering a complete codification of the criminal law relating to morals and decency. There is much legislation on the statute book regulating morals and decency and with this we are concerned only to the extent that it overlaps with, and provides criminal sanctions for, conduct also covered by common law offences. Our concern in this paper is to identify the conduct which ought to be made criminal by statute before all common law offences in this area can be abolished and the inchoate crime of conspiracy limited in the way proposed.

Common law offences relating to morals and decency

10. Our examination of this branch of the law has shown that there are a number of common law offences of somewhat uncertain scope, derived from cases decided in social conditions very different from our own. These include not only the wide offences of corrupting public morals and outraging public decency but also offences of more limited character (some probably now subsumed under the general offence). In Knuller, Lord Reid identified "three well known offences of general application which involve indecency":[18] they were -

(a) indecent exposure of the person;

(b) keeping a disorderly house; and

(c) exposure or exhibition in public of indecent things or acts.

The Home Office Working Party

11. Our work has proceeded contemporaneously with that of a Working Party set up by the Home Office to examine the law

18. [1973] A.C. 435, 458.

on Vagrancy and Street Offences. The law on vagrancy is to be found principally in the Vagrancy Acts 1824-1935. Section 4 of the Vagrancy Act 1824 contains a collection of offences which include -

(a) wilfully exposing to view, in any street, road, highway or public place, any obscene print, picture, or other indecent exhibition; and

(b) wilfully, openly, lewdly, and obscenely exposing the [male] person with intent to insult any female.

Clearly these two offences overlap with the common law offences of indecent exposure of the person and exhibition of indecent things. In addition, in their examination of street offences the Working Party had proposed to consider the question of that method of solicitation for prostitution which consists of the use of advertisements in shop windows or display cabinets outside shops.

Co-operation between the Home Office Working Party and the Law Commission

12. The Home Office Working Party is publishing a consultative document at the same time as we publish this paper. We have agreed that, for the convenience of those whom we consult, consideration of those topics which overlap our respective terms of reference shall be considered in one or other paper only. The consultative document issued by the Working Party makes provisional proposals for the creation of new statutory offences to take the place of the Vagrancy Act offences mentioned in the last paragraph. Implementation of their proposals would, we think, make it possible to abolish the common law offence of public exhibition of indecent acts and things. We do not therefore make new proposals to replace this offence in this paper. Implementation of the Working

Party's proposals relating to indecent exposure would deal with all cases of male exhibitionism, and our consideration of the common law offence is therefore restricted to the very limited types of conduct which come within the common law offence but are excluded from the Vagrancy Act offence by the requirement of intent to insult a female. The third topic mentioned in paragraph 11, solicitation by prostitutes by means of shop window advertisements, could be looked at in the context of street offences; but this conduct could probably also be prosecuted as a conspiracy to corrupt public morals and, in the case of a male shopkeeper, is sometimes prosecuted as an offence under section 30 of the Sexual Offences Act 1956 (which penalises living on immoral earnings). Because a charge of conspiracy to corrupt is available, it has been decided that we shall consider this matter in our Working Paper. We are much indebted to the Working Party for the assistance and information we have had from them on this aspect of our work, particularly from the senior police officers who are amongst their members. To facilitate consultation on our paper we are sending a copy of the Working Party's consultative document to all recipients of our paper.

Scheme of the paper

13. This paper first examines the law relating to morals and decency as, by legislation and precedent, it existed prior to the decision of the House of Lords in Shaw. After considering this very important decision, which established the existence of the wide offence of conspiracy to corrupt public morals, we examine the conduct which has been prosecuted by means of this offence. Between the decisions in Shaw and Knuller the Obscene Publications Act 1964 and the Sexual Offences Act 1967 were enacted and their provisions are briefly considered. The decision of the House of Lords in Knuller and the establishment of the generalised offence of conspiracy to outrage public decency is the last subject in our examination of the present law. We next seek to identify the gaps in the law which the abolition of all common law offences in this area

of the law would leave. Finally, we make provisional proposals for reform of the law. We suggest the creation of new statutory offences and certain amendments to existing legislation, the implementation of which would, in our provisional view, make it possible to abolish all common law offences in this area of the law.

II THE LAW PRIOR TO SHAW

A. The development of the common law

14. In the present section of this paper we trace the development of the law before Shaw[19], and in particular the growth of the common law from the earliest cases dealing with morals and decency. It will be appreciated that our chief concern is to outline the law in this area so that the extent of its operation may be borne in mind when making proposals for its revision and rationalisation. We are concerned not with whether recent cases were rightly decided in the light of the authorities, but simply with the state of the law as it was believed to be prior to those cases; and for these reasons our treatment of this subject has been kept as short as is consistent with adequate exposition of what is an extremely diffuse and obscure branch of the law.

15. The jurisdiction of the secular courts (as distinct from that of the ecclesiastical courts) to deal with conduct relating to morals was not fully established until the eighteenth century. The first case in which this jurisdiction was asserted was Sedley[20] where the defendant had, apparently, exposed himself from a balcony to the crowd in Covent Garden and thrown down upon them bottles containing urine. The Court of King's Bench asserted that, in succession to the Star Chamber, it was

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19. [1962] A.C. 220.
20. (1663] 1 Sid. 168; 1 Keb. 620.

"custos morum de touts les subjects le Roy" and that it was high time to punish such profane actions contrary both to modesty and Christianity. The court appears not to have differentiated between offences against religion and morals, and even the longest of the reports (in Siderfin) is no more than a note about the case. In Curl[21] the defendant was indicted for printing an "obscaenum libellum", "Venus in the Cloister" "machinans et intendens bonos mores corrumpere". The defence contended that "whatever tends to corrupt the morals of the people ought to be censured in the Spiritual Court, to which properly all such causes belong". But the court said that "if it reflects on religion, virtue or morality, if it tends to disturb the civil order of society, I think it is a temporal offence" and this accordingly gave the court jurisdiction. Finally, in Delaval[22], there was a charge of conspiracy to remove a girl of eighteen from her master (one of the defendants) without her father's knowledge, into the hands of Sir Francis Delaval "for the purpose of prostitution" - that is, she was to become his kept mistress. The third party to the conspiracy was a lawyer, who cancelled the deeds of apprenticeship. Lord Mansfield, again in answer, it seems, to arguments that Delaval's offence was not cognisable in the temporal courts, cited Sedley, Curl and a case of wife-selling which he remembered from Lord Hardwicke's time in support of his view that the courts had "superintendency of offences contra bonos mores". He added that the presence of a conspiracy also gave the court jurisdiction. But his other remarks make it clear that his purpose was to justify the assumption by a temporal court of jurisdiction to treat Delaval's conduct as an offence triable by it. The basis of the jurisdiction there asserted by Lord Mansfield, a "superintendency" over offences against morals which assumed the power of the court to create new offences, is one which became obsolete with the increasing intervention of the legislature, and it is now clear, after

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21. (1727) 2 Str. 788; 1 Barn. K.B. 29.
22. (1763) 3 Burr. 1434; 1 Black. W. 410 and 439.

Shaw and Knuller[23], that the courts have jurisdiction only in the case of offences already established by law.

16. Nevertheless, after Delaval the jurisdiction of the secular courts over conduct relating to morals was not in dispute. What later cases served to do was to indicate with more or less precision the areas in which the courts would intervene. Not all conduct was capable of being indicted: neither adultery nor prostitution as such were matters which the courts assumed jurisdiction to try. The reported decisions related to particular situations which were regarded by later commentators and writers as separate misdemeanours[24]. Five such misdemeanours in this field were distinguishable, and we outline these in the following paragraphs.

1. Indecent exposure

17. The facts of Sedley involved an indecent exposure, but the first reported case subsequent to Sedley in which such behaviour was successfully prosecuted appears to have been Crunden[25], in 1809. Later cases indicated the range of conduct which fell within the offence. That conduct includes exposure of the whole body or sexual organs[26], sexual intercourse in public[27], nude bathing[28] and homosexual conduct in public[29]. It may be noted, however, that in no reported case

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23. See para. 43 fn. 96.

24. As to pre-Shaw commentaries, see e.g. Stephen's Digest of the Criminal Law (9th ed., 1950), pp. 171-173, 177, 180; Russell on Crime (11th ed., 1958), pp. 1633-43, 1646 et seq.

25. (1809) 2 Camp. 89.

26. E.g. Rouverard (1830) unrep. (see Parke B. in Webb (1848) 3 Cox C.C. 183, 184); Holmes (1853) Dears. 207; Thallman (1863) 9 Cox C.C. 388.

27. Elliot and White (1861) Le. & Ca. 103. See also Carnill v. Edwards [1953] 1 W.L.R. 290.

28. Crunden (1809) 2 Camp. 89; Reed (1871) 12 Cox C.C. 1.

29. Bunyan and Morgan (1844) 1 Cox C.C. 74; Harris and Cocks (1871) L.R. 1 C.C.R. 282.

relating to sexual intercourse in public have the defendants actually been convicted of the common law offence and that, in what appears to be the only reported case involving simply exposure by a female, the indictment was quashed "because nothing appears immodest or unlawful"[30]. In the most recent leading case, Mayling[31], the authorities were cited, although the indictment referred to an "outrage to public decency". The conduct in this case involved homosexual activity in public.

18. The offence requires a certain number of actual or potential witnesses[32] and an act occuring in a "public" place[33]. This act has to be indecent, but according to the most recent authority, there is no need for the witnesses to say that they were in fact outraged or disgusted by what they saw[34]. The only intention required is the intention to do

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30. Gallard (1733) W.Kel. 163, where D ran "in the common Way naked down to the Waist".

31. [1963] 2 Q.B. 717.

32. See Watson (1847) 2 Cox C.C. 376: held, exposure to one witness not enought to support an indictment; Webb (1848) 3 Cox C.C. 183: held, if indictment alleges exposure to more than one witness, this must be proved. But see Mayling [1963] 2 Q.B. 717 where it was held that "more than one person must ... have been able to see the act" (emphasis added) which may mean that, for this offence, witnesses need only be potential, not actual.

33. E.g. the top deck of an omnibus (Holmes (1853) Dears. 207); a roof of a private house which would have been seen only from other houses (Thallman (1863) 9 Cox C.C. 388); areas within sight of houses (Reed (1871) 12 Cox C.C. 1); a place where the public habitually went although without right to do so (Wellard (1884) 14 Q.B.D. 63) and also public urinals if the exposure is in fact public - Harris and Cocks (1871) L.R.1. C.C.R. 282, but compare Orchard and Thurtle (1848) 3 Cox C.C. 248.

34. Mayling [1963] 2 Q.B. 717. Such evidence, if required, could apparently be given by a police officer. What happens if the witness is willing is not clear. In Wellard (1884) 14 Q.B.D. 63, D had paid several little girls to go and see him, and in this sense they may have been willing, but were too young to establish "consent", even if it affected liability. The question arises again in Saunders (1875) 1 Q.B.D. 15, a case of an indecent exhibition: see para. 19.

the act; there is no need to intend to outrage or disgust witnesses.

2. Public exhibition of indecent acts and things

19. The public exhibition of indecent things seems to have been established as an indictable offence by cases decided in the eighteenth and nineteenth centuries[35]. But two of the cases sometimes cited, Herring v. Walround[36] and Clark[37], concerned dead bodies and therefore might equally well be categorised as within the common law offence covering failure to bury a body by a person under an obligation to do so[38]. Indeed, the first of these two cases did not involve a criminal charge at all. However, in Lynn[39] it was held an indictable offence to disinter a corpse from a graveyard, as being highly indecent and contra bonos mores, "at the bare idea alone of which nature revolted". A clearer case was Saunders[40], where the defendant showmen kept a booth on Epsom Downs for the purpose of an indecent exhibition to those who paid. Since those who entered were willing witnesses, the case might be regarded as a forerunner of Shaw on the basis that what the defendants were doing was corrupting public morals, but the decision itself stands on the basis of the indecency of the exhibition. In Grey[41] a herbalist put in his shop window adjoining the highway a picture of a man covered in eruptive sores, "the effect of which was disgusting to the last degree"

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35. See e.g. Stephen's Digest (9th ed., 1950), p. 173; Russell on Crime (12th ed., 1964) p. 1429.

36. (1682) 2 Cha. Ca. 110.

37. (1883) 15 Cox C.C. 171.

38. See Stewart (1840) 12 A. & E. 773.

39. (1788) 2 T.R. 733; and see Hunter [1973] 3 W.L.R. 374 (conspiracy to prevent burial). Today Lynn would presumably be guilty of an offence under the Criminal Damage Act 1971; compare Farrant, "The Times" 12 and 15 June 1974.

40. (1875) 1 Q.B.D. 15.

