

SEX OFFENSES: AN ETHICAL VIEW

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INTRODUCTION

"St. Paul's advice is as sound today as it was two thousand years ago," says Morris Ploscowe. "It would be a great deal better if men and women remained continent sexually or got married and then adhered to their marriage vows. Much emotional disturbance, human misery, crime, disorder, and illegitimacy would be averted if humanity could abide by St. Paul's teachings. It never has."¹

Because the "flesh is weak" in most people some of the time and in some people most of the time, with resulting offenses either to the persons or the opinions of others in the community, the law has erected fences of prohibition and of penalty. How effective these fences are is, at the very least, questionable. One distinguished writer on jurisprudence, Edmond Cahn, has observed that "the criminal laws relating to sex have very little systematic enforcement anywhere. Most of them ought to have been repealed long ago."² There is some evidence, based on one serious, although debatable, attempt at research into sexual behavior, that if existing laws were actually enforced, about ninety-five per cent of the male population in America would go to jail.³ If this finding even remotely reflects the realities, it is plain that there is room to wonder whether our criminal sex laws are legally viable, and possibly also to question their ethical validity.

Why are these unenforced laws still on the statute books? Morris Ploscowe, in another place, has explained their presence as "dead letter legislation" kept there "because of the fear that a vote for repeal would be branded as a vote for immorality."⁴ Writing more than a quarter of a century ago, Walter Lippmann offered a second explanation, saying that "what everybody must know is that sexual conduct, whatever it may be, is regulated personally and not publicly in modern society. If there is restraint, it is voluntary; if there is promiscuity, it can be quite secret."⁵ Here, in these two comments, we have a large part of the reason for our continued lip service to unenforced sex laws: *fear of appearing indifferent to morality* if we advocate cutting out the dead wood, in the eyes of those who think by what recently

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¹ MORRIS PLOSCOWE, *SEX AND THE LAW* 271 (1951).

² EDMOND CAHN, *THE MORAL DECISION* 89 (1955).

³ ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 392 (1948).

⁴ Ploscowe, *The Place of Law in Medico-Moral Problems*, 31 N.Y.U.L. REV. 1238 (1956).

⁵ WALTER LIPPMANN, A PREFACE TO *MORALS* 286 (1929).

has been called the conventional wisdom;⁶ and the plain fact that *most sexual activity is clandestine* and, therefore, not easily subjected to control by public policy and judiciary. The rules of evidence in our law are such that the secretive nature of sexuality removes a great deal of it from ordinary criminal procedures.

However, "evidence" is a technical legal question and outside the scope of this article. The present discussion will be restricted to the ethical side of the problem. Lord Russell has asserted what he called "the well known fact that the professional moralist in our day is a man of less than average intelligence."⁷ In spite of the grim possibility that his harsh judgment may be well grounded, it is necessary, just the same, to place the whole question of criminal law and sex offenses within the ethical perspective and frame of reference. It is even possible that a "professional moralist" might share Glanville Williams's dissatisfaction over the present state of affairs in which "proposals to extend the law of crime and sharpen its penalties receive ready consideration, while proposals to restrict it are almost impossible to realize."⁸ If it is true that "law is the rule of reason applied to existing conditions,"⁹ then moral values and ethical analysis are an important part of that reasoning. Morality is as much at stake in our laws themselves as it is in the behavior which our laws ostensibly seek to regulate. Justice Holmes once remarked that "law is a statement of the circumstances in which public force will be brought to bear upon men through the courts."¹⁰ Since morality is meaningless apart from freedom, moralists naturally seek to reduce "legalism" to a minimum, keeping the range of choice and personal decision or responsibility as wide as possible. In the language of classical biblical theology in the West, grace reinforces law and sometimes even bypasses it, but it does not abolish it nor can it replace it until sin itself is no more.

There are some who seem to imagine that law and ethics can be divorced, as if law were not a matter of translating morals (value judgments) into formal social disciplines. Every law is the fruit of a decision about good and evil, right and wrong. "It is a pretty safe rule," as Felix S. Cohen once put it, "that whenever a judge says, 'This is a court of law,' and then goes on to say that he cannot be guided by moral or theological considerations, he is actually being guided by moral & theological considerations without knowing it."¹¹ There certainly are differing ethical doctrines; we do not all derive our values from the same source or, to alter the figure, base our norms on the same foundations and premises. A lawmaker's ethic, and a court's, may be utilitarian or hedonistic, based on a striving for happiness or pleasure as the highest good; or it may be a sheer duty-ethic, based on commandments from God or from some other authority such as the State or a Leader. But

⁶ See J. KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 7-20 (1958).

⁷ BERTRAND RUSSELL, *MARRIAGE AND MORALS* 88 (1929).

