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Everything You Wanted to Have in Sex Laws[2]

There are many laws on sex—to name a few: rape, crime against nature, exhibitionism, voyeurism, indecent behavior with minors, sexual pscyhopath legislation, prostitution, pornography, divorce, and abortion. To what extent are these laws necessary?

Law is designed to control behavior. It is designed to limit one's own impulses and the impulses of others. In the best personality development, external controls turn into self-control. When self-control is a fact, security imposed from the outside may be an insult. However, the needs of individuals vary, and in some measure, we are all relieved to know that there are external controls.

What should be the nature of control in the area of sexual behavior? Laws governing sexual behavior are justified, it seems, when the behavior is public or when it is aggressive, whether public or private. In either case, the aim of the law would be better served by non-sex laws.

So-called sex crimes are expressions of aggression usually representing a considerable degree of personality disorganization. Non-sex laws dealing with aggression are ample enough to cover the waterfront. The nontraumatizing or nonviolent type of behavior, which too can be covered by non-sex laws, may be considered solely from the point of view of indecency.

As is often recommended, the emphasis of the law ought to be the deterrence of untoward aggressive activity, gross public indecency, and the seduction of juveniles and children. The law ought not to be concerned with activity performed in private and between consenting adults, be it heterosexual or homosexual. In all of these cases, the issue is really not sex but rather protection of the helpless from indecent behavior or attack.

Sex Laws and Their Enforcement

Rape

Women are primarily interested in the prevention of rape, not in the apprehension of an offender. They fear the violence and transgression of their integrity. Whatever the concern of others, the particular woman who has actually been raped usually wants to fade out of the picture as quickly and quietly as possible. Apprehension of the offender seems to her like closing the stable after the horse is out. Especially, she is not interested in assisting law enforcement officials in prosecuting the offender when the proceedings would tend to

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humiliate her. She wants nothing to add to her distress. Moreover, in rape cases, the prosecutor must establish beyond a reasonable doubt that she "resisted to the utmost," which is very difficult to prove. An acquittal, which is more probable than not, leaves the public with the impression that she voluntarily had sexual intercourse with a vagrant. Her reputation is stained. Often, the woman who does shout rape is regarded simply as vindictive and the reality of her complaint is doubted. As a result, the law on rape goes largely unenforced. Only a small percentage of rapes are reported and fewer are prosecuted.

The criminal law postulates that the apprehension of an offender serves to deter others from crime, but the present law is self-defeating. A rape victim would be more likely to assist law enforcement officials if the proceeding were less humiliating. The crime of "kidnapping," "indecent assault" or "assault and battery," with adjustment in penalty, could replace the rape charge. Penetration or chastity of the victim is irrelevant in a kidnapping or battery case. No distinction, moreover, need be made between heterosexuality and homosexuality. The sex is irrelevant. The homosexual rape can be as devastating as the heterosexual rape; Lawrence of Arabia is the classic illustration of a mental breakdown that resulted from a homosexual attack. Originally rape referred to a carrying off or seizure of the person, not necessarily a female.

Crimes Against Nature

The typical case of "crime against nature" nowadays involves a person who shows lack of discretion by committing homosexual acts in a public restroom. This type of conduct is as offensive and against public decency as would be the performance of a heteroxexual act in public.

Forms of human behavior rooted in biology are relegated to the private arena, at least in the civilized world as we know it. Perhaps we want to hide those activities we do in common with animals or at least do them in dignity. As Chekhov put it, man should strive to be beautiful—in character, dress, and behavior. To do certain things in public would not be considered in the best of taste. Hence, to eat in a public cafeteria is a relatively styleless activity—it almost resembles the pig's stall. Eating is surely not the same as dining. To be invited to a person's home to dine is an honor; it represents an opportunity to be graceful, an invitation to be intimate and to participate in another's private life. Even more, to live intimately with a woman is an honor, but to carry on sexual activity in public is the greatest affront to good taste, as well as utterly demeaning to the parties involved. It is poor taste even to talk publicly about it.