41. (1864) 4 F. & F. 73.

and "calculated to turn the stomach". Willes J. found him guilty of a nuisance even though his motive was innocent and there was "nothing indecent or immoral in the exhibition". In so far as these cases disclose a consistent principle, they seem to indicate a species of public nuisance[42], where intention to do the act is enough to constitute the offence, and innocent motive is irrelevant. There may on the facts be an overlap with keeping a disorderly house, with which we deal next, but the elements of the offence itself are different.

3. Keeping a disorderly house

20. Keeping a disorderly house is a firmly established offence which has been charged at common law for over two hundred years, At common law a disorderly house was not defined but included any house which a jury found to be open to and frequented by persons conducting themselves so as to violate law and good order[43]. Where several defendants are concerned in the running of a disorderly house, they have on occasion been indicted for "conspiracy to corrupt the morals of and to debauch persons resorting to" the house[44]. A broad definition was advanced by counsel in Quinn and Bloom[45] which the Court of Criminal Appeal accepted -

> "a house conducted contrary to law and good order in that matters are performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency or (b) tends to corrupt or deprave or (c) is otherwise calculated to injure the public interest so as to call for condemnation and punishment."

This definition is, perhaps, in regard to (c), incompatible with the decisions in Shaw and Knuller as explained in the

42. Formerly, offences against public morals, including public exhibition of indecent acts, were treated by writers as falling within the rubric of public nuisance, but this is not now always so; compare Archbold (38th ed., 1973), para. 3822 and Russell on Crime (12th ed., 1964), pp. 1423 and 1429, with Smith and Hogan Criminal Law (3rd ed., 1973), p. 620.

43. Berg (1927) 20 Cr. App. R. 38.

44. Ibid.; Dale (1960) unrep., cited in Shaw [1962] A.C. 220, 288.

45. [1962] 2 Q.B. 245, 255, where the court expressly followed the principle of Shaw as then understood.

latter case[46]. But the court expressly confined its attention to cases where indecent performances where alleged and left open what might be the test in other cases.

21. A further requirement of the offence is that there must be some element of persistence in keeping the house[47], which is one distinction between it and indecent exhibition. Another distinction is that, although outraging public decency is one possible test, an alternative is the corruption of public morals. Nevertheless, the court in Quinn and Bloom said that these tests were not mutually exclusive; a case might fall within all three tests adumbrated in the definition which it accepted[48]. But it seems that different sentences will be imposed according to whether a disorderly house falls within test (a) or (b), the latter being regarded as the more serious[49].

22. To what categories of premises does the offence apply? They may be considered in four groups.

(i) Brothels: these are now largely covered by statute[50], but the common law liability remains and has been invoked in cases where premises were made available for sexual activity but fell short of being a brothel[51].

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46. See para. 43, fn. 96.

47. Brady and Ram (1963) 47 Cr. App. R. 196.

48. [1962] 2 Q.B. 245, 255.

49. See Griffin and Farmer (1974) 58 Cr. App. R. 229, where on a conviction for keeping a disorderly house the Court of Appeal substituted a fine for a prison sentence because a public house strip show was indecent but not corrupting.

50. Sexual Offences Act 1956, ss. 33-36 and Sexual Offences Act 1967, s. 6.

51. Berg (1927) 20 Cr. App. R. 38; Prendergast [1966] Crim. L. R. 169; Blake [1966] Crim. L.R. 232; Andrews [1967] Crim. L.R. 376.

(ii) Gaming houses: common law liability has now been abolished by section 53(2) of the Gaming Act 1968 and they are now entirely dealt with by statute[52].

(iii) Public places of refreshment and entertainment: these are now generally registered under statute by systems of licensing the premises, and conduct of the type which could be prosecuted as keeping a disorderly house will often be a specific offence by the licensee[53].

(iv) Theatres and cinemas are also subject to their own legislation, but as we point out below[54], gaps in this legislation necessitate the charge of keeping a disorderly house in some instances.

It will be seen that, apart from the cases referred to in the first and fourth categories above, statutory offences would seem to be available in all cases where a charge of keeping a disorderly house might be brought.

4. Obscene libel

23. We have seen[55] that the defendant in Curl[56] was charged with obscene libel, and this offence appears, indeed,

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52. Betting, Gaming and Lotteries Act 1963 and Gaming Act 1968.

53. See Gaming Act 1845, s. 11; Public Health Acts Amendment Act 1890; Home Counties (Music and Dancing) Licensing Act 1926; Hypnotism Act 1952; London Government Act 1963, s. 52 and Sch. 12; Licensing Act 1964, s. 4. and ss. 175-177; Private Places of Entertainment (Licensing) Act 1967; Late Night Refreshment Houses Act 1969, ss. 7-9. All save the Acts of 1845, 1964 and 1969 have been amended by the Local Government Act 1972.

54. Paras. 67-68.

55. See para. 15.

56. (1727) 2 Str. 788; 1 Barn. K.B. 29.

to have originated with that decision. The offence was, until the Obscene Publications Act 1959, that charged at common law in respect of obscene publications; and the test of obscenity in the leading case of Hicklin was defined as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such a publication might fall"[57].

5. Conspiracy to debauch an individual

24. Three cases appear to have established that it is an offence to conspire to debauch an individual. The cases all concerned young females. They are -

> Delaval[58]: the facts of this case have been set out in paragraph 15. In addition to citing the court's function as guardian of morals, Lord Mansfield relied upon the fact that the charge was one of conspiracy as a ground for holding that it had jurisdiction. The conduct concerned would now constitute an offence under the Sexual Offences Act 1956, section 23 (procuration of a girl under 21) so far as the master and attorney are concerned. Delaval would be liable as accessory to their offence[59].
>
> Mears and Chalk[60]: in this case, the defendant prostitutes attempted to procure an unwilling girl to join their ranks. There were two counts under the Protection of Women Act 1849 relating to attempts, and a third count of conspiracy to solicit prostitution which the court held sufficient at common law, "being against good morals and public decency". Today, the defendants could have been charged with -
>
> (a) attempting to procure a woman to become a common prostitute: Sexual Offences Act 1956, section 22;

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57. (1868) L.R. 3 Q.B. 360, 371, per Lord Cockburn C.J.

58. (1763) 3 Burr. 1434; see para. 15.

59. See Mackenzie and Higginson (1910) 6 Cr. App. R. 64. A Delaval-type conspiracy was also charged in this case but the court said: "without throwing any doubt on the proposition that to conspire to procure the defilement of a girl is an offence at common law, we do not say whether the common law counts are good" (per Lord Alverstone C.J. at 73).

60. (1851) 4 Cox C.C. 423; 2 Den. 79.

(b) attempting to procure a girl under 21 to have extra-marital intercourse with a third person: Sexual Offences Act 1956, section 23;[61]

(c) detaining a woman against her will (i) in a brothel, or (ii) in any premises with intention that she should have extra-marital intercourse: Sexual Offences Act 1956, section 24;[62]

(d) allowing a young person to reside in a brothel: Children and Young Persons Act 1933, section 3.

All these offences save that in (d) date from the Criminal Law Amendment Act 1885.

Howell[63]: a man and a woman, having "effected the ruin" of a girl they had met, tried to make her take up prostitution. On a charge of conspiracy to procure an unmarried girl of 17 to become a prostitute, Bramwell B. ruled that prostitution was "unlawful" and this was a conspiracy to bring about an unlawful state of affairs, and therefore criminal. Again, today the defendants could probably be convicted of attempts to commit offences under the Sexual Offences Act 1956, sections 22 and 23.

It is noteworthy that the House of Lords in Shaw relied upon the authority of these cases in support of the existence of a general offence of conspiracy to corrupt public morals. In particular, Lord Tucker said of Delaval -

> "It is clear and compelling authority in support of the existence of the crime of conspiracy to corrupt the morals of an individual, and a fortiori of the public."[64]

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61. Johnson [1964] 2 Q.B. 404 establishes that "procuration" here means successfully procuring, but this does not exclude a charge of attempt.

62. Depriving the girl of her clothes, as occured in Mears, is deemed to amount to detention (s. 24(2)). Two prostitutes "resorting" to their own home are keeping a brothel within the meaning of s. 33 (keeping a brothel): Gorman v. Standen [1964] 1 Q.B. 194.

63. (1864) 4 F. & F. 160.

64. [1962] A.C. 220, 287.

B. Legislation prior to Shaw

25. The two principal statutes in the area of the law which we are considering, under both of which charges were brought in Shaw itself, are the Sexual Offences Act 1956 and the Obscene Publications Act 1959. In the following paragraphs we outline some of their more important provisions; but we stress that in this context we are concerned with the operation of these Acts only in so far as certain of their provisions were construed in Shaw, which in turn has an important bearing upon the development of the law subsequent to that case.

1. The Sexual Offences Act 1956

26. Many of the offences contained in this Act were first introduced by the Criminal Law Amendment Act of 1885. In outlining the law relating to disorderly houses[65] and to conspiracy to debauch[66] we have seen that there is a wide range of offences covering the keeping of brothels and the protection of women and children. For present purposes it is necessary only to mention further section 30(1), which makes it "an offence for a man knowingly to live wholly or in part on the earnings of prostitution". Before the decision in Shaw there was a conflict of authority as to the precise scope of this provision[67].

2. The Obscene Publications Act 1959

27. By section 2 of the Obscene Publications Act, any person who publishes an obscene article, whether for gain or not, commits an offence. For the purposes of the Act, an article is deemed to be obscene "if its effect or (where the article

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65. See para. 22.

66. See para. 24.

67. See Thomas [1957] 1 W.L.R. 747; Silver [1956] 1 W.L.R. 281; Calvert v. Mayes [1954] 1 Q.B. 342.

comprises two or more distinct items) the effect of any one of these items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it" (section 1(1)). An "article" means "any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures" (section 1(2)). The test of obscenity embodied in the Act is very similar to that propounded in Hicklin[68] as the test for the common law offence of obscene libel. So long as the Act is in force, it is unlikely that a charge at common law can be brought, since section 2(4) of the 1959 Act provides that "a person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene". It may be that the test of obscenity in obscene libel is slightly wider than that in the statute, but although that offence still remains, for practical purposes it is in abeyance, since it is one of which "the essence" is the publication of an obscene article.

28. By section 4, a specific defence of public good is introduced which may be established by expert evidence as to the literary, artistic, scientific or other merits of the article. In the result, the jury (or the magistrate in forfeiture proceedings) are required (1) to decide whether the article, taken as a whole, tends to corrupt or deprave a substantial proportion of those into whose hands it is likely to fall; then if so (2) to weigh against this the merit alleged by the defence, and (3) to reach a decision as to whether publication should be

68. (1868) L.R. 3 Q.B. 360; see para. 23.

penalised[69].

Films and broadcasting under the Obscene Publications Act 1959

29. Section 1(3)(b) of the 1959 Act provides that a person publishes an article, who "in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it". There is a proviso to this section which exempts from its operation -

(i) "anything done in the course of television or sound broadcasting"; and

(ii) "anything done in the course of a cinematograph exhibition...other than one excluded from the Cinematograph Act 1909 by" section 7(4) of that Act.

As to (i), television and broadcasting are subject to their own system of controls and need not detain us.

30. The position as to films is more complicated. The Cinematograph Act 1909 provides by section 1 that "no cinematograph exhibition shall be given other than in premises licensed for the purpose". And by section 3, penalties[70] for

69. Calder & Boyars Ltd. [1969] 1 Q.B. 151 ("Last Exit to Brooklyn"). It is relevant to note that "obscene" carries a different meaning under the Post Office Act 1953. Sect. 11 prohibits inter alia the sending of a postal packet (i) enclosing any indecent or obscene print etc. or article, or (ii) which has on it or on its cover any words etc. grossly offensive or of an indecent or obscene character. "Obscene" here bears its "ordinary" meaning which includes "shocking, lewd and indecent" matter: Anderson [1972] 1 Q.B. 304. See also Customs Consolidation Act 1876, s. 42: prohibition on importation of "indecent and obscene" prints, books etc. and articles.

70. A fine of £200; see Criminal Justice Act 1967, s. 92(1) and Sch. 3, Part I. The licence (if any) may also be revoked by the district council: see s. 3 of the 1909 Act as amended by Local Government Act 1972, s. 204(5).

contravention are provided. Section 7 of the 1909 Act exempts certain premises from the requirement that they must be licensed. These are -

(i) by section 7(2), "premises used occasionally and exceptionally only" (subject to prior notice to the local authority and the police);

(ii) by section 7(3), "buildings or structures of a moveable character" (subject to a number of conditions); and

(iii) by section 7(4) "an exhibition given in a private dwelling-house to which the public are not admitted, whether on payment or otherwise."

To these exemptions were added certain others by the Cinematograph Act 1952[71].