⁸ Williams, *The Reform of the Criminal Law and of Its Administration*, 4 J. Soc'y Pub. Teach. L. 217, 221 (1958).

⁹ *City of Milwaukee v. Milwaukee Elec. Ry.*, 173 Wis. 400, 406, 180 N.W. 339, 341 (1920).

¹⁰ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

¹¹ Cohen, *Judicial Ethics*, 12 OHIO ST. L.J. 3, 10 (1951).

whether pragmatic or formal, there *is* an ethic at work, no matter how covert or obscure it may be.

Some forms of sexual activity are historically and conventionally related to criminal law, such as fornication, adultery, abortion, bigamy, indecent exposure, rape (both forcible and statutory), homosexuality, prostitution, psychopathic sexuality, incest, and crimes against children. The problem of obscenity might be included, along with pornography—which D. H. Lawrence called “the attempt to insult sex.”¹² Roman Catholic theologians would add artificial insemination from a third-party donor (“adultery”), divorce (“legal adultery”), and contraceptive birth control (“unnatural,” as with sodomy, bestiality, etc.). For general purposes of discussion, however, the laws affecting marriage, divorce, and annulment only *indirectly* regulate sexual acts, and we should focus here upon the acts which are directly regulated by law.

I

THINGS AS THEY ARE

The relativity and variety of sex laws, even within the common framework of “Christian civilization” in the West, may be seen when we compare the network of statutes in the United States and England to the French *Code pénal*, for the latter ignores entirely all sexual acts which are adult, private, and consensual.¹³ It should be carefully noted that the whole objective of recent studies and reviews of sex laws, such as the Model Penal Code proposals of the American Law Institute,¹⁴ is to encourage the adoption of legislative principles and statutory codes which approximate the *laissez-faire* code of France.

The Anglo-American policy has been a very confused and inconsistent one, tending to “dead letter” laws and hypocrisy. In England, law reformers find it something of a puzzle that adultery, fornication, and prostitution are not criminal offenses; nor is homosexuality between females an offense, although between males it is; nor was it until a scant fifty years ago that incest was made a crime.¹⁵ In the United States, with its fifty separate law-making states, there has been a veritable mare’s nest of statutory laws. Since Elizabethan and Jacobean times, for example, courts and legislatures have tended to follow Lord Coke’s line that homosexuality is “a detestable and abominable sin among Christians not to be named,”¹⁶ with the result that the statutes outlawing it are commonly so broadly and evasively worded as to make it difficult, if not impossible, to draw an indictment that allows the defense any bill of particulars. A quick reading of Ploscowe’s survey of the obscurities, contradictions, and loopholes of American law shows why he ended his

¹² D. H. LAWRENCE, *PORNOGRAPHY AND OBSCENITY* 13 (1930).

¹³ Adultery in certain circumstances, especially of the wife, is punishable; but it is punished as an offense against the marriage contract, not as a sexual act in itself.

¹⁴ MODEL PENAL CODE art. 207 (Tent. Draft No. 4, 1955; Tent. Draft No. 9, 1959).

¹⁵ British attitudes and policies, as reflected in its sex offender legislation, are treated more extensively elsewhere in this symposium. Hall Williams, *Sex Offenses: The British Experience*, *infra* pp. 334-60.

¹⁶ See MORRIS PLOSCOWE, *SEX AND THE LAW* 151 (1951).

work declaring that the criminal law needs "a complete reorientation in the field of sex crimes."¹⁷

The logical difficulties are compounded by the moral evasions accompanying them. It has been seriously estimated that in the United States, there are about 40,000 sex crimes reported annually and perhaps ten to twenty times as many actually committed.¹⁸ Most state legislatures obviously do not regard their "sex crimes" as real crimes at all. For example, in Virginia¹⁹ and West Virginia,²⁰ only twenty dollars is the maximum penalty for fornication; in Rhode Island, it is only ten dollars.²¹ In Arizona, the penalty might be imprisonment for three years;²² but in North Dakota, it is only thirty days.²³ Police departments, except for Boston's, simply do not make arrests for adultery.²⁴ "Men and women copulate in sovereign disregard of penal statutes," and there is little that police, courts, or prosecutors can do about it unless we throw away the constitutional principle that safeguards privacy and frowns upon its invasion.²⁵

The hypocrisy of these laws is nothing new or "modern." It has revealed itself not only in the broad secular patterns of behavior, but also among such special and exemplary circles in the social order as the clergy. In medieval days, concubinage was common among the supposedly celibate priests, and the church authorities did not try to enforce the canons against it, even though they had the canons.²⁶ The Bishop of Winchester licensed prostitutes, or "stews," and collected the taxes on them; yet he forbade them the rites of the church and Christian burial on the ground that brothels were forbidden by "the law of God."²⁷ It is a comfort, as we shall see, to find that many distinguished churchmen are much less hypocritical in our own times.