Homosexual or other abnormal sexual activity is to be prescribed like heterosexual activity to the private sphere, not because it is evil as some moralists might put it, but because there is a proper time and place. Law-enforcement practices reveal, actually, that homosexual behavior is generally punished only when it occurs in public. The important question is: What should be considered "in public"? Suppose it is done secretively but in a public place (for example, behind a partition wall in a theater restroom). As regards heterosexual behavior, we know that those who "neck" in public (daytime or nighttime), even on lover's lane, are sometimes charged with "disturbing the peace" or at least told to move along.

The community has a need to control as well as to express its feeling about gross violations of established social amenities but it can do so without sex laws. If the criminal law is to be applied, individuals who display their privates in public places can be charged with "public disorder," "disturbing the peace," or "assault and battery." These crimes protect the public and at the same time carry less stigma than "crime against nature" or "sodomy," which could then be removed from the statute books. Embarrassed by a sex

charge, even if unfounded, the already miserable offender generally pleads guilty. He wants to get out of the process as quickly as possible and the sex charge, in effect, deprives him of a fair hearing.

Nuisance Behavior

What was once generally assumed about sex offenders is not to be assumed any longer. The image of the sex offender has been one sexually very potent. In actual fact, he is often impotent. He needs all the cooperation that a woman can possibly muster before he can come close to her. He is an emotionally immature person who has deep feelings of inadequacy.

Unable to relate to others, an individual may instead simply show himself or look. He is as though a spectator to the human race. The exhibitionist and the voyeur (peeping tom), however, make nuisances of themselves when the showing takes place on a public street or the looking takes place through a bedroom window. Fear is understandable: how can a person distinguish the harmful from the harmless? Again, however, sex laws are not necessary; there are other laws to prohibit these activities.

Frightened by adults, an individual may turn to a minor. An exhibitionist may be unable even to get physically close enough to a woman to exhibit himself, so instead, finding it less threatening, he may exhibit himself to a child. Confinement, if that is in order, should be in a hospital (not a special sex-offender hospital) rather than in a prison. In prison, they not only receive no treatment but are the subject of every brutality; usually they are prey to vicious, homosexual attacks.

Criminal assaults on young girls are sometimes committed by aging men who have the task of adjusting themselves to a decline in physical strength and sexual power. Another characteristic of aging may be a shift from genitality to pre-genitality. There may be increasing interest and engagement in scatalogical activities. Pornographic books and pictures are in great demand and peeping-tom tendencies may occur in old age as well as in adolescence. A great deal of the sexual behavior of old people is not basically genital in origin but results from their emotional isolation. One of the difficult problems facing the aged person is how to employ his remaining love and energy. Contemporary society is remiss in not providing activities for and encouraging relationships among the aged.

Then there are the various perversions. Some people must go through bizarre, unusual, or extremely specific rituals before they can have sexual stimulation or intercourse. A man may have to dress in women's clothing or have his hair pulled or twisted before intercourse or an orgastic discharge can occur. Some men may have to "play rape"—break down a door or break through a window—and the woman must play that she is being attacked; only then may her partner feel like a man. Breaking a door or window is permissible at home ("a man's home is his castle"), but it may be disturbing to neighbors.

The law can cope with such situations through non-sex laws. But how has the law met these problems? The law has responded by emphasizing sex, by enacting special legislation and providing special institutions. Since sex organs are involved, it has been natural for legislators to think in terms of sex. Almost half of the states have responded with the enactment of legislation providing for indeterminate confinement of the "sexual psychopath." All the statutes do not agree on a definition but usually such a person is defined as one lacking the power to control his sexual impulses or having criminal propensities toward committing sex offenses.