Effect of the proviso to section 1(3) of the 1959 Act

31. There is no statutory provision for censorship of films. However, legal effect is given to the certificates of the British Board of Film Censors or of local authorities by the imposition of terms and conditions in licences issued by the licensing authority under the Cinematograph Act 1909. The object of the proviso in the Obscene Publications Act 1959[72] relating to films was clearly to exempt from the operation of the Act cinematograph exhibitions on licensed premises which, in this indirect way, are

71. Private exhibitions and free public exhibitions are exempted exhibitions except when organised for a children's cinema club: s. 5(1)(a), (2). And exhibitions given in premises by certain non-profit making societies (where so certified by the Commissioners of Customs and Excise) are also exempted: s. 5(3), (4).

72. See para. 29.

subject to censorship. But the Act did not achieve its object. The only films to which the 1959 Act does apply are those exhibited in a private dwelling-house to which the public are not admitted, whether on payment or otherwise. It does not apply to films shown on other exempted premises or occasions or, much more importantly, to films shown on premises which, in breach of the provisions of the 1909 Act, are not licensed. This means that the only penalty available without recourse to conspiracy to corrupt[73] for showing an obscene film on (illegally) unlicensed premises is the monetary penalty provided by the 1909 Act[74]. This clearly unintended lacuna in the proviso has, as we shall see[75], been responsible for many of the charges of conspiracy to corrupt public morals brought in recent years.

3. The Indecency with Children Act 1960

32. Section 1(1) of the Indecency with Children Act 1960 provides that -

> "Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment....."

This provision (in particular, the part underlined) is discussed in paragraph 69, in that section of the Paper dealing with lacunae in the law which the two general offences of corrupting morals and outraging decency at present fill.

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73. Nor can a prosecution for a common law offence be brought where the essence of the charge is the publication of an obscene article: see Obscene Publications Act 1959, s. 2(4) and see para. 27.

74. See fn. 70.

75. See para. 67.

4. Indecent exposure under statute

33. Indecent exposure may be prosecuted under section 4 of the Vagrancy Act 1824, which requires an intent to insult a female, although the conduct need not take place in public[76].

5. Indecent exhibitions under statute

34. Prosecutions for indecent exhibitions may be brought under section 4 of the Vagrancy Act 1824[77] or section 3 of the Indecent Advertisements Act 1889[78]. It may be that the latter was originally directed against advertisements for quack remedies for venereal disease, for which other statutory offences are now available, but the wording is general, and is not even confined to advertisements.

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76. See para. 11; and compare the requirements of the common law offence: para. 18. See also Town Police Clauses Act 1847, s. 28 which imposes a maximum fine of £20 on anyone who in any street to the annoyance or danger of residents or passengers, wilfully and indecently exposes his person. See further Home Office Working Party's working paper, para. 145 et seq.

77. "Every person wilfully exposing to view, in any street, road, highway, or public place any obscene print, picture or other indecent exhibition." The Vagrancy Act 1838, s. 2 extends this to any "window or other part of any shop or other building situate in any street...". And see Home Office Working Party's working paper, para. 115 et seq.

78. "Whoever affixes to or inscribes on any house, building, wall, hoarding, gate, fence, pillar, post, board, tree or any other thing whatsoever so as to be visible to a person being in or passing along any street, public highway, or footpath, and whoever affixes to or inscribes on any public urinal, or delivers or attempts to deliver or exhibits to any inhabitant or to any person being in or passing along any street, public highway, or footpath, or throws down the area of any house, or exhibits to public view in the window of any house or shop, any picture or written matter which is of an indecent or obscene nature....". Prosecutions may also be brought under the Town Police Clauses Act 1847, s. 28 and the Metropolitan Police Act 1839, s. 54 for selling or exhibiting to public view indecent or obscene books, prints etc: penalty, £20. The former requires this to take place in the street to the annoyance or danger of residents or passengers, the latter in any public thoroughfare in the Metropolitan Police District (see London Government Act 1963, s. 76).

6. Insulting behaviour

35. Two statutory provisions penalise in similar terms "insulting behaviour". By section 54(13) of the Metropolitan Police Act 1839, a fine of £20[79] may be imposed on anyone within the Metropolitan Police District who, in any thoroughfare or public place -

> "shall use any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned."

Section 5 of the Public Order Act 1936 penalises -

> "Any person who in any public place or at any public meeting (a) uses threatening, abusive or insulting words or behaviour ... with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned."[80]

We understand that both of these provisions (the first in London only) have been used to penalise "streaking" and other displays of public nudity in both sexes. In this connection it is relevant to note that the House of Lords in Brutus v. Cozens[81] held that "insulting" in section 5 was to be given its ordinary meaning: behaviour which affronted others was not necessarily "insulting" and it did not suffice to show that the behaviour was merely annoying and did annoy.

C. Conclusion

36. This survey has indicated that, before Shaw, the courts possessed a wide jurisdiction at common law in matters relating to morals and public decency, but that at that time it was

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79. Increased from £2 by the Criminal Justice Act 1967.

80. By the Public Order Act 1963, maximum penalties are three months' imprisonment and £100 (summary) or twelve months' imprisonment and £500 (indictment).

81. [1973] A.C. 854.

widely thought that the conduct in respect of which charges could be brought was susceptible of classification. Thus, while the jurisdiction was described in broad terms, each class of case was regarded as indicating the ambit of an indictable misdemeanour[82]. Statute law had in large measure covered the relevant conduct, but in no instance had the common law offences been abolished. This legislation had itself given rise to problems of interpretation, and, as we indicate in the next part of this paper, Shaw not only had the effect of redefining the breadth of the offences at common law, but also defined the extent of section 2 of the Obscene Publications Act 1959[83] and section 30 of the Sexual Offences Act 1956[84].

III SHAW v. D.P.P.

The facts

37. In Shaw[85], the defendant operated a directory of Soho prostitutes which gave their names, telephone numbers, prices and (by means of abbreviations) details of various sexual perversions offered. The booklet, which was sold, was a successful advertising medium which attracted men of all ages. Shaw was prosecuted on an indictment containing three counts -

(i) publishing an obscene article, contrary to section 2 of the Obscene Publications Act 1959;[86]

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82. See para. 16.
83. See para. 39.
84. See para. 40.
85. [1962] A.C. 220.
86. See para. 27.

(ii) living on the earnings of prostitution, contrary to section 30 of the Sexual Offences Act 1956[87]; and

(iii) conspiracy to corrupt public morals.

He was convicted on all three counts.

Reasons for the addition of the conspiracy count

38. The prosecution gave three reasons why the count alleging conspiracy to corrupt morals had been added. First, there was a conflict of authority as to the scope of the offence of living on the earnings of prostitution. Secondly, there was doubt as to whether the directory was covered by the 1959 Act. Finally, a further reason was stated to be that "on this much graver charge of conspiracy the punishment is at large and not limited to the two years under the Act"[88].

The Obscene Publications Act 1959, section 2

39. On appeal against conviction under section 2 of the Obscene Publications Act 1959, it was argued, in the Court of Criminal Appeal, that the accused's honesty of purpose in publishing the directory was a relevant factor for consideration which ought to have been left to the jury. The Court rejected this argument and held[89] that the test of obscenity in section 1(1) of the Act was whether the effect of the article was such as to tend to deprave and corrupt persons who were likely to read it, so that obscenity depended on the article and not the author; thus intention and the appellant's honesty of purpose were irrelevant. There was no appeal to the House of Lords against Shaw's conviction on this count.

87. See para. 26.

88. [1962] A.C. 220, 254.

89. [1962] A.C. 220, 227 (C.C.A.).

The Sexual Offences Act 1956, section 30

40. Shaw appealed to the House of Lords against his conviction under section 30 of the Sexual Offences Act 1956. His appeal was dismissed. The House held that a person might fairly be said to be living in whole or in part on the earnings of prostitution if he was paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes and that, accordingly, as Shaw accepted advertisements for reward from prostitutes of their readiness to prostitute themselves, he knowingly lived on the earnings of prostitution within the meaning of the section[90].

Conspiracy to corrupt public morals

41. As we have seen, the Court of Criminal Appeal held that there was a general offence constituted by "conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual)"[91]. Conspiracy to public morals was therefore an offence. But the House of Lords (Lord Reid dissenting) based its affirmation of the conviction on the grounds that "a conspiracy to corrupt morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury"[92]. We have seen[93] that, in so far as the House considered it necessary to cite authority, reliance was placed upon the cases of conspiracy to debauch an individual; and reference was also made to certain cases which involved the participation of several defendants in the keeping of a disorderly house[94].

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90. Ibid.; see in particular Lord Simonds at 264.
91. [1962] A.C. 220, 233 (C.C.A.). See para. 4.
92. [1962] A.C. 220, 290 per Lord Tucker.
93. Para. 24.
94. [1962] A.C. 220, 288 per Lord Tucker; and see para. 20.

42. It was argued that section 2(4) of the Obscene Publications Act 1959 set out above at paragraph 27 was an answer to the conspiracy charge. The House of Lords rejected this contention. Lord Tucker said -

> "the short answer to this argument is that the offence at common law alleged, namely, conspiracy to corrupt public morals, did not 'consist of the publication' of the magazines, but of an agreement to corrupt public morals by means of the magazines, which might never have been published."[95]

Since the agreement was said to be a necessary factor in excluding the defence under section 2(4), it would follow that the sub-section ought to have provided a defence had the charge been one of a substantive offence of corrupting public morals.

43. The view taken by the House of Lords in Shaw was that there remains in the Courts as custodians of public morals a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which were prejudicial to the public welfare[96]. It was specifically

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95. [1962] A.C. 220, 290. Lord Tucker was here agreeing with the words of the C.C.A. (ibid. at 236) although that court had also upheld the existence of the offence of corrupting public morals: see para. 41.

96. In Knuller it was emphasised that the decision in Shaw was not to be taken as affirming or lending support to the doctrine that the courts have some general or residual power either to create new offences or so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment; see [1973] A.C. 435, 457 (per Lord Reid), 464-5 (per Lord Morris), 490 (per Lord Simon) and 496 (per Lord Kilbrandon). The existence of a wide generalised offence of corrupting public morals, however, effectively gives the Courts such a residual power in this field. Thus see Shaw [1962] A.C. 220 for the possibility that a charge of conspiracy might lie in the case of an agreement to further homosexual practices (per Lord Tucker at 285), to promote lesbianism (ibid.), to encourage fornication and adultery (per Lord Hodson at 294). And see Knuller [1973] A.C. 235 for a similar possibility in regard to advertisements seeking extra-marital sexual relations (per Lord Morris at 460). In Kamara v. D.P.P. Lord Cross of Chelsea said that agreement to commit adultery would not amount to a criminal conspiracy; [1974] A.C. 104, 132.

accepted that the final arbiter would be the jury. Viscount Simonds said -

> "So in the case of a charge of conspiracy to corrupt public morals the uncertainty that necessarily arises from the vagueness of general words can only be resolved by the opinion of twelve chosen men and women. I am content to leave it to them."[97]

Lord Tucker -

> "This element [that the advertisements indicated that the advertisers were willing to take part in sexual perversions] was, I think, conclusive against the appellant's submission, but I am not to be taken as expressing the view that in the absence of this feature the case should have been withdrawn from the jury, who must be the final arbiters in such matters, as they are on the question of obscenity. They alone can adequately reflect the changing public view on such matters through the centuries."[98]

Lord Morris -

> "It is said that there is a measure of vagueness in a charge of conspiracy to corrupt public morals, and also that there might be peril of the launching of prosecutions in order to suppress unpopular or unorthodox views. My Lords, I entertain no anxiety on these lines. Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved. If there were prosecutions which were not genuinely and fairly warranted juries would be quick to perceive this. There could be no conviction unless 12 jurors were unanimous in thinking that the accused person or persons had combined to do acts which were calculated to corrupt public morals. My Lords, as time proceeds our criminal law is more and more being codified. Though it may be that the occasions for presenting a charge such as that in count 1 will be infrequent, I concur in the view that such a charge is contained within the armoury of the law, and that the jury were in the present case fully entitled to decide the case as they did."[99]

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97. [1962] A.C. 220, 269.

98. Ibid., 289.

99. Ibid., 292.

and Lord Hodson -

> "Since a criminal indictment is followed by the verdict of a jury it is true that the function of custos morum is in criminal cases ultimately performed by the jury, by whom, on a proper direction, each case will be decided. This I think is consonant with the course of the development of our law. One may take, as an example, the case of negligence where the standard of care of the reasonable man is regarded as fit to be determined by the jury. In the field of public morals it will thus be the morality of the man in the jury-box that will determine the fate of the accused, but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law."[100]

44. It is, we think, clear that a residual jurisdiction of this kind is incompatible with the objective, stated in the Working Paper on Inchoate Offences, that "legal rules imposing serious criminal sanctions should be stated with the maximum clarity which the imperfect medium of language can attain"[101]. In section VI of this paper we shall see that, in the years since the decision, charges of conspiracy to corrupt public morals seem, in fact, to have been used only to fill quite small and easily identifiable lacunae in the armoury of the law. These, we think, can easily be filled by legislation. Others may arise in the future and, if by then the common law no longer has any residual powers, wicked conduct may go unpunished until legislation can be passed to fill the gap. But this is the inevitable price which has to be paid for an acceptable degree of certainty as to the conduct to be penalised by the law. It is one which we believe to be worth paying.