There were, of course, other reasons than hypocrisy and venality for the failure of the ecclesiastical courts to deal effectively with forbidden sexuality, either heterosexual or homosexual. Their statutes, like many of the modern ones, were poorly drawn and defined, procedures were faulty as to evidence and judgment, and penalties were commonly meretricious. The penances imposed were so often commuted to money fines for the sake of the income that church courts lost status even where there was, as in England, a religious establishment with civil authority.

When the civil courts in England in 1533 took jurisdiction over sex sins and changed some formally into crimes,²⁸ they were far more punitive than the church courts had ever thought of being. For example, death was made the penalty for

¹⁷ *Id.* at 281.

¹⁸ JOHN MCPARTLAND, *SEX IN OUR CHANGING WORLD* 145 (1947).

¹⁹ VA. CODE ANN. § 18.82 (Cum. Supp. 1959).

²⁰ W. VA. CODE ANN. § 6058 (1955).

²¹ R.I. GEN. LAWS ANN. § 11-6-3 (1956).

²² ARIZ. REV. STAT. ANN. § 13-222 (1956).

²³ N.D. REV. CODE § 12-2208 (1943).

²⁴ MORRIS PLOSCOWE, *SEX AND THE LAW* 157 (1951).

²⁵ *Id.* at 281.

²⁶ H. C. LEA, *HISTORY OF SACERDOTAL CELIBACY IN THE CHRISTIAN CHURCH* 244, 260 *et seq.*, 445 *et seq.* (1932).

²⁷ GEOFFREY MAY, *SOCIAL CONTROL AND SEX EXPRESSION* 105 (1930).

²⁸ 25 Hen. 8, c. 6 (1953).

male homosexual acts (ignoring "lesbian" behavior altogether); and it was not until 1828 that this was reduced to life imprisonment, to be reduced again, with typical gyration, in 1885 to a maximum of two years!²⁹ Penalties in the United States range from one day in New York³⁰ to life imprisonment in Nevada;³¹ some states have a five-year maximum,³² others a five-year minimum.³³ It seems fairly evident that the common-law courts have never managed to work out a comprehensive or coherent code of forbidden sexual acts. Following a precedent of harshness by the early Puritans, some states have gone very far; for example, an Indiana statute actually made self-masturbation an offense punishable on the same terms provided for sodomy.³⁴

Prostitution might serve as another example, although not as much of confusion as of evasion. The "call girl" phenomenon in America today is simply a sophistication of the older practice. Christian culture has always been two-sided about prostitution—unfairly condemning prostitutes, while winking at or even justifying toleration of prostitution as a necessary evil.³⁵ St. Thomas Aquinas reasoned that God allows it "lest certain goods be lost or certain greater evils be incurred."³⁶ In the United States, it is a criminal offense in all states, defined as the indiscriminate offer of sexual intercourse for hire; but in England, it is not in itself an offense, although certainly the law there prohibits certain features that commonly attend it, such as street and public solicitation.

And so with other statutory offenses. Similar varieties, duplications, contradictions, inequalities, and lacunae are to be found on other scores of sexual behavior. To correct the trouble, we have a swelling stream of suggestions. Glanville Williams urges, for example, that bigamy should not be an offense, since it is actionable already as a fraudulent obtaining of intercourse and a deliberate registering of a void marriage.³⁷ In the same way, it has been argued that bestiality can be left to the general provisions covering cruelty to animals, and that incest be dropped as a statutory offense and reliance made upon existing laws on family relations, mistreatment, and assaults on children—as in Belgium.³⁸ The range and complexity of sex laws at present "on the books" is a monument to tongue-in-the-cheek legislation and to the "prohibitionist fallacy."

²⁹ Offenses Against the Person Act, 1828, 9 Geo. 4, c. 31, § 1, as amended, Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, § 11.

³⁰ N.Y. PEN. LAW § 690.

³¹ NEV. REV. STAT. § 201.190 (Supp. 1958).

³² KY. REV. STAT. § 436.050 (Supp. 1955); LA. REV. STAT. § 14: 89 (1950); N.H. REV. STAT. § 579.9 (1955); S.C. CODE § 16-412 (1952); WIS. STAT. § 944.17 (1957).

³³ ARIZ. REV. STAT. ANN. § 13-651 (1956); IDAHO CODE ANN. § 18-6605 (1948); MONT. REV. CODES ANN. § 94-4118 (1947); N.C. GEN. STAT. § 14-177 (1943); S.C. CODE § 16-412 (1952); TENN. CODE ANN. § 39-707 (1956).