Special institutions such as the one in Atascadero, California have been created in a few states to implement these statutes. To put it mildly, they have not worked out; in blunt opinion, they are a fraud and a hoax. A special institution is theoretically justified when there is a homogeneity within the group and a particular institution can offer some special

service for that group. For the so-called sexual psychopath neither criterion is met. One might assume that sexual deviates are people with much in common, a class apart. However, such homogeneity assuredly does not exist. Among the deviates are neurotics, schizophrenics, schizoid personalities, alcoholics, persons with chronic brain damage, mental defectives—the entire gamut of mental disorders. All that they share is a single trait, one that psychiatrists must consider a symptom.

The special sexual psychopath proceeding was adopted in an effort to detain the dangerous, aggressive offender; but the type of person usually confined has been the mental defective or impoverished farm boy who is bewildered by city life. Moreover, the proceeding was designed to offer treatment, but, whatever that is supposed to constitute, it is assuredly not available. Instead, the proceeding serves only to stigmatize the inmate. He is labelled a "sexual psychopath." In the institution he himself puts around his neck a sign that reads, "I am a masturbator," "I am a peeping tom," etc. His self-esteem was low before; now it is utterly devastated. His troubles with the opposite sex are multiplied. Imagine, if you will, his problem later when seeking the companionship of a girl. Surely, no parents would want their daughter to go out with a "sexual psychopath." Surely, no employer is likely to hire him. The sorry experience of states that have enacted sexual psychopath legislation and have established special institutions furnishes ample evidence that their approach is not to be followed.

Prostitution

Prostitution, an age-old activity, is the only institution that has survived all revolutions. In one form or another, it is likely to remain with us. The Wolfenden Report, which dealt with prostitution as well as homosexuality, did not recommend that prostitution should be made illegal as that is an impractical objective. It did recommend that legislation should be passed "to drive it off the streets" on the ground that public solicitation is a nuisance. The problem was expressed as being one of "high-visibility," thus supporting, at least functionally, the position taken by Mrs. Patrick Campbell in correspondence with George Bernard Shaw that she did not particularly care what people did as long as they did not do it in the streets and frighten the horses.

Following a series of complaints from businessmen, tourists, and area residents in midtown New York, that city's police department recently cracked down and made a "cleanup." Checking on the backgrounds of the 1,250 female and 52 male prostitutes it arrested during a three-month period, the department discovered that about 40 percent of those arrested had been previously arrested for other crimes—drugs, possession, burglaries, robberies, larcenies—and half of the 40 percent had a history of violent crime, including, in some cases, homicide. Offenses usually do not occur singularly or in isolation, and laws covering these non-sex crimes were amply available to loop these individuals into the criminal law process.

In addition to these criminal laws, municipalities usually have an ordinance providing, "no soliciting or peddling without permit." Designed to control salesmen, its scope also covers the prostitute. Using this approach, the enforcement problems in the law on prostitution, such as a policeman's affair with the prostitute, are avoided.

Pornography

Considering today's society, the figleaf is like the patch that an adolescent puts over a pimple on his face, thinking that it is his only problem or that it will cure all of his worries. (One poster asks: Remember when the air was clean and sex was dirty?)

Obscenity is more than the display of one's private parts. Obscenity includes the exploitation of man's sexuality for nonsexual ends. Sex is used as a lure. Consider, for

example, the banality of commercial advertising, which exploits the emotional life of man, his joy and pain, in every conceivable way in order to sell any marketable object. Emotions appropriate for a moonlight ride are evoked over a deodorant or other product and utterly debase man's emotional life: "Super Bright toothpaste gives you sex appeal."

Legal restrictions on the private use of pornography or obscenity are objectionable not because the term is difficult to define but because censorship is a restriction on the mind. Does this mean that nothing can or should be done about the display of pornographic or obscene materials in public places? In this connection, the issue needs to be focused differently. It is the commercial exploitation of pornography or obscenity that gives it a character different from private use. At common law, a public nuisance was always a crime and punishable as such, as well as giving rise to liability in tort. The public nuisance concept is based on an interference with the interests of the community or the comfort or convenience of the general public. The concept is also applied where a hogpen or the keeping of a malarial pond interferes with the public health.