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100. Ibid., 294.

101. Working Paper No. 50, "Inchoate Offences", para. 9.

IV CHANGES AND DEVELOPMENTS IN THE LAW BETWEEN SHAW AND KNULLER

45. In the ten years between the two cases of Shaw and Knuller several important law reform statutes were enacted which are relevant to the present examination of the law in the area of morals and decency; in particular, the Obscene Publications Act 1959 was amended by the Act of 1964, homosexual conduct between consenting adults ceased to be a crime by virtue of the Sexual Offences Act 1967, and the test of obscenity set out in the 1959 Act was applied to the theatre by the Theatres Act 1968. In addition some forty prosecutions were brought in the decade following Shaw for conspiracy to corrupt public morals before a decision on such a charge again reached the law reports. It is necessary to examine the legislation referred to, since, like the pre-Shaw legislation, it has a bearing upon, and probably overlaps with, the common law; and this factor will necessarily be relevant to the proposals which we make for reform of the law. And the cases of conspiracy to corrupt must also be considered to determine which conduct would cease to be criminal if that offence were to be abolished.

A. Legislation enacted between 1964-1968

1. The Obscene Publications Act 1964

46. The main purpose of the Act was to close gaps in the 1959 Act which had become apparent as a result of certain decisions[102]. The most important amendments were, first, to section 2[103], to penalise not only persons who publish obscene

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102. Mella v. Monahan [1961] Crim. L.R. 175, Clayton and Halsey [1963] 1 Q.B. 163, Straker v. D.P.P. [1963] 1 Q.B. 926.

103. See para. 27.

articles, but also those who have such articles in their ownership, possession or control, with a view to publication or gain; and, secondly, to include within the definition of an "article"[104] anything, such as photographic negatives, intended for use for the reproduction of obscene articles.

47. In the course of the debates in the House of Commons upon the 1964 Act, the Solicitor-General gave an assurance -

> "that a conspiracy to corrupt public morals charge would not be charged so as to circumvent the statutory defence in section 4 [of the 1959 Act]."[105]

This assurance was given as a result of fears voiced in the debate that a conspiracy charge such as that brought in Shaw could be used as an alternative to a prosecution under the 1959 Act, and could thereby eliminate the possibility of raising the "public good" defence in section 4 of the Act. The effect of this assurance was considered in Knuller[106]

2. The Sexual Offences Act 1967

48. By virtue of the Sexual Offences Act 1967, homosexual acts between consenting adults in private ceased to be an offence, either at common law or under statute. Section 5 of the Act penalises any man or woman who knowingly lives wholly or in part on the earnings of male prostitution. The section is similar to section 30 of the Sexual Offences Act 1956, but wider in scope in so far as it penalises both men and women.

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104. Ibid.

105. Hansard (H.C.), 3 June 1964, vol. 695, col. 1212.

106. Whether the charge of conspiracy to corrupt public morals in Knuller was, as Lord Diplock thought, in breach of this assurance is not a question which we have in this paper to consider. See [1973] A.C. 435, 456 (Lord Reid), 466 (Lord Morris), 480 (Lord Diplock).

3. The Theatres Act 1968

49. The Theatres Act in effect applies the scheme of the Obscene Publications Act 1959 to plays. By section 2 a performance of a play is deemed obscene upon a test similar that set out in section 1(1) of the 1959 Act[107] and a "play" includes -

> "(a) any dramatic piece ... given wholly or in part by one or more persons actually present or performing and in which the whole or a major proportion ... involves the playing of a role; and (b) any ballet given wholly or in part by one or more persons present and performing..."[108]

A person who, whether for gain or not, presents or directs an obscene performance of a play, whether in public or private, commits an offence under section 2(2) of the Act. As in section 2(4) of the 1959 Act, section 2(3) contains a prohibition on proceedings at common law, but the breadth of the prohibition is greater. It applies where -

(a) the essence of the common law offence is that the performance was obscene, indecent, offensive, disgusting or injurious to morality, or

(b) the offence is one under section 4 of the Vagrancy Act 1824[109], consisting of wilfully exposing to public view an indecent exhibition.

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107. See para. 27; s. 2(1) of the 1968 Act states that "for the purposes of this section a performance of a play shall be deemed to be obscene if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all the relevant circumstances, to attend it". See further para. 90.

108. See s. 18; only part of the definition is here reproduced.

109. See para. 34 and fn. 77.

Further, the "unfortunate situation"[110] brought about by the use of the charge of conspiracy to corrupt public morals in cases of obscene publications was remedied so far as the theatre was concerned as a result of an amendment put forward in debate in the House of Lords. As enacted, this provides that -

> "no person shall be proceeded against for an offence at common law of conspiring to corrupt public morals, or to do any act contrary to public morals or decency, in respect of an agreement to present or give a performance of a play, or to cause anything to be said or done in the course of such a performance."

Corresponding to section 4 of the 1959 Act, the 1968 Act provides in section 3 a defence of public good, which is similarly worded[111].

B. Cases decided between 1962-1972

50. Some forty cases between Shaw and Knuller involved a charge of conspiracy to corrupt public morals. Of these, only one was reported[112]. We considered an examination of these cases to be necessary in order to find out the fact situations for which the charge was thought by the prosecuting authorities to be required; and we are indebted to the Director of Public Prosecutions for providing us with a list of these cases and with details of them.

51. Of these cases, by far the largest group (some two-thirds) related to the showing of pornographic films on private, unlicensed premises to which members of the public were admitted on payment. Charges in these cases were brought

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110. See Hansard (H.L.), 20 June 1968, vol. 293, col. 911 et seq and 19 July 1968, vol. 295, col. 592 et seq.

111. See para. 28.

112. Anderson [1972] 1 Q.B. 304 (the "Oz" case); see para. 54.

variously against the organisers, projectionists and doormen concerned with the shows, and against touts soliciting custom. In a few of these cases, some of the defendants were also found guilty of other offences, such as keeping a disorderly house or conspiracy to outrage public decency. Some defendants were also found guilty of conspiracy to corrupt public morals in relation to "live sex shows" being held on the same premises.

52. Four cases may be mentioned in more detail as being representative of this first group, in most of which the premises concerned were in Soho. In the first case[113], a film projectionist, his receptionist, his money collector and fourteen touts were all charged with conspiracy to corrupt; some were also charged with conspiracy to outrage public decency and keeping a disorderly house. All save three touts were convicted of conspiracy to corrupt public morals. The other charges were not proceeded with save against two of the touts for keeping a disorderly house, both of whom were convicted. In the second case a projectionist, doorman and tout were charged with conspiracy to corrupt and conspiracy to outrage; the pleas of not guilty to the first charge was accepted, but all pleaded guilty to the second[114]. In the third case[115], on similar facts a projectionist and three touts were all found guilty both of conspiracy to corrupt and of conspiracy to outrage. The last case[116] is atypical in that the premises were in Gloucester,

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113. Caney and others: Central Criminal Court, 27 July 1966.

114. Kelly and others: Central Criminal Court, 19 December 1972. The conspiracy to outrage charge had the best of both worlds: the defendants "conspired together ... to commit acts outraging public decency by exhibiting certain lewd ... films ... the exhibition whereof would have tended to corrupt and deprave [Her Majesty's] subjects". The indictments for conspiracy to outrage were similarly drafted in some other cases.

115. Barry and others: Central Criminal Court, 23 September 1966.

116. Ledbury and others: Gloucester Assizes, 4 July 1967.

where the defendants were tried. A projectionist and tout were found guilty on several counts of conspiracy to corrupt, one of which related also to a "live sex show". The defendants' pleas of not guilty to charges of keeping a disorderly house or of offences under section 2(1) of the Obscene Publications Act 1959[117] were accepted.

53. A second group of cases involved making and participating in obscene films. Besides the findings on the counts of conspiracy to corrupt, some of the defendants were also found guilty of conspiracy or aiding and abetting offences under section 2(1) of the Obscene Publications Act 1959. For example, in one case[118] the owners (husband and wife) of premises where obscene photographs and films, a camera and ladies' underwear were found, were charged with conspiracy to corrupt by inducing persons to resort to the premises "for the purpose of watching obscene films and taking part in and watching disgusting and immoral acts and exhibitions and for the purpose of fornication". They were also charged with keeping a disorderly house and conspiracy to contravene section 2(1); similar charges were brought against their "butler". All three were convicted on both conspiracy charges, but the disorderly house charge was not put to the jury, perhaps because of lack of evidence of repeated film shows[119]. In this case a professional photographer was also charged with the two conspiracies and found guilty of the second only, that of contravening the 1959 Act.

54. A third group concerning obscene publications in which the conspiracy charges were either unsuccessful or not proceeded with, but where the defendants were found guilty under the 1959

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117. Publishing or possessing for publication an obscene article; as to the meaning of "article", see s. 1(2), and para. 27.

118. King and others: Central Criminal Court, 29 September 1967.

119. As to the element of continuity required for this offence, see para. 21.

Act or the Post Office Act 1953[120]. For example, the directors and editors of "Oz" were found not guilty of conspiracy to corrupt but guilty under the 1959 Act (this count was quashed on appeal) and under the Post Office Act[121]. Knuller appears to have been the first case since Shaw where the conspiracy to corrupt charge was successful against purely written material.

55. A fourth group of cases concerned the taking of obscene photographs in which children were participants. Where not convicted on the conspiracy charge, all defendants were found guilty on alternative statutory charges. For example, in one case[122] the defendants were a man and woman cohabiting, the other participants being the woman's daughter (aged eleven) and son (about the same age) by a previous marriage. Photographs were taken by the man of himself having intercourse with the girl and buggering the boy, of the two children in indecent poses and of the mother in indecent poses with the boy. The defendants' pleas of not guilty on charges of conspiracy to corrupt and procuring were accepted, but they were convicted on several counts under the Sexual Offences Act 1956[123] and section 1(1) of the Indecency with Children Act 1960. By contrast, in another case[124] the defendants, a photographer and three male "models", were all found guilty of conspiracy to corrupt by inducing three girls all aged fourteen or fifteen to pose with the models for indecent photographs; but all, in any event, pleaded guilty to charges under section 6(1) of the Sexual Offences Act 1956[125].

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120. See para. 28, fn. 69.

121. See Anderson [1972] 1 Q.B. 304.

122. Thomas and another: Hereford Assizes, 27 February 1968.

123. Sects. 5, 12, 14(1) and 25.

124. Hart and others: Bristol Assizes, 22 June 1966.

125. Penalising sexual intercourse with a girl under 16.

56. Finally, in one case[126] the directors and employees of a company (but not the company itself) were found guilty of conspiracy to corrupt where they were involved in a flourishing business in sado-masochistic accoutrements, catalogues and books. The count charged them with "procuring, producing and offering for sale certain whips, leg irons, wrist irons, arm restrictors, belts, straps, chains, gags, hoods, masks, head harnesses, chastity belts, restrictive equipment and other articles, rubber and leather garments" etc. We give details of this and other cases both because little has been generally known about the use to which the charge of conspiracy to corrupt has been put in recent years and because it will enable us to identify with more precision the kind of conduct which would cease to be criminal if the two charges at common law used in Shaw and Knuller ceased to be available. Before discussing this, the decision in Knuller itself must be considered.

V KNULLER v. D.P.P.

57. In Knuller[127] the defendants published a magazine called "IT", the circulation of which was about 38,000. Readers might include some 10,000 school children, and most of the remaining readership were students or young persons. There was, in the magazine, one column of advertisements headed "Males". In this were inserted advertisements which certainly amounted to solicitation of homosexuals and some to offers of homosexual prostitution[128]. The only real distinction between this case and Shaw was that the column of advertisements constituted only a small part of the whole

126. Traill-Hill and others: Central Criminal Court, 19 June 1967.

127. [1973] A.C. 435.

128. This was the view taken of them by the Court of Appeal: see [1972] 2 Q.B. 179.

publication, whereas, in Shaw, the Ladies' Directory had been wholly devoted to the advertisement of prostitution.

58. On the facts of Knuller it seems clear that a number of charges might have been preferred -

(i) As we have indicated, some of the advertisements in question amounted to offers of male prostitution and, as Lord Morris said[129], "it was not suggested that the advertisements in the present case (nor was it suggested that the directory in Shaw's case) could be regarded as publications which were justifiable as being for the public good". Having regard to the similarities between the two cases, a charge under the Obscene Publications Act 1959 would very probably have succeeded[130].

(ii) Lord Diplock thought that "having regard to the contents of some of the advertisements which were the subject-matter of the charges ....and to the provision of facilities for forwarding to the advertisers answers to such advertisements, the defendants might well have been guilty... of the common law misdemeanour of inciting or procuring the commission of the statutory offence [under section 13 of the Sexual Offences Act 1956] of doing acts of gross indecency with male persons under the age of 21"[131].