³⁴ Ind. Acts 1905, ch. 169, § 473, at 584.

³⁵ ST. AUGUSTINE, DE ORDINE II. iv (12).

³⁶ ST. THOMAS AQUINAS, SUMMA THEOLOGICA II-II, Q.X, 11.

³⁷ Williams, *supra* note 8, at 224.

³⁸ *Id.* at 197.

II

THE MORAL QUESTION POSED

The conclusion that "the American sex revolution" has trapped us in a "listless drift towards sex anarchy"³⁹ is no doubt overdrawn. Still, there has been a change in sex attitudes and practices of a truly revolutionary caliber; this is a patent truth accepted generally among present-day culture analysts. Perhaps a typical symptom can be seen in the recent furor within British Medical Association circles over a booklet, *Getting Married*, by Eustace Chesser, M.D., and Winifred de Kok, M.D. It was written and published by the BMA, but had to be withdrawn after some members resigned in protest shortly before the first printing was exhausted. As an American commentator at the University of Oklahoma expresses it, the protestants disavowed the booklet's claim that chastity is "outmoded and should no longer be taught young people."⁴⁰ Nevertheless, the fact that it could reach the advanced stage of publication and discussion it did is significant.

Parallels and cross-cultural traits as between England and America are a commonplace. Transatlantic attitudes and customs have always maintained a marked degree of similarity, in spite of typically chauvinist disclaimers in the journalism of both countries. Therefore, it is important, even vital, to keep abreast of British developments as we carry on our American discussion of sex ethics and sex law. We have a significant development of this kind in the proposals of a recent parliamentary committee chaired by Sir John Wolfenden,⁴¹ and in the testimony formally submitted to it by the Church of England Moral Welfare Council.⁴² These studies are as appropriate to our own American legal and ethical problems as to Great Britain's. Proposals in the American Law Institute lean heavily in the direction of the English ones, but by comparison, they seem to lack the sharp edge and clarity we need to reach and explore the issues at stake. Perhaps the most succinct statement of the core issue as between ethics and sex laws is one in the testimony of the Anglican Council. It declared that⁴³

it is not the function of the State and the law to constitute themselves guardians of *private* morality, and thus to deal with *sin as such* belongs to the province of the church. On the other hand, it is the duty of the State to punish crimes, and it may properly take cognizance of, and define as criminal, those sins which also constitute offenses against *public* morality

The heart of the ethical question, for lawmakers and enforcers, is precisely this distinction between public and private interests, between illegality and immorality, between crime and sin. The Anglican Council, which is not an official agency, even though it carries great weight, "unreservedly" condemned as "sinful" all violations

³⁹ PITIRIM A. SOROKIN, *THE AMERICAN SEX REVOLUTION* 131 (1956).

⁴⁰ Dersch, *Chastity Is Not Outmoded*, 18 *CHILD-FAMILY DIG.* 3, 5 (1959).

⁴¹ Committee on Homosexual Offenses and Prostitution, *Report*, CMND. No. 247 (1957) [hereinafter cited as CMND. No. 247].

⁴² D. S. BAILEY (ED.), *SEXUAL OFFENDERS AND SOCIAL PUNISHMENT* (1956).

⁴³ *Id.* at 38.

of Christian teaching on chastity. Yet, it insisted that "there should be no departure in specific instances from the generally accepted principle that the British law does not concern itself with the private irregular or immoral sexual relationships of consenting men and women," and that "the action of the State should be therefore limited to the protection of the citizen from annoyance or obstruction."⁴⁴

We have here two legally relevant distinctions. One is the distinction between immoral and illegal offenses; the other is the distinction between private and public acts. The laissez-faire nature of this approach is self-evident. Thus, Eustace Chesser has called these distinctions the moral of the Wolfenden Report, which followed the line proposed by the Anglican Council.⁴⁵ The Anglican Council and the Royal Committee, on this common basis, called for a radical minimization of statutory laws controlling and penalizing both heterosexual and homosexual activities, whether in prostitution or in noncommercial relationships.

The fact is that recent tentative drafts of the Model Penal Code for the American Law Institute are very similarly inclined. Published private opinions, too, are increasingly of the same kind. To give one example, Albert Ellis, a psychiatrist, has published views that have much popular support (outside of legislative halls) and a wide reading, even though the almost truculent hedonism he espouses would generally be repudiated.⁴⁶ In his basic ethical norms, he is poles apart from the Anglican Council, since he gives his approval to any and every kind of sexuality, but his viewpoint parallels the Council's as far as the law is concerned. He insists that⁴⁷

society should not legislate or invoke social sanctions against sex acts performed by individuals who are reasonably competent and well-educated adults; who use no force or duress in the course of their sexual relations; who do not, without the consent of their partners, specifically injure these partners; and who participate in their sex activities privately, out of sight and sound of unwilling observers. If this and only this kind of limitation were applied in modern communities, only a few distinct sex acts would be considered illegal and illegitimate. Included would be seduction of a minor by an adult; rape, sexual assault and murder; and exhibitionism or forms of public display.