Where the displays of bookstore windows and entrances to motion picture theatres of explicit sexual materials sully the surroundings, the public can be protected by public nuisance principles. Ownership or rental of property abutting public thoroughfares does not create a constitutional right to present any matter for public view, even matter that may not be legally obscene and may be constitutionally protected when sold indoors to a voluntary audience of adults. The public has the right to regulate the public display of materials that offend the sensibilities.

The highways and byways are strewn with signs which are no less obscene or ugly than the four-letter word. Surely they must go. Physicians and lawyers are restricted by their associations to the size and type of shingle they may display. Liquor stores in many states may not have signs larger than four by six inches, bearing only the words, "liquor store." Why should not this principle apply generally to all advertising?

The issue is really not one of free speech but one of aesthetics. People can talk "junk" under the First Amendment, but should they be allowed to breed and foist their junk upon the unwilling? This is an issue independent of sex.

Divorce

How helpful is the law to persons who are going through a divorce—a grievous time of life? Divorces are easily obtained (the approaching rate of nearly one out of two marriages attest to that) yet the parties are obliged to go through a legal procedure that is degrading and widens the gap already existing between them.

Divorce other than the property settlement aspects ought to be taken out of the courts. Courts are congested (the average lawsuit being tried today in Chicago was filed six years ago), a principal reason for the congestion being that courts handle many matters that are more administrative than judicial. Divorce is one of those matters that may be better handled out of the courts.

The common evaluation among judges and lawyers is that divorce and custody matters are "trash" cases. This is due to the modest fee and the demeaning procedure. In New York, where, until recently, adultery was the only grounds for divorce, one judge regularly began his docket by declaring, "Let the perjury begin." An allegation of cruelty is the most common ground for divorce, and the petition usually reads something like this:

> Your petitioner avers that the defendant has beat her severely on numerous occasions, and during these periods of intemperate conduct he has, in addition to causing physical injury to the petitioner, made her highly nervous and apprehensive for the safety not only of herself but of the children as well.

> Your petitioner notwithstanding has at all times during the existence of said marriage to defendant been a dutiful and faithful spouse and mother to their minor children, providing the defendant the respect and devotion of a loving wife.

The petition alleging cruelty, as is true with the other grounds, stigmatizes the defendant as a malevolent and sadistic person. The divorce law, like the criminal law, has long been based on an offense theory. Today, with the exception of a few states where it is sufficient simply to allege "breakdown of the marriage," a matrimonial offense, such as adultery or cruelty, must be alleged.

Divorce at the request of one party after one or two years' separation is a growing procedure in many states. To establish separation, however, the petitioner must bring in a neighbor or two to testify that no reconciliation took place during that time. The husband during this period of time may have come, perhaps weekly, to see the children and the neighbors surely know not a whit about what has occurred between the parties. The proceeding thus calls for fraud from the neighbors as well as from the parties. In law a single act of intercourse constitutes a reconciliation. It is irrelevant that the wife may have consented in order to attempt a reconciliation or to avoid an argument in the belief that peace and quiet would be in the best interest of the children.

Since a divorce can now be obtained as easily as candy at Christmas, why not handle it in a more proper setting? Courts are set up to decide issues, and there is really no issue in a divorce case. Present procedure, which rigs up an issue, is demeaning and degrading. Divorce is really now an administrative matter and should be handled accordingly.

Abortion

The prevailing law in most states allows abortion only when the life of the mother is endangered. Such action may be justified, without positive sanction of law, however, as self-defense. The Spanish rabbi Maimonides long ago (1168) reasoned that the fetus might be destroyed if a woman's life is endangered by pregnancy, just as in self-defense an attacker could be justifiably killed.

Thirteen states have recently revised their law to allow abortion when the birth would cause serious mental harm to the mother, when the pregnancy is the result of forcible or statutory rape or incest, or when it is likely that the child would be born with a grave physical or mental defect. These changes were recommended by the American Law Institute (A.L.I.).