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129. [1973] A.C. 435, 465.

130. The distinction between the two cases referred to in para. 57 would not have affected the outcome of such a charge: see Anderson [1972] 1 Q.B. 304. As to why a charge under the 1959 Act was not brought in Knuller, see [1972] 2 Q.B. 179, 182 (C.A.) and [1973] A.C. 435, 446.

131. [1973] A.C. 435, 481. For the same reasons, Lord Diplock thought the defendants might well have been guilty of an offence under the Obscene Publications Acts.

(iii) Section 13 of the Sexual Offences Act 1956 makes it an offence to procure the commission by a man of an act of gross indecency with another man. Section 4(3) of the Sexual Offences Act 1967 restricts this offence to an act where one of the parties is under the age of 21. Section 4(1) of the 1967 Act makes it an offence to procure another man to commit with a third man an act of buggery even though the act itself is not an offence (because committed in private between consenting adults). Lord Reid thought that some of the facts in the case might have supported a charge of procuring under section 4(1) of the 1967 Act[132]. A charge of procuring under section 13 of the 1956 Act would also have been available.

59. In fact the defendants in Knuller were charged with two counts of conspiracy: to corrupt public morals and to outrage public decency. The Court of Appeal dismissed their appeal against conviction on both counts. As we have seen[133], the House of Lords (Lord Diplock dissenting) affirmed the Court of Appeal's decision on the count of conspiracy to corrupt public morals but (for differing reasons) allowed the appeal on the count of conspiracy to outrage public decency.

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132. Ibid., at 457. It may be that this offence is not complete until the indecency has taken place, but a charge of attempt would also be available: see Mackenzie and Higginson (1910) 6 Cr. App. R. 64, 72.

133. See paras. 4 and 5.

Conspiracy to corrupt public morals

60. On the appeal against the conviction for conspiracy to corrupt public morals it was argued for the appellants that the House of Lords ought to overrule its own previous decision in Shaw and hold that no such offence existed. This argument failed for several stated reasons. In the first place, the criminal law should be certain and it was now certain that there was a crime of conspiracy to corrupt public morals[134]. Secondly, Parliament was the proper forum to canvass the merits of Shaw[135]. A third reason was that Parliament had clearly approved that decision both by not overruling it, and by recognising it in section 2(4) of the Theatres Act 1968[136]. Finally, it was said that the objections to Shaw would apply to the whole field of public mischief offences and the offence could not be considered separately[137]. And once the argument for overruling Shaw had failed it was inevitable that the conviction for conspiracy to corrupt public morals would be upheld; the essential facts of Knuller were indistinguishable from those in Shaw.

Conspiracy to outrage public decency

61. The importance of Knuller lies more especially in the fact that, although allowing the appeal, the majority of the House of Lords held that the offence of conspiracy to outrage decency (and, perhaps, the generalised offence of outraging decency) existed at common law and was capable of being used to prosecute indecent publications, which were "lewd, disgusting and offensive". As we have seen[138], in support of

134. See [1973] A.C. 435, 455 (Lord Reid), 463 (Lord Morris) and 486 (Lord Simon).

135. Ibid., at 455 (Lord Reid), 463 (Lord Morris) and 489 (Lord Simon).

136. Ibid., at 464 (Lord Morris) and 483 (Lord Simon). But see para. 49.

137. Ibid., at 489 (Lord Simon). It is the Law Commission's intention to deal with other conspiracies to commit a public mischief in a further Working Paper in this series.

138. See para. 5.

his conclusion that the conspiracy charge lay, Lord Morris relied upon the case of Mayling[139], and upon dicta by Lord Reid in Shaw[140]. Lord Simon, in holding that there exists a substantive offence independent of conspiracy, referred, first, to the cases outlined in the paragraphs above under the headings of public exhibition of indecent acts[141], indecent exposure[142], and conspiracy to debauch an individual[143]; secondly, to the three cases of Delaval, Sedley and Curl described in paragraph 15; thirdly, to Lord Reid's dicta in Shaw[144]; and, finally, to the indictment in Mayling[145].

62. Two members of the House of Lords, Lord Reid and Lord Diplock, considered that there was no general offence of outraging public decency nor of conspiracy to outrage. Lord Reid said that there were some specific offences (indecent exposure, keeping a disorderly house and public exhibition of indecent acts and things) but none of them had ever covered the sale of indecent literature, nor were they analogous to the subject matter of the present charge[146]. Lord Diplock was unable to distinguish between corrupting on the one hand, and outraging on the other and if, as he thought, the decision on

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139. [1963] 2 Q.B. 717; and see para. 17.

140. [1962] A.C. 220, 281; from his speech in Knuller it is clear that Lord Reid was referring to the offence which he there described as the "exposure or exhibition in public of indecent things or acts"; see [1973] A.C. 435, 458; and see paras. 19 and 62.

141. Saunders, Lynn, Herring v. Walround, Grey: see para. 19.

142. Crunden, Mayling: see para. 18.

143. Delaval, Howell: see para. 24. Lord Simon referred also to the case of wife-selling mentioned in para. 15; see Knuller [1973] A.C. 435, 492-3.

144. See fn. 140.

145. [1963] 2 Q.B. 717; see para. 17.

146. [1973] A.C. 435, 458.

the charge of conspiracy to corrupt in Shaw was wrong, then the other head of liability could not be supported[147].

63. A charge of conspiracy to outrage where the subject matter of the offence is a publication may penalise publications which do not come within the "deprave and corrupt" formula of the 1959 Act. It is not clear from Knuller precisely what meaning is to be attributed to "outrage to decency". To Lord Morris, printed matter which "could rationally be regarded as lewd, disgusting and offensive", and which would outrage "the sense of decency of members of the public"[148] would clearly be caught by the offence; but Lord Simon said that 'outrage' like 'corrupt' is a "very strong word. 'Outraging public decency' goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people"[149]. However that may be, it is clear that "depraving and corrupting" is a stricter test than "lewd and disgusting"[150]. It appears also that a charge of conspiracy to outrage takes the conduct in question outside the ambit of section 2(4) of the Act[151], and, as in the case of conspiracy to corrupt, the defence of literary or other merit is not available.

64. Whilst it is clear that no injustice was done to the defendants in Knuller by preferring the charges of conspiracy (as we have shown[152], they were probably guilty of several statutory offences), we consider that the offence of outrage, whether or not linked with a charge of conspiracy, is so uncertain in its scope that, as in the case of conspiracy to corrupt, it should not survive codification of the law in this area. Furthermore, upon the evidence of cases in which the charge has been used in recent years, we find it difficult

147. Ibid., 469 and 479.

148. [1973] A.C. 435, 469.

149. Ibid., 495.

150. See Secker & Warburg [1954] 1 W.L.R. 1138 and Anderson [1972] 1 Q.B. 304.

151. See para. 27.

152. See para. 58.

to discern any conduct outside the field of publication of written matter and the like which would be the subject matter of a charge of outrage (with or without the addition of the element of conspiracy) which would not also be covered by a charge of conspiracy to corrupt public morals[153].

65. The question of whether statutory offences ought to be created to deal with the display in public places of indecent and obscene matter is one which forms an important part of the discussion of vagrancy and street offences in the working paper of the Home Office Working Party[154]. So far as publications which do not consist of the public display of offensive materials are concerned, we think that the provisions of the Obscene Publications Acts of 1959 and 1964 provide sufficient control. Parliament has recently decided what publications should, because of their obscenity, render their publishers liable to criminal sanctions. If (and this is not a view which we ourselves take) it is thought that there are publications which fall outside the provisions of these Acts[155] but the publication of which ought to be punished, then we think that the way to do that is by widening the scope of the existing legislation. And if there are publications which ought to render their publishers liable to more severe penalties[156] than those provided in the present legislation, the way to achieve this is by increasing the maximum penalties in that legislation. Of course, if the publication consists of or contains an incitement to commit a criminal offence then it will still be punishable as such.

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153. As to the range of such conduct, see sections IV and VI of this paper.

154. See para. 11 above and para. 115 et seq of their paper.

155. It must not be forgotten that the publication in Shaw was actually held to fall within the Obscene Publications Act 1959.

156. As the prosecution thought might be the case in Shaw; see para. 38.

VI CONDUCT WHICH WOULD CEASE TO BE CRIMINAL IF CORRUPTION OF PUBLIC MORALS AND OUTRAGE TO PUBLIC DECENCY WERE ABOLISHED

66. Having surveyed the development of the common law, recent changes in legislation, the two important cases of Shaw and Knuller, and the use to which conspiracy charges in this area of the law have been put in recent years, we are now in a position to identify the type of conduct which would cease to be criminal if, in accordance with the provisional proposals of the Law Commission's Working Party, conspiracy charges were to be restricted to those having crimes as their object; and if, also, the two common law offences which we have assumed to exist, corruption of public morals and outrage to public decency, were to be abolished.

67. The necessity for bringing charges of conspiracy to corrupt in the cases referred to in paragraphs 45-46 arose out of the lacuna in the proviso to section 1(3) of the Obscene Publications Act 1959. As we have seen[157], while the proviso effectively brings within the scope of the Act the showing of films in a private dwelling house to which the public are not admitted, it excludes from the Act the showing of such films on unlicensed[158] private premises where the public are admitted. The charge of conspiracy to corrupt or to outrage can be used, and often has been used, in these circumstances. There is also the possibility of prosecution for keeping a disorderly house[159], provided, however, that there has been an element of persistence in keeping the house[160]; but where this element is absent, conspiracy to corrupt or to outrage are the only indictable

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157. See para. 29 et seq.

158. Whether illegally unlicensed or exempt from licensing otherwise than under s. 7(4).

159. Unless this would be excluded by the Obscene Publications Act 1959, s. 2(4): see para. 27 and fn. 73.

160. See para. 21.

offences which can be charged[161].

68. The charge of conspiracy to corrupt is also the only one appropriate, although it seems not often to have been so used, where conduct involves, not the showing of a film, but "live" performances such as "live sex shows" and the like. In these cases, the performance falls outside the definition of a play within the terms of the Theatres Act 1968[162] while, if the element of continuity is absent, a charge of keeping a disorderly house is also not available.

69. Cases of indecency involving children have been dealt with under the Sexual Offences Act 1956 and the Indecency with Children Act 1960. Doubts have been expressed, however, whether the latter is entirely satisfactory. Its main provision has been set out above[163]. The difficulty of interpretation in this provision lies in the phrase "with or towards" in cases where there has been no physical contact with the child but where, nevertheless, the child has been persuaded to pose in indecent postures for the purpose of being photographed. In the context of section 13 of the Sexual Offences Act 1956 (gross indecency "with" another man) it has been held[164] that no physical contact is required for

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161. It is, however, possible for a distributor of an obscene film to be prosecuted, according to a recent case before Lord Widgery C.J. at the Central Criminal Court. (See "The Guardian" 22 May 1974; a private prosecution against United Artists Corporation, distributors of "Last Tango in Paris".) This held that the proviso to s. 1(3) does not apply to the persons who publish an article within the meaning of s. 1(3)(a) i.e. those who distribute, circulate, sell, let on hire, give or lend the article. The decision accords with the apparent intentions of Parliament as expressed in debate: see Hansard (H.C.), 24 April 1959, vol. 604 col. 811 and 835.

162. See para. 49.

163. Para. 32.

164. Hunt [1950] 2 All E.R. 291, a decision under the corresponding section of the Criminal Law Amendment Act 1885.

the offence to be committed, and it is possible, therefore, that the procurement of children for the aforementioned purpose is covered by the 1960 Act. But another difficulty arises from the fact that section 1(1) of the Act applies only to children under the age of fourteen. This means that, even if the Act can be used in the case of inducing children to pose, it is not available where they are fourteen or fifteen years of age. Unless, therefore, other statutory charges can be brought (as in the second case outlined in paragraph 55), conviction may only be secured in such a case by means of a charge of conspiracy to corrupt public morals.

70. One isolated case amongst those prosecuted for conspiracy to corrupt public morals involved, as we have noted, a charge where the director and employees of a company were active in a business selling sado-masochistic accoutrements, catalogues and books. The printed matter, it is clear, could have been dealt with under the Obscene Publications Act 1959, but an "article" under that Act is limited to matter to be read or looked at, sound records and films. The conspiracy charge was the only one available to deal with the other articles.