In connection with its proposal to remove homosexuality from the list of proscribed acts in the criminal law, the Royal Committee, like the Anglican Council, held:⁴⁸

Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality.

⁴⁴ *Id.* at 17, 62.

⁴⁵ EUSTACE CHESSEY, *LIVE AND LET LIVE* (1958).

⁴⁶ ALBERT ELLIS, *SEX WITHOUT GUILT* (1958). Complete promiscuity (short of coercion) is also defended by RENE GUYON, *THE ETHICS OF SEXUAL ACTS* (1934); NORMAN HAIRE, *HYMEN OR THE FUTURE OF MARRIAGE* (1928).

⁴⁷ ELLIS, *op. cit. supra* note 46, at 190.

⁴⁸ CMND. No. 247, para. 61.

The core consideration here is the separation of public and private morality. There is no suggestion that what is private or nonpublic is not subject to moral judgment, or that what is done in secret is ipso facto righteous. In developing its appeal for clarification of the circumstances that might make prostitution illegal, the Wolfenden Report simply said:⁴⁹

It should not be the duty of the law to concern itself with immorality as such . . . it should confine itself to those activities which offend against public order and decency or expose the ordinary citizens to what is offensive or injurious.

In our common-law tradition, a premium has always been put on privacy; the law has frowned upon its invasion. Police and citizens alike are forbidden to trespass. No general right of search is provided. The principle is that "an Englishman's home is his castle," and consequently wire tapping, interference with mail, or any other such maneuver is subject to close scrutiny by the courts. The public-private distinction has some legal history. And besides, there has always been a real respect for ethical pluralism and for private convictions in our liberal inheritance, as well as for private *actions*. As an American Law Institute report expresses it, "to use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions."⁵⁰

These two distinctions, then, between morality and legality (sin and crime), and between public and private interests, set the major terms of the problem of sex laws in relation to social ethics.

III

AN ETHICAL ANALYSIS

A. Morality and Legality

The old crackerbarrel phrase is, "You cannot legislate morals." Experience with our sex laws, as with the "noble experiment" of prohibition in the 'twenties, seems to show that the ethical standards after which we aspire cannot be imposed by force of law. It has occasionally been argued that law encourages and inculcates higher standards of behavior and that the proper role of positive law is not merely to reflect the consensus of the society enacting it, but to anticipate and pioneer it. But this doctrine has little prospect of being adopted in democracies. A more cautious view might hold that law can inhibit as well as prohibit behavior, operating as "a conditioner of conduct," but even this is questionable.⁵¹ And the opposite can be true; Westermarck refers to a homosexual who said "he would be sorry to see the English law changed, as the practice would then lose its charm."⁵²

Law certainly does not seem to be edifying in its moral influence, even if

⁴⁹ *Id.* para. 257.

⁵⁰ MODEL PENAL CODE § 207.11, comment at 151 (Tent. Draft. No. 9, 1959).

⁵¹ *Cf. Frey, Freedom of Residence in Illinois*, Chicago Bar Record, Oct. 1959, p. 4.

⁵² E. WESTERMARCK, *CHRISTIANITY AND MORALS* 374 (1939). *Cf. Havelock Ellis, Sex in Relation to Society* 207 (1937).

it is though to be a restraint on one or more levels. Ethical analysis of law reveals that its real function is to *limit* obligation. Law says, "This specifically (*i.e., only* this) you are to do, or to refrain from doing." Law's definition of obligation is inherently a limitation of obligation. It does not—it cannot—prescribe ideals or even an optimum discipline. This is precisely the reason for St. Paul's revolt from code law (Torah) and the rise of the term "pharisaism" to describe the practice of hiding behind the law to evade the unbounded demands of grace (an evasion as common in Christian as in Jewish conduct). The radical Christian love-ethic is so grace-focused that its own built-in danger is a tendency to ignore our need of law to make sure that justice is served in a world of still-selfish rather than neighbor-concerned citizens.