To obtain an abortion under these laws, however, a woman must allege that she has been raped, or that she will commit suicide, or that she is crazy or will go crazy if she must bear a child. She must get the attestation of one or two physicians or psychiatrists, to whom she must pay a relatively handsome fee, for nothing more than a signature. What doctor will refuse to approve an abortion for a woman who says she will kill herself or go crazy? He will perfunctorily assent but the woman is degraded in the process. In one way or another, members of her family and friends will learn that she obtained an abortion because she is "crazy," and she will be bothered by the label. Having German measles is the only nondegrading ground for abortion.

In discussions on abortion, two historical considerations are rarely noted. First, abortion as a crime was not, historically, designed for the protection of the woman; it was designed for the protection of the unborn child. Abortion was prohibited because the technical methods were so poor that injury was often done to the fetus but it was not aborted. To protect against an unsuccessful abortion resulting in a deformed birth (and a public charge) no abortion was permitted. Today, an abortion, properly performed, is not technically hazardous. Secondly, if bearing a child posed any risk to the woman, abortion

was allowed the healthy woman but not the deranged, on the theory that there was nothing to lose for one already deranged. Judge Macnaghten of the House of Lords, in the classic case of *The King v. Bourne*, said that an abortion may not be performed on a girl who is "feeble-minded" or has what he called a "prostitute mind." As a healthy woman by definition would not be threatened by childbirth, apart from physical reasons (that is, a small pelvis), the net result was that no one was entitled to abortion except, as Judge Macnaghten put it, "a normal, decent girl brought up in a normal, decent way" who had been raped.

"Therapeutic abortion" is the basic concept of the A.L.I.-style abortion law. Under it, the disturbed woman—not the healthy woman—is allowed an abortion. But what is a "therapeutic abortion"? The mechanical procedure of abortion lies within the province of the obstetrician, but the decision to terminate the pregnancy should not. The decision is neither medical nor theological. The real question is whether the woman herself may decide whether or not to bear a child. To confuse the operation with the decision to undergo it is to convert a nonmedical decision into a medical one, and the medical books do not provide the answer.

When would it be "therapeutic" to terminate a pregnancy? Statistics reveal that few pregnant women commit suicide. Postpartum depression sometimes follows the birth of a child—separation is psychologically difficult for some women—but the condition is one that can be remedied easily enough. The concept "therapeutic abortion" is but a method to obtain enactment of more "liberal" law—in short, a gimmick, but in the process it denigrates the woman (and her husband). The fundamental question is: Does a woman own her body? The issue, too, is whether the law can stand the fraud of "therapeutic abortion."

The Reverend Robert Drinan, former Dean of the Boston College School of Law and now Congressman, says that having no abortion laws at all is more compatible with Catholic teaching than is the present "liberalized" abortion law recommended by the A.L.I. He states: "Abortion on request—or an absence of law with respect to abortion—has at least the merit of not involving the law and society in the business of selecting those persons whose lives may be legally terminated. A system of permitting abortion on request has the undeniable virtue of neutralizing the law so that, while the law does not forbid the abortion, it does not on the other hand sanction it."

The prevailing anti-abortion law, Drinan realizes, can not be preserved, and he observes: "Public authorities today are generally unable or unwilling to carry out the enforcement of existing anti-abortion laws. When the common conviction or the consensus that originally supported a law of a penal nature have eroded, it is sometimes wise for the law to withdraw its sanctions rather than have the majesty of the law brought into disrepute by open disobedience and unpunished defiance." Four states to date have repealed entirely their laws on abortion, making it completely legal.

Conclusion

Aristotle once observed that if man kept his actions slow, his voice low, and his words controlled, he would command respect. This, too, ought to be the way for the law, especially in matters that are as sensitive and delicate as sex. Oliver Wendell Holmes, writing about the criminal law, once asked, "What have we better than a blind guess to show that the criminal law in its present form does more good than harm?" As far as sex laws are concerned the answer is clear. Not only are sex laws unnecessary, the harm they do exceeds any good that they may possibly do. The legitimate goals of present-day sex laws can be better accomplished by non-sex laws.