71. The final situation requiring consideration is one which has arisen as a result of the operation of the Street Offences Act 1959 penalising prostitutes who loiter or solicit in streets or public places. It was to provide another means of advertising availability that the directory was compiled which led to the prosecution in Shaw. The Act has also led to the wide scale use of small card advertisements in shop windows or display cabinets, describing in euphemistic terms the services offered. The placing of such advertisements by the prostitutes (whether male or female) does not amount to soliciting either under section 1 of the Street Offences Act 1959 or section 32 of the Sexual Offences Act 1956[165]. But

165. See Weisz v. Monahan [1962] 1 W.L.R. 262 and Burge v. D.P.P. [1962] 1 W.L.R. 265.

the shopkeeper, whether a man or a woman, who accepts the advertisements can probably be made liable (assuming agreement with the prostitute, whether male or female) for conspiracy as in Shaw; the shopkeeper, if a man, can also be made liable for living on the earnings of female prostitution under section 30 of the 1956 Act, and further, whether a man or a woman, can be made liable under section 5 of the Sexual Offences Act 1967 for living on the immoral earnings of a man. We treat at greater length the problems raised by these advertisements at paragraph 102 of this paper.

72. We are unaware at present of other cases for which charges of corrupting public morals or of outrage to public decency (whether or not accompanied by a conspiracy count) have been used, and, save in the instances discussed in paragraphs 66-71, other charges under statute or at common law seem to be available. This is, however, a matter upon which we welcome advice.

VII PROVISIONAL PROPOSALS FOR AMENDMENTS TO THE LAW

A. General

73. Our aim in the following paragraphs is to put forward for consideration reforms which will ensure that all conduct in the area of the law discussed in this paper which ought to be penalised will be covered by statutory offences. We indicated at the outset of this paper that, having regard to the speeches and judgments in Shaw and Knuller, it seems likely that offences of corrupting public morals and outraging public decency exist without the element of conspiracy, although at present conspiracy charges are invariably brought. If, in accordance with our provisional proposals, conspiracy is confined to cases where the object of the conspiracy is a crime, abolition of the two common law offences will result in

the elimination of conspiracy in the area which they cover except in so far as that area is also covered by statutory offences.

74. We have indicated that[166], so far as we know, the only conduct penalised by the offence of corrupting public morals where no other charges are at present available is -

(i) the exhibition of films on unlicensed premises,

(ii) the holding of "live sex shows" and the like without the element of continuity necessary for a charge of keeping a disorderly house,

(iii) some cases of inducing children to pose for obscene photographs,

(iv) selling accoutrements to aid deviant sexual practices, and,

(v) possibly, advertising the services of prostitutes in shop windows.

Outside the field of obscene publications the allied offence of outraging public decency appears to add next to nothing to the armoury of the law. As the cases in paragraphs 50-56 indicate, conspiracy to outrage is used sometimes as an alternative to conspiracy to corrupt, and it may also be appropriate where a charge of keeping a disorderly house would lie but for the absence of the element of continuity necessary for that offence[167]. It would, therefore, be possible to deal with the two broad offences of outraging and corrupting by abolishing them and making only minor changes in the law. This, however, would not, it seems to

166. See section VI of this paper.

167. See para. 21.

us, be an adequate response to the objective which we stated at the commencement of this paper of codifying the criminal law and thereby making it as certain of application as possible. We have pointed out in the Introduction to this paper that some of the common law offences cognate to corrupting public morals and outraging public decency are themselves uncertain in scope. Further, they derive in most instances from ancient authorities decided in social conditions very different from those of today, often reported in an unsatisfactory and fragmentary way. This, in our view, makes it desirable that these offences should be dealt with at the same time as our proposals in regard to conspiracy and, bearing in mind the ultimate aim of providing certainty in the criminal law, their elimination is, indeed, inevitable. We take the provisional view, therefore, that the best course to adopt in the present context is to examine these cognate offences and consider whether some rationalisation is possible without disturbing the statutory framework which exists in certain areas. We examine under specific headings the proposals which we regard as necessary to amend the law.

75. As a preliminary point, we observe that, in matters of obscenity and public morality, it is desirable to confine offences to specific situations, rather than to extend them to broad but ill-defined areas of conduct[168]. For example, the common law identified and penalised the specific conduct involved in indecent exposure. In considering proposals for reform of the law relating to the corruption of morals or of outrage to decency, we take the provisional view that it is preferable to discuss what new offences, if any, are required to deal with particular conduct which is recognised as an existing social evil. Accordingly, this is the approach we have adopted in putting forward the provisional proposals in the following paragraphs.

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168. Compare the possible breadth of corrupting public morals, para. 43 and fn. 96.

B. Specific proposals for amendments to the law

1. Indecent exposure at common law

76. In view of the citation of authority in Knuller[169], it may be that indecent exposure at common law is now subsumed under the broader offence of outrage to public decency there held to exist; but whether this is, indeed, the case is a matter which, for the purposes of this paper, it is unnecessary to pursue further.

77. We have seen[170] that most of the conduct dealt with by the common law offence is also capable of being prosecuted under the Vagrancy Act 1824. In fact, the vast majority of charges of indecent exposure are brought under that Act. The Home Office Working Party which is considering the replacement of the Vagrancy Acts have put forward for consideration an offence which will consist, in essence, of the exposure of the male genital organs in circumstances such that the exposer knew or ought to have known that his exposure was likely to be seen by persons to whom the exposure was likely to cause offence[171]. This offence is intended to deal with cases of "exhibitionism" which at present are almost invariably prosecuted under the Vagrancy Act.

78. Having regard to the terms of the offence proposed by the Home Office Working Party, our own task in the present context is limited to a consideration of whether there is any other behaviour in this area which should be the subject of criminal sanctions; and if so, what form any new offence to deal with that behaviour should take. Our earlier outline of the common law offence shows that it deals not only with exposure of the male genital organs, but also with sexual

169. See para. 61, fn. 142.

170. See paras. 11, 12 and 33.

171. See Home Office Working Party's working paper, para. 161.

conduct taking place in public which does not necessarily involve such exposure, such as sexual intercourse[172]. Because of its requirement that a witness or witnesses must have been able to see the conduct in question[173], the common law offence may be regarded as a form of public nuisance offence, and its main use is, in fact, in dealing with conduct which partakes of that character. But it is relevant to note, in the first place, that because of the objective character of the test of liability in the offence of exposure proposed by the Home Office Working Party, many of the cases which could be dealt with at common law might be capable of being prosecuted under the new offence. We instance in this respect cases of nude bathing taking place in such a location that the male bather knew or ought to have known that his conduct was likely to be seen by persons to whom his conduct was likely to cause offence[174]. Secondly, such conduct is also an offence by both sexes under some local bye-laws[175]. Thirdly, summary prosecutions are brought against persons of both sexes under the Metropolitan Police Act 1839, section 54 and the Public Order Act 1936, section 5, for "insulting behaviour" in cases of "streaking" and other similar manifestations[176].

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172. See para. 17.

173. See para. 18.

174. See para. 17.

175. See Home Office Working Party's working paper, para. 147. The Public Health Act 1936, s. 231, provides that a local authority may make bye-laws with respect to public bathing and may (inter alia) by such bye-laws regulate, so far as decency requires, the costumes to be worn by bathers. Among the model forms of Good Rule and Government bye-laws issued by the Home Office for the guidance of local authorities there is, for example, a bye-law about indecent bathing, which provides that no person shall within 200 yards of any street or public place, bathe from the bank or strand of any water, or from any boat thereon, without wearing a dress or covering sufficient to prevent indecent exposure of the person; this offence applies to both sexes.

176. Such as females in topless costumes in public. See further para. 35.

79. We consider in the following paragraphs the proposals which we think necessary in the residual area of indecent exposure that is not dealt with by the new and wide offence proposed by the Home Office Working Party. A review of the ambit of the provision in the Public Order Act 1936 lies outside our terms of reference; but we think it right to point out that section 5 of that Act, to the extent that it is used to punish "streakers" and the like, is being employed for a purpose which is far from its original intention, which was to penalise those whose behaviour was likely to cause a breach of the peace by reason of activities directed against racial or religious minorities. It may be, however, that more widespread appreciation of the full effect of the decision in Brutus v. Cozens[177] will in future inhibit prosecutions for the minor nuisance of "streaking", where the presence of real insult to the feelings of ordinary people is unlikely. Since the wording of section 54 of the Metropolitan Police Act 1839 is in this respect almost identical, similar considerations in regard to the interpretation of "insulting" apply to prosecutions for "streaking" under that section.

80. In so far as male nudity in public is concerned, our provisional view is that the terms of the offence proposed by the Home Office Working Party are sufficiently wide to deal with all cases which need to be penalised. The proposed offence contains the double requirement that the defendant must have known or ought to have known that he would be seen, and that his exposure was likely to cause offence. For our part, we do not think that further provisions are required to deal with the male "streaker", since it seems to us that the objective character of the new proposed offence is sufficiently wide to cover all males whose behaviour of this kind merits punishment.

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177. [1973] A.C. 854; see para. 35.

81. The Home Office Working Party has restricted its proposed offence to exposure by males because their primary purpose is to deal with male "exhibitionism". "Exhibitionism" is a well-recognised phenomenon which has no counterpart in the female. However, as we have shown in the previous paragraph, the objective nature of the offence proposed would cover other conduct such as male "streaking". Our provisional view is that we doubt whether any new offence is necessary to deal with such relatively unimportant anti-social activities on the part of women as "streaking" and the like. If, however, consultation indicates the need for an offence to deal with such conduct, consideration can be given to the appropriate form of offence, whether it be a widened offence analogous to the one proposed by the Home Office Working Party, or a widening of the offence which we propose in the following paragraph.

82. It remains only to deal with cases of sexual intercourse and other overt sexual behaviour in public. We think that there is a need here for a summary offence to deal with acts which, when done in public by individuals or between persons of different sexes[178], the great majority of people find offensive. We doubt whether a summary offence which simply penalised sexual intercourse alone would be sufficiently wide, since it is not difficult to detail other sexual behaviour, not necessarily involving either intercourse or actual exposure of the sexual organs, which would be considered offensive if taking place in the view of others. But we do not consider it necessary to define further precisely which forms of behaviour should be the subject of a new offence. In our provisional view, it will suffice if the offence penalises sexual intercourse or other overt sexual behaviour taking place in such circumstances that the participants knew or ought to have known that their behaviour was likely to be seen by other persons

178. Indecency between males in public is, of course, still an offence under the Sexual Offences Act 1956, s. 13.

to whom the behaviour was likely to cause offence. It will be noted that this proposal contains the same objective tests as the Home Office Working Party's proposed new offence of indecent exposure. It does not state the precise forms of overt sexual behaviour, other than actual sexual intercourse, which is to be penalised, but in our provisional view, this is unnecessary having regard to the objective requirements of the offence. We think that, for this relatively minor offence, which we regard as socially of lesser importance than the proposed new offence of indecent exposure, a maximum sentence of a fine of £100 alone would be appropriate. More serious forms of sexual misconduct which may take place in public are dealt with below[179].

83. The breadth of conduct covered by the two offences proposed, one by the Home Office Working Party and one by ourselves above, will, in our view, enable the common law offence of indecent exposure to be abolished.

2. Public exhibition of indecent acts and things

84. For the reason given in the case of indecent exposure[180], the common law offence which covers the public exhibition of indecent acts and things may be subsumed in the more general offence of outraging public decency. In any event, the range of subject matter which may be prosecuted under this offence may also be prosecuted under statute[181] and, since the statutory provisions are unaffected by the defence available under section 2(4) of the Obscene Publications Act 1959[182], the range of materials which may be the subject of a prosecution under them is wide. It seems to us,

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179. See the proposals relating to obscene performances, para. 90 et seq.

180. See para. 76 and para. 61, fn. 141.

181. See para. 34.

182. See para. 27 and see e.g. (1967) 31 Jo.Cr.L. 6; and compare Theatres Act 1968, s.2(3)(b), para. 49.

indeed, that there is nothing which may be prosecuted at common law, either as in Knuller or as an indecent exhibition, which may not be the subject of a statutory charge.

85. The whole question of indecent public displays is being reviewed by the Home Office Working Party on Vagrancy and Street Offences, and proposals are being made by them for replacement of the statutory provisions. Accordingly, we are making no proposals in the area of indecent public exhibitions as distinct from displays involving human conduct[183]. But we believe that acceptance of the Working Party's proposals for reform of the law in this area would enable the common law offence covering public display of indecent acts and things to be abolished.

3. Keeping a disorderly house

86. The common law offence of keeping a disorderly house has probably not been subsumed under the more general offences discussed in this paper, although charges of outrage to public decency or corrupting public morals may be brought in many cases covered by the disorderly house offence where the conduct charged involves an indecent performance[184]. Charges under statute can also be brought in appropriate cases, such as the keeping of a brothel, but the common law offence has been invoked in cases where premises have been made available for sexual activity but have fallen short of being a brothel[185]. We deal in the following paragraphs with the various amendments to the law and new statutory provisions which, in our provisional view, would be required before abolition of the offence of keeping a disorderly house would be possible.

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183. Our proposals for dealing with "live" displays are dealt with under the heading of disorderly houses; see para. 90 et seq.