The Wolfenden Report and Anglican Council testimony favored the elimination of most of our existing sex statutes for these two reasons: first, law does not build character; and second, it tends to stunt the sense of moral obligation and provide defenses for the complacent. In the same spirit, the American Law Institute has allowed that the criminal law on sex offenses "cannot undertake or pretend to draw the line where religion and morals would draw it."⁵³

There is a third reason for separating sin, or moral fault, from crime, and that is that compelled (law-enforced) behavior is not righteous behavior anyway. No merit, or moral credit, accrues to obedience under the *imperium* of positive law. Only voluntary obedience, under the *auctoritas* of the moral law, represents ethical achievement. Sir George Frazer once suggested that it is better for men to do the right thing for a wrong reason than the wrong thing for a right reason.⁵⁴ He was speaking of the role of superstition; but whether the reason is superstitious or legalistic, it is a dubious principle to follow. The only possible ground for *compelling* people to do "the right thing" is concern for justice. We cannot permit innocent third parties to be victimized by the exercise of such high principles as personal freedom and responsibility, desirable as they are, if in some situations, freedom from law means that those who enjoy that freedom exercise it to the injury of others. It was for this reason that the Anglican Council, when recommending freedom (*legal* freedom) for sexual promiscuity, added the condition that it must be adult, consensual, and not a public nuisance.

There is still another related consideration. Most of our sex statutes do not take adequate account of the element of psychological compulsion. Modern depth psychology has revealed the wide extent to which many sexual acts, hetero and homosexual, are compulsive. Both civil law and ethical analysis make it a principle (*mens rea*) that an act must be *internally* free to be blameworthy, as well as *externally* free to be praiseworthy. The compulsive are not culpable, and this rule applies to many sex crimes. Hence the maxim: *actus non facit malum nisi mens sit rea*—an act is not criminal unless the mind is guilty. The courts have said, "Our collective conscience does not allow punishment where it cannot impose blame."⁵⁵

⁵³ MODEL PENAL CODE § 207.11, comment at 150 (Tent. Draft. No. 9, 1959).

⁵⁴ GEORGE FRAZER, *MAN, GOD AND IMMORTALITY* 191-92 (1927).

⁵⁵ *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945).

We have passed beyond the appeal of the Gilbert and Sullivan song, "let the punishment fit the crime," to the insight that the punishment should fit the criminal as well. In the effort to establish a new rule that some sins are not crimes, we must remember the reverse proposition too: some crimes are not sins.

In pleading for the separation of sins and crimes, this article asserts quite simply that it is not the business of law to punish sin at all. It is the business of law to prevent or punish wilful injuries to individuals or to the common order. There is no idea here that ethics, whether religious or not, is to be separated from society and social practice; on the contrary, ethics always limit individual or private freedom by subordinating it to the social or public interest—to neighbor-concern. Nor is the separation of sin and crime a matter of any one orientation or philosophy. Both religious and nonreligious moralists could oppose criminal actions against sexual wrongdoing, holding such actions to be the wrong remedy. Thus, the present Archbishop of Canterbury, Geoffrey Fisher, says of nonprostitutional homosexuality, "Some of us think that this particular evil could be more effectively dealt with pastorally if it were not regarded as criminal."⁵⁶ At the same time, he favors putting both adultery and prostitution on the statute list as, in his view, inherently injurious to other individuals and/or the collective good. (Even more controversially, he holds that artificial insemination from a donor is adultery and should be proscribed. This is the papal position, too.)

In brief, it seems axiomatic that the law cannot rely upon a doctrine that its citizens are legally entitled to disbelieve. There are some ethical doctrines that do not render an adverse judgment (*moral* judgment) upon many sexual acts commonly held to be crimes or sins or both. For example, ethical standards based on natural-law theories, as in Roman Catholicism, or on scriptural-law rules, as in Protestant literalism and fundamentalism, are *not* the standards of humanists, naturalists, and others. They have not, in fact, been acceptable even in the law for a long time—especially in the American positive-law tradition. Sin is already divorced from crime in our pluralistic culture, and the only real sanction for criminal law is *the common interest*, public order, or the collective good. On this basis only may an ideologically free and pluralistic society frame its moral principles or judgments as to right and wrong and enforce its standards by legal weapons. Society has a right to *protect* itself from dangers within and without, but not to enforce a monistic and monopoly standard of personal (in the sense of private) conduct. The question is: What, if anything, is discretely private? This leads us on to the second crucial distinction.

B. Privacy and Community

Ethically regarded, the distinctions between private and public moral standards and conduct would be irrelevant and even meaningless in societies in which cultural

⁵⁶ *Time*, Nov. 30, 1959, p. 44. The Earl of Winterton has remarked that if the Archbishop's wish to outlaw adultery were realized, a good many members of the House of Lords would have to go to prison. *Id.*, Jan. 4, 1960, p. 23.

monism obtained—*i.e.*, in societies that had a single, monopolistic faith or philosophy. Such was the case in the era of church establishment, for example, when the state was the secular arm of the church. But that kind of uniformity (as distinguished from unity) has suffered Queen Anne's fate; it is dead, and its resurrection seems, at least, a highly eschatological hope. For some of us, it seems far better, anyway, that there should be a diversity of religions and philosophies and political doctrines. For out of their rubbing together, their competition in the free market of ideas, truths and insights are revealed that would not have emerged in a monochrome culture. Many colors are needed in the democratic coat.

