SEX, CRIME, AND THE LAW

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To Gladys Topkis
A superb editor is
an author's best friend

Preface

Events, movements, organizations, and changes in sociosexual attitudes over the past few decades have brought the relationships among sex, crime, and the law into newly sharpened focus. Foremost among these dynamic factors has been the sharp rise in violent crime, more specifically the astonishing increase in forcible rape, which has elicited widespread anger, fear, frustration, and indignation. At the same time, the new feminism has been waging an aggressively effective campaign to protect the complainants in rape cases from the humiliations they have all too often experienced during police and prosecutorial investigations of their allegations and the embarrassing probes into their previous sex lives by defense counsel during cross-examination in court. As a result more rape victims are reporting attacks; police have set up special sex-crimes units staffed by women detectives; more vigorous prosecutions and less leniency are the rule; both court procedures and in some states the amount and type of evidence necessary for conviction have been changed; and some improvement in public attitudes toward rape victims has been noted.

Paralleling these developments, a strong movement toward eliminating legal sanctions against consensual sexual activity engaged in by adults in privacy (adultery, fornication, homosexuality, and noncoital sex play), reducing penalties for public-nuisance type sex activity (exhibitionism, voyeurism, nonassaultive fetishism), a much more tolerant attitude toward what was once denounced as obscene and pornographic, and recodifications of the penal laws for certain offenses to prevent their misuse have been evident not only in the United States but in most European countries as well. These

changes, generally subsumed under the concept of decriminalization, antedate in some respects the so-called moral revolution that has markedly relaxed the puritanical American reaction to the open cohabitation of unmarried persons and to public manifestations of homosexuality.

Laws change slowly, unevenly, in one jurisdiction or geographic area sooner than