184. See para. 20.

185. See Berg (1927) 20 Cr.App. R. 38; see also para. 22(i).

Obscene films

87. Perhaps the most significant gap in existing legislation is that left by the omission from the Obscene Publications Act of provisions to deal with films which are shown on unlicensed premises which should be licensed, otherwise than by prosecution for the summary offence under the Cinematograph Act 1909. Charges both of keeping a disorderly house and of conspiracy to corrupt have been used in this area[186]. The Cinematograph and Indecent Displays Bill proposed to deal with these film exhibitions in two ways: by bringing within the licensing provisions cinematograph exhibitions previously exempt[187], and by applying the provisions of the Obscene Publications Acts to the exhibition of all other films[188]. Provisionally, we do not propose an extension of existing licensing arrangements. We are not aware that there has been a demand for such an extension - although this is a matter upon which we would welcome comment - and it seems to us that the extension might give rise to considerable practical difficulties[189]

88. We believe that the changes necessary in the law in this area can best be effected by amending the Obscene Publications Act 1959; but, in our view some reconsideration of the aims of the law in relation to unlicensed film exhibitions is required before the amendments can be specified with the requisite precision. The aim of the proviso to section 1(3)

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186. See paras. 51-53.

187. See para. 30.

188. Except those exempted from licensing by the Cinematograph Act 1909, s. 7(2) (buildings or structures of a moveable character); see para. 30.

189. E.g. in exercise of the authority to licence the very large number of foreign language films shown privately to immigrant audiences.

of that Act, as we have indicated[190], seems to have been to exclude from the Act the showing of films on licensed premises; but in doing so, it also excluded the showing of films on illegally unlicensed premises to which the public are admitted, while including within the Act's operation the showing of such films on domestic occasions in private dwelling-houses. It seems to us that, given that the scheme of the 1959 Act ought to apply to film exhibitions on unlicensed premises, the law in this area should, nevertheless, aim at penalising obscene films which are exhibited for the purpose of commercial exploitation rather than the personal gratification of the screener or viewer. It is relevant to observe that the possession of an obscene book for the personal gratification of its reader is not penalised by the 1959 Act. Similarly, although the Theatres Act applies the general scheme of the 1959 Act to the presentation and direction of a play[191], by virtue of section 7(1) of that Act this does not affect the performance of a play given on a domestic occasion in a private dwelling. Thus it seems to us that possession of an obscene film entirely for the purpose of domestic viewing, or the actual screening of such a film for this purpose, is not a matter which should be dealt with by the 1959 Act; nor, indeed, should it be penalised at all. At present, however, the "domestic" screening is penalised, while illegal unlicensed "commercial" screening is not covered. The right policy would, therefore, be that which sought to reverse this situation, and we discuss how, in our view, this may best be done in the next paragraph.

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190. See para. 31.

191. See para. 49.

89. There are, at present, three classes of film exhibition -

(i) those shown on licensed premises;

(ii) those shown on premises or occasions which are exempt from the requirement of licensing; and

(iii) those shown on premises which ought to be licensed but are not.

As we have seen[192], films shown on licensed premises are subject, indirectly, to the censorship of the British Board of Film Censors or local authorities, and clearly the provisions of the Obscene Publications Act ought not to be extended to them. At present the only exhibitions in class (ii) above to which the Obscene Publications Act applies are those given in a private dwelling-house to which the public are not admitted, whether on payment or otherwise[193]; other exempt exhibitions[194] as well as those in class (iii) are subject neither to censorship nor to the provisions of the Act. It is our provisional view that the only exhibitions which ought to be exempt from both censorship and the Act are exhibitions given on a domestic occasion on private premises. A new provision exempting such performances from the provisions of the Obscene Publications Act would bring the law relating to the domestic screening of obscene films into line with that relating to performances of plays on domestic occasions[195]. Whether a somewhat wider term than "private dwelling" (the expression used in the Theatres Act 1968), to include outhouses etc., would be justifiable is a small matter upon which we would welcome the guidance of those whom we consult.

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192. See para. 31.

193. Ibid.

194. See para. 30.

195. See Theatres Act 1968, s. 7(1) and para. 92.

In our provisional view all other film exhibitions which are given on unlicensed premises should be subject to the provisions of the Act[196]. This would include, of course, exhibitions in class (iii) above held on premises not licensed in accordance with the 1909 Act (the most important category) as well as those exempt from censorship. Amendments to the 1959 Act to give effect to these proposals would, in our provisional view, obviate the need for charges of conspiracy to corrupt in regard to obscene films.

Obscene performances

90. The second important amendment to the law concerns cases where conduct does not involve playing a role or performance of a ballet and where, therefore, the conduct falls outside the definition of a "play" within section 18(1) of the Theatres Act 1968[197]. The most obvious examples are the strip-tease show and its derivative, the live performance or simulation of various permutations of sexual activity. Again, keeping a disorderly house and conspiracy to corrupt have been used in this area[198]. In our provisional view, a new offence is needed to penalise certain physical activity which (where it takes place in premises) is the subject of disorderly house charges. Our proposed means of achieving this is to create an offence parallel to section 2 of the Theatres Act 1968[199], which would penalise the presentation or direction of obscene performances which do not fall within the definition

196. For the purpose of this provisional proposal we would include in licensed premises those "buildings or structures of a moveable character" which are exempted from the licensing provisions of the Cinematograph Act, 1909 by s. 7(3); the owner of such a building or structure requires a licence from the council of the district in which he ordinarily resides: see s. 7(3)(a) as amended by Local Government Act 1972, s. 204(5).

197. See para. 49.

198. See paras. 51-52.

199. See para. 49.

of a "play" in section 18 of that Act. This would have the effect of extending the "tendency to deprave and corrupt" test to the performance of any live activity[200] whether in public or private and whether or not for gain. We do not propose any restriction as to the place of presentation of the performances which would be the subject of this offence. In this connection, it is relevant to note that for certain purposes in the Theatres Act the term "premises" is by section 18 defined to include "any place"; but we do not think it necessary to specify in the present context that the performances in question must take place upon premises.

91. There are, however, certain difficulties in making provision for such a new offence. For example, some may object that it might penalise certain activities which are now regarded as socially acceptable, such as strip-tease shows. We doubt if the new offence would have this effect, for the reason that such shows would, in the normal course, be most unlikely to fall within the test of obscenity; it may be doubted whether, by currently accepted standards, they would even be regarded as an outrage to decency, a test which, as we have indicated[201], is broader than that of obscenity under the Theatres Act. In any event, if the activities taking place at these shows were, in a particular instance, to be such as to tend to deprave and corrupt, we believe that, as a matter of principle, it would be right for the new offence to apply to them: if the test of obscenity is thought to be appropriate for printed material

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200. The presence of an audience would be a precondition of this offence being committed, since the test of obscenity would be the tendency to deprave and corrupt those likely, having regard to all relevant circumstances, to attend it: see para. 49, fn. 107. But presumably an audience of one might suffice for this purpose.

201. See para. 63.

and the "legitimate" theatre, it ought in our provisional view to be appropriate for application to other activities to which people in general are permitted access for the purpose of viewing.

92. The question of access to the activities under discussion does, however, point to a more substantial difficulty which we see in an offence similar to section 2 of the Theatres Act. Section 2(2) of that Act penalises the presentation or direction of obscene performances of plays by anyone in public or private, whether for gain or not. By section 7(1), section 2 and other related sections have no application in relation to a performance of a play given on a domestic occasion in a private dwelling. Without some similar restriction upon any new offence extending to obscene, live, non-dramatic performances, we believe that it would be unacceptably wide; it would penalise activity taking place on private premises entirely for the personal gratification of the participants, provided that there was an audience - which could be a minimum of one individual - and would thus penalise conduct which, when taking place on such premises, is at present subject to no penalty[202]. A possible alternative would be to limit the ambit of the new offence to public performances. Such performances are defined in section 18 of the Theatres Act (for certain limited purposes under the Act) as -

> "any performance in a public place within the meaning of the Public Order Act 1936 and any performance which the public or any section thereof are permitted to attend, whether on payment or otherwise."

Under section 9 of the Public Order Act 1936 as amended by

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202. Assuming that the conduct did not amount to the running of a brothel or other similar activity which is penalised by the Sexual Offences Acts 1956 and 1967; see para. 22.

section 33 of the Criminal Justice Act 1972, "public place" -

> "includes any highway and other premises or place to which at the material time the public have or are permitted access, whether on payment or otherwise."

On the whole, we would tend to favour a limitation such as that found in section 7 of the Theatres Act. The definition of public place is not free of difficulty, since, by virtue of the words "the public have...access", it might be held to include places where the public are present, although present only as trespassers. By contrast, the words of section 7 seem to us to be straightforward in application, and free of the difficulties which in other contexts have surrounded the question of whether a performance is in public or in private[203]. However, as in the case of the parallel exception which we propose in the case of the private exhibition of films, we would prefer the expression "private premises" in place of "private dwelling", in order to cover all parts of a private residence; but we invite views as to whether this expression might not create too wide an exception for its purpose.

93. There is a final consideration to bear in mind in formulating a new offence in this area. Some of the premises, conduct upon which is made the subject of disorderly house charges are, in any event, subject also to licensing arrangements. This is the case for example, with "stag shows" held in public houses[204]. Where this is the case, persistent disregard of the terms of the licence may be dealt with in the appropriate way.

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203. See e.g. the cases cited in Halsbury's Statutes (3rd ed., 1971), vol. 35 p. 312.

204. See para. 22; and see Griffin and Farmer (1974) 58 Cr. App. R. 229.

94. Our provisional proposal in regard to non-dramatic performances is, therefore, that an offence parallel to section 2 of the Theatres Act should be created to penalise the presentation of any obscene live performance, whether in public or private, and whether for gain or not; but that this offence should not apply in relation to such performances given on a domestic occasion on private premises. We have doubts as to whether the "public good" defence in section 3 of the Act[205] is either necessary or relevant in this context, although this is a matter upon which we should welcome views. As to penalties, provisionally, we think that those provided in section 2 of the Theatres Act, that is, six months' imprisonment or a £400 fine on summary prosecution, and three years' imprisonment and a fine on indictment, are appropriate maxima for this kind of offence.

Touting

95. A further new offence in this area is, in our provisional view, desirable, because it is clear from recent prosecutions for conspiracy to corrupt or to outrage that one of the most frequent defendants is the tout, both for live performances and for obscene film exhibitions not at present subject either to the Obscene Publications Act 1959 or to licensing arrangements. It may be that, with the amendments to the 1959 Act and the creation of a new offence dealing with obscene live performances which we have proposed, these individuals would be liable as secondary parties; this would, in our view, certainly be the case with doormen, who have also been prosecuted at common law. Since, however, their activities may be regarded as less serious than those directly concerned with the presentation or direction of the films or performances themselves, we think such individuals would be best dealt with by the creation of a specific summary offence penalising anyone who solicits others in a public place to induce them to attend such performances as those referred to

205. See para. 49.

above and film exhibitions penalised by the Obscene Publications Act 1959[206]. This should, we suggest, have a maximum penalty of 3 months' imprisonment and a £400 fine.

96. Creation of these two new offences, together with the amendments proposed to the Obscene Publications Act 1959, would, in our view, enable the offence of keeping a disorderly house to be abolished. It is appropriate to note here that this abolition would necessitate amendment of the Public Health Acts Amendment Act 1890, section 51, and the Sunday Observance Act 1780, both of which impose criminal liability by deeming certain premises to be a disorderly house and rendering their keepers punishable accordingly.

4. Obscene libel

97. We have seen that the Obscene Publications Act 1959 in effect superseded the common law, although the offence charged as obscene libel was not abolished[207]. We have seen also that the earliest case of obscene libel was cited in Knuller in support of the existence of the offence of outrage to public decency[208]. Whether or not the test at common law as laid down in Hicklin[209] is wider than that laid down by the 1959 Act, we are of the view that, having regard to the amendments proposed to the Act and to the new offences proposed in the preceding paragraphs, there is no need to retain the common law offence; and we therefore propose its abolition. Taken with the proposed abolition of the broad offence of corrupting public morals, we think that this would enable section 2(4) of the 1959 Act to be repealed.

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206. Compare Street Offences Act 1959, s. 1(1); the reference to the Obscene Publications Act 1959 is to that Act as amended by our proposals in para. 89.

207. See para. 27.

208. I.e. the case of Curl; see paras. 15 and 61.

209. See para. 23.

5. Conspiracy to debauch an individual

98. We have indicated[210] that, in so far as the authorities show that there is an offence of conspiracy to debauch an individual, this type of conspiracy seems to be quite unnecessary today, the situations which it covers being dealt with now by statutory offences. Accordingly, we propose that conspiracy to debauch where the object of the conspiracy is not itself a crime should cease to be an offence. This proposal in any event conforms with the provisional proposal to restrict conspiracies to those having as their object the commission of a criminal offence.