This belief that variety provides creativity, uniformity yields only conformity, is not held by all. At the political level, communists and many anticommunists strive for a one-party state. At the religious level, many Christians and Jews long for a one-faith, one-morality order. For example, Roman Catholic moralists often claim that "truth has rights which error may not enjoy."⁵⁷ They have defended their wish to outlaw contraceptive birth control on the ground that it is a practice that violates the natural law (what St. Thomas Aquinas called a *vitium contra naturam*) and further claim that the natural law is binding on *all* people, Roman Catholics and others alike.⁵⁸ The obvious difficulty with this doctrine is that it relies upon the *magisterium* of the church hierarchy to decide which moral judgments are correctly adduced from nature and which ones are not. It is clearly not a matter of *consensus communis* and, therefore, incommensurate with democratic principles. Although careful democrats will not claim that "the voice of the people is the voice of God," they are not likely, for the same reasons, to acknowledge that any ecclesiastical party is either. This is clearly, and persuasively, the reason why legal positivism has triumphed in American law and jurisprudence, rather than natural-law doctrines. As Lon Fuller has pointed out in his discussion of these "two competing directions of legal thought," positive law is skeptical about any attempt to bridge "Hume's gap" between what is and what ought to be, whereas natural-law theory does so confidently.⁵⁹

Our American tradition is, therefore, pragmatic and utilitarian, not metaphysical and dogmatic. We cannot be otherwise in the face of different and conflicting schools of natural-law morality and law, deriving their norms and criteria from such various sources as the nature of God, or the nature of man, or the nature of things. The same position would hold in relation to Kant's categorical imperatives of practical reason—as, for example, his conclusion deduced from the principle of requital (*jus talionis*) that those who engage in an act of bestiality should be expelled from society and deprived of human rights.⁶⁰

⁵⁷ F. J. BOLAND & J. A. RYAN, *CATHOLIC PRINCIPLES OF POLITICS* 169 (1940).

⁵⁸ See, e.g., O'Brien, *Why Do Catholics Oppose Artificial Birth Control?*, *Our Sunday Visitor*, June 15, 1958.

⁵⁹ LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 4-6 (1940).

⁶⁰ Cf. WESTERMARCK, *op. cit. supra* note 52, at 378.

Again, then, there is no just and realistic way in law to take account of the pluralistic situation, except by distinguishing between private and public standards. There is no ambiguity here, but there is an ambivalence. Wiley Rutledge once said, "I believe in law. At the same time I believe in freedom. And I know that each of these things may destroy the other. But I know too that, without both, neither can long endure."⁶¹ He referred to the neat balance we must maintain between the *areas* of private choice and public policy. Only by means of distinguishing private and public (preserving privacy and responsibility, and protecting the public order for the sake of justice) can we give life to the truth that freedom and order presuppose each other. On the one hand are the moralists who covet the widest possible range of freedom according to conscience; on the other is the equally imperative obligation of the lawmakers and courts to fulfill what Holmes called their "duty of weighing considerations of social advantage," which is the "very ground and foundation of [legal] judgments."⁶² Freedom without control by law—*i.e.*, without concern for the collective interest and protection of the innocent—invites disaster either in the form of anarchy or dictatorship.⁶³

This pragmatic distinction is already partially recognized in the law and the courts. It is sufficiently illustrated in a Missouri case where the appellate court reversed a conviction for adultery on the ground that the appellants had not been guilty, according to the act, of *open and notorious* cohabitation. "It is not," said the court, "the object of the statute to establish a censorship over the morals of the people, nor to forbid the violation of the seventh commandment. Its prohibitions do not extend to stolen waters nor to bread eaten in secret."⁶⁴ Here is the operation of the principle imbedded in the Wolfenden Report and the Anglican Council's recommendation. In the same way, the American Law Institute's latest draft proposal extends the legal grounds for abortion from the present restriction to therapeutic reasons only, to include the mental and physical health of the mother, to prevent physical or mental defects in the child, and to end pregnancies after rape and incest. Soon, we may be sure, statutory rape will be added. The Institute's discussion has also referred to further possible grounds such as pregnancy in a deserted wife, a working mother having to support a dependent husband and children, a prison inmate or other institutionalized person, or an unmarried woman who could not rear her child. Says the draft commentary, "the weight of critical and public opinion probably favors much more restricted applications of criminal sanctions than present laws contemplate."⁶⁵

But *can* sex conduct be a private matter? In terms of ultimate meaning, the probable answer is "No." As Edmond Cahn has expressed it, although each of us

⁶¹ WILEY B. RUTLEDGE, A DECLARATION OF LEGAL FAITH 6 (1947).

⁶² Holmes, *The Path of Law*, 10 HARV. L. REV. 456, 467 (1897).

⁶³ Cf. BRUNO BETTELHEIM, LOVE IS NOT ENOUGH *passim* (1950).

⁶⁴ State v. Chandler, 132 Mo. 155, 164, 33 S.W. 797, 799 (1896).

⁶⁵ MODEL PENAL CODE § 207.11, comment at 149 (Tent. Draft. No. 9, 1959). *But cf.* Tinnelly, *Abortion and Penal Law*, 5 CATHOLIC LAW. 187 (1959).

has our own unique being and integrity, yet "each human being is also a cell in the social organism and in the complex tissue of its members, operating always as a socius with others, never through himself alone."⁶⁶ In the same vein, Archbishop Temple said, "Personality is inherently social. We can only become fully personal through the interaction of our own and other selves in the fellowship of society"—there are no "hard, atomic cores of individuality."⁶⁷ Nevertheless, in opposing a merely monadic view of people, we must avoid a false solidarism or collectivist view. There is *some* boundary between personal existence and the social membership. There is some range for private choice and personal taste.

Sylvanus Duvall, whose ethical analysis of sex conduct is far from puritanical or doctrinaire, has concluded that the greatest danger in our day is a kind of antinomian selfishness about sex. "Nobody," he says, "frankly repudiates the whole idea of morality and defends his position in a logically organized statement."⁶⁸ But he thinks a-moralism lurks behind much of the discussion, like a weasel in the hen-house. "The non-moral are those who . . . recognize no obligation beyond their own wishes and desires except those dictated by prudence."⁶⁹ All such autonomies, whether they be sex for sex's sake, or business, or art, or science, or even "America First," are the sworn enemies of law with its concern for the common good.

The English jurist Sir Patrick Devlin said in opposition to the Wolfenden Report that "it is wrong to talk of private morality" and "the suppression of vice is as much the law's business as the suppression of subversive activities."⁷⁰ But this appears to be a position based on a radically solidaristic view of community and personality, and perhaps it predicates the natural-law theory of universals. It is entirely tenable, however, to hold that any sexual act that seems directly or indirectly to affect the public interest adversely, either through its overt consequences, such as illegitimacy, or its remote consequences, such as the influence of its example, may be statutorily forbidden. Since it would hurt the public interest, it is a matter for the law. This would not be taking the line that we cannot distinguish between private and public affairs. It would be up to the consensus, expressed through democratic lawmaking channels, to determine the issue in each form of sexuality.

CONCLUSION

Ethics and moral philosophy are concerned with character on the practical side, as well as with a critical analysis on the theoretical side. It is doubtful whether sex laws can build character (raise sights), and it is even probable that unenforced and/or unenforceable laws, through the attendant hypocrisy or outwit-the-cops spirit, actually weaken character and standards. Modern medicine and its technology have

⁶⁶ EDMOND CAHN, *THE SENSE OF INJUSTICE* 31 (1949).

⁶⁷ WILLIAM TEMPLE, *THEOLOGY* 8, 17 (1936).

⁶⁸ This is not quite true any longer. One well-known psychiatrist was quoted as saying, "No human being should ever be blamed for anything he does." *Time*, Sept. 14, 1959, p. 69. This presumably entails a "no praise" clause also. It repudiates ethical judgment altogether.

⁶⁹ SYLVANUS DUVALL, *MEN, WOMEN, AND MORALS* 285 (1952).

⁷⁰ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 15 (1959).

brought about a revolution. Lippmann has caught it in a phrase: contraception and other means of control have provided a sexual freedom that is a "transvaluation of values" in sex ethics.⁷¹ This revolution has removed from sex conduct the triple terrors of conception, detection, and infection. Sex is safe. From now on, it will be personal conviction, not fear, that will hold people to chaste standards if they are to be preserved.⁷²

Looking at the relation of ethics to law in general, we may assert four propositions.

1. Value (*i.e.*, moral) considerations enter into lawmaking.
2. Law should be the means of making social morality effective.
3. The prelegal, value-finding process lies in the consensus of the community as to the common welfare.
4. What is held to be private, in the consensus, is not the law's business.

As to sex laws in particular, offenses should be restricted to (a) acts with persons under the legal age of consent; (b) acts in situations judged to be a public nuisance or infringement of public decency; and (c) acts involving assault, violence, duress, or fraud.

⁷¹ LIPPMANN, *op. cit. supra* note 5, at 292.

⁷² *Cf.* Fletcher, *A Twentieth Century Philosophy of Sex*, Ladies Home Journal, March, 1959, p. 48.