6. The Indecency with Children Act 1960

99. We have pointed out that section 1 of the Indecency with Children Act 1960 is in need of amendment to ensure conviction under that provision of individuals who induce children to pose for indecent photographs and the like. It may be that the Act is already adequate to deal with this activity (at any rate in cases of children under fourteen) but to clarify its scope we propose that for the purpose of section 1(1) it should not be necessary to show that the defendant intended that physical contact with him should take place or that such contact did in fact take place.

100. The Act at present only deals with indecency with children under the age of fourteen, but we have shown that there is, apparently, a need to cover the case of inducing those of fourteen or fifteen years of age to pose in indecent postures. The Act was passed as a result of the recommendations

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210. See para. 24.

in the First Report of the Criminal Law Revision Committee[211]. The Committee in their Report favoured the age of fourteen, rather than sixteen, because children aged fourteen or fifteen are more aware of the nature of the things which they are induced to do, and they are "already sufficiently protected by the existing provisions as regards sexual offences"[212]. Recent cases involving conspiracy to corrupt[213] seem to indicate that there are, in fact, children aged fourteen or fifteen who are in need of protection more extensive that that which the law now provides. If we are correct in this (and we would welcome further advice on this point) we think that the protection afforded by the 1960 Act should be widened by permitting it to be invoked where the boy or girl with or towards whom an act of gross indecency is committed is "under the age of sixteen".

7. Sale of accoutrements for use in deviant sexual practices

101. We have noted that the sale of accoutrements for use in deviant sexual practices has been penalised by a charge of conspiracy to corrupt public morals[214], which is the only charge available at present. We are, however, very doubtful about the need for penalising this conduct. A new offence to deal with it would involve considerable difficulties of definition since some of the objects concerned may be bought and

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211. First Report, on Indecency with Children, (1959) Cmnd. 835. The recommendations were made after a reference by the Home Secretary to consider alterations to the criminal law to deal with a person who "without committing an assault, invites a child to handle him indecently or otherwise behaves indecently towards a child". See Fairclough v. Whipp [1951] 2 All E.R. 834 and the discussion of the law in Smith and Hogan, Criminal Law (3rd ed., 1973), p. 338-9.

212. (1959) Cmnd. 835, para. 9.

213. See Hart and others, cited in para. 55.

214. See paras. 56 and 70.

sold legitimately; and, in any event, the advertising of such material may in certain circumstances be prosecuted[215]. We would welcome comment upon the need for creating an offence in this area.

8. Advertisements by prostitutes

102. The Wolfenden Committee, in its Report on Homosexual Offences and Prostitution[216] remarked -

> "It must be accepted that for so long as prostitution exists the prostitute will seek customers and the potential customer will seek prostitutes. If the prostitute is not allowed to find her customers in the streets then presumably she and her customers will find other means of meeting each other."[217]

The Committee foresaw, as a possible consequence of their proposals, "an increase in small advertisements in shops or local newspapers, offering the services of masseuses, models or companions", adding that they thought that "this would be less injurious than the presence of prostitutes in the streets".

103. This forecast has proved correct. The use of advertisements in shop windows or display cabinets outside shops has become a popular way for prostitutes to publicise their services. The advertisements usually comprise some such formula as "French lessons" or "doll for sale", together with a telephone number. Overtly they are not usually indecent. In some cases the

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215. E.g. if the advertising material is indecent, under the Indecent Advertisements Act 1889; or if sent through the post and obscene within the meaning of s. 11 of the Post Office Act 1953 (see fn. 69), under that section.

216. (1957) Cmnd. 247.

217. Ibid., para. 286.

euphemistic metaphor used by the prostitute may be capable of being interpreted as an innocent advertisement, but their true meaning will generally be apparent, particularly where, as often happens, they are grouped on display boards notorious for providing this service. Of course, it is always possible that an unwitting person could take such an advertisement at its face value, telephone a prostitute and be caused offence, but the members of the Home Office Working Party[218] have not heard of such a case.

104. We have been told by the senior police officers who are members of the Home Office Working Party that the rewards to shopkeepers for displaying these advertisements are sometimes very high. Prostitutes are apparently prepared to pay up to £40 per week for the display of a small card and, as one display cabinet can accommodate many such cards, it is obvious that shopkeepers such as these are making large profits out of prostitution.

The present law

105. Under the present law, the placing or display of these advertisements does not, in itself, constitute any offence[219]. A male shopkeeper who displays them may commit the offence under section 30 of the Sexual Offences Act 1956 of knowingly living wholly or in part on the earnings of prostitution; and there have been successful prosecutions for this offence of shopkeepers who have made the advertisements a substantial source of income. We understand that the police do not prosecute without giving a caution first. The section 30 offence, however, applies only to men so that no such action can be taken against a woman shopkeeper.

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218. See para. 11.

219. See para. 71.

106. It is also possible that a jury might decide that the agreement between a shopkeeper (of either sex) and a prostitute or her pimp for the shopkeeper to advertise the prostitute's services in this way constitutes the offence of conspiracy to corrupt public morals, though we have not heard that this conduct has been so prosecuted.

107. We have noted that the Wolfenden Committee was prepared to accept an increase in this type of advertising as part of the price to be paid for "driving the prostitute from the streets"[220]. Nevertheless the Committee thought that, where exploitation of the prostitute was involved, the laws covering such exploitation should be rigorously enforced or even extended[221]. Thus, in respect of landlords' letting of premises to prostitutes at exorbitant rents, they recommended what they thought, on the authorities as they then stood, would be an extension of the law, to deem such landlords to be living on the earnings of prostitution[222].

Should there be a new offence?

108. It is clear that widely differing views about this type of advertisement are possible. On the one hand it may be argued that very few people nowadays are likely to be offended by advertisements of the kind we have described; that many of the advertisements are displayed by shopkeepers who are known

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220. See para. 102.

221. (1957) Cmnd. 247, para. 286.

222. Ibid., para. 331. The Court of Criminal Appeal in Thomas [1957] 1 W.L.R. 747 overruled Silver [1956] 1 W.L.R. 281, the case upon the authority of which the Committee based its recommendation. The decision in Thomas that a person who, at a cost of £3 a night, allowed a prostitute to use his bedroom, was living in part on the earnings of prostitution rendered implementation of this recommendation unnecessary.

to specialise in them and will probably be read only by those who seek them out; and that society should tolerate this method of plying a trade which is not itself illegal. On the other hand, it may be said that it is wrong that shopkeepers should be able to make large profits from prostitution and that the ready accessibility of such advertisements may encourage resort to prostitutes and place young people in moral danger.

109. It is our provisional view that, so long as such advertisements are not overtly indecent, their display should not, of itself, constitute any offence[223].

110. Where, however, a shopkeeper is plainly exploiting prostitutes by charging exorbitant fees for the display of these cards, then we agree with the view of the Wolfenden Committee that the laws covering exploitation should be rigorously enforced; and, consequently, that it is not inappropriate to prosecute the male shopkeeper under section 30 of the Sexual Offences Act 1956. There is no simple solution to the anomaly which arises in the case of a female shopkeeper. It arises equally in the case of the female owner of a flat let at an exorbitant rent to a prostitute or, indeed, to any other female who exploits prostitutes without going so far as to commit one of the offences under the Sexual Offences Act 1956[224]. The extension of the section 30 offence to women would bring within its ambit not only the woman shopkeeper but also, for example, the prostitute's "maid", and would raise difficult questions about the proper scope of the offence which would go beyond the limits we have set ourselves in

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223. If they are overtly indecent they may be the subject of summary prosecution under s. 3 of the Indecent Advertisements Act 1889; see para. 34.

224. E.g. exercising control over a prostitute under s. 31, keeping a brothel under s. 33, letting premises for use as a brothel under s. 34 or permitting premises to be used as a brothel under s. 35.

this paper. A re-examination of the ambit of section 30 is something which must await a full consideration of sexual offences generally[225].

111. To summarise, we take the provisional view that the display of small card advertisements by prostitutes in the window or display cabinets of shopkeepers should not of itself constitute an offence on the part of the prostitute or the shopkeeper. Where large profits are being made by male shopkeepers by means of such display, we think that continuing use of section 30 of the Sexual Offences Act 1956 (penalising living off the earnings of prostitution) to prosecute the shopkeepers concerned is appropriate. But the problem of the female shopkeeper in this context is one which must await a review of the scope of that section.

C. Conclusion

112. The proposals which we have put forward for consideration in the preceding paragraphs will, in our provisional view, permit the charge of conspiracy in the area of the law concerned with morals and decency to be restricted to cases in which the object of the conspiracy is a crime; and, further, will enable the general offences at common law of corruption of public morals and of outrage to public decency to be abolished.

VIII SUMMARY

113. We propose that conspiracy to corrupt public morals and conspiracy to outrage public decency should cease to be criminal where the object of the conspiracy falls short of being a crime. We further propose that a number of cognate common law offences should be abolished, namely, the

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225. See the Law Commission, Second Programme of Law Reform, (1968) Law Com. No. 14, Item XVIII.

general offences of corrupting public morals and outraging public decency, and the offences of indecent exposure at common law (paragraphs 76-83), public exhibition of indecent acts and things (paragraphs 84-85), keeping a disorderly house (paragraphs 86-96), obscene libel (paragraph 97) and conspiracy to debauch (paragraph 98). We welcome comment upon our proposals for abolishing common law offences in this area and upon the proposals for amending the law summarised in the following paragraphs.

114. (a) In the field of indecent exposure, the Home Office Working Party on Vagrancy and Street Offences (whom we have consulted on this and other matters of common interest) have proposed an offence to deal specifically with male exhibitionism. This will penalise the exposure of the male genital organs in circumstances such that the exposer knew or ought to have known that his exposure was likely to be seen by persons to whom the exposure was likely to cause offence (the maximum penalty to be a fine of £100 and 3 months' imprisonment). In our view, this offence would be wide enough to penalise also all cases of male nudity in public (such as "streaking") which merit punishment. We do not propose the creation of any other offences to deal with nudity in public but if consultation indicates the need to penalise female "streaking" and the like, consideration may be given to an appropriate extension either of the offence proposed by the Home Office Working Party or the offence summarised in subparagraph (b).

(b) To deal with other conduct which at present falls within the ambit of the common law we propose the creation of a new offence with a maximum penalty of a fine of £100, which would penalise sexual intercourse or other overt sexual behaviour taking place in such circumstances that the participants knew or ought to have known that their behaviour was likely to be seen by other persons to whom the behaviour was likely to cause offence (paragraphs 79-83).

115. In the area of public exhibition of indecent acts and things, we are making no proposals, since the proposals being made by the Home Office Working Party on the Vagrancy Acts to replace existing legislation will (taken with our proposals summarised in paragraph 116) cover the whole field at present dealt with by the common law (paragraphs 84-85).

116. In the area of conduct dealt with by the offence of keeping a disorderly house, we make the following proposals -

(a) We propose two amendments to the Obscene Publications Act 1959, which will have the effect, first, of bringing all exhibitions of films upon unlicensed premises within the operation of the Act; and secondly, of exempting from the operation of the Act all exhibitions of films given on a domestic occasion on private premises (paragraphs 87-89).

(b) We propose a new offence on the lines of section 2 of the Theatres Act 1968 (which penalises the presentation and direction of an obscene performance of a play) to

penalise the presentation or direction of any obscene live performance, whether in public or in private and whether or not for gain; but this offence should not apply in relation to such performances given on a domestic occasion on private premises. The penalties should be similar to those in section 2 of the 1968 Act, that is, a maximum of six months' imprisonment and a fine of £400 on summary conviction, and of three years' imprisonment and a fine on indictment (paragraphs 90-94).

We also propose the creation of a new offence penalising anyone who solicits others in a public place to induce them to attend film exhibitions or performances penalised under our proposals in (a) and (b) above. This would be a purely summary offence, punishable with a maximum penalty of 3 months' imprisonment and a fine of £400 (paragraph 95).

117. We propose two amendments to section 1(1) of the Indecency with Children Act 1960 -

(a) For the purposes of that subsection it should not be necessary to show that the defendant intended that physical contact with him should take place or that such contact did in fact take place.

(b) Protection should be afforded to boys and girls under the age of sixteen rather than, as at present, those under the age of fourteen (paragraphs 99-100).

118. We seek comments upon the necessity or desirability of creating new offences to deal with two situations -

(a) The sale of accoutrements for use in deviant sexual practices. We ourselves doubt the desirability of creating a new offence here (paragraph 101).

(b) Advertisements by prostitutes in shopkeepers' windows and display cabinets. Provisionally, we do not think that display of these small card advertisements (provided that they are not overtly indecent) should of itself constitute an offence on the part either of the prostitute or the shopkeeper. But when large profits are made by male shopkeepers by such displays, we think that use of section 30 of the Sexual Offences Act 1956 (penalising men who live off the earnings of prostitution) to prosecute these shopkeepers is appropriate. The problem of the female shopkeeper in this context must await a review of the scope of section 30 in the context of sexual offences generally (paragraphs 102-111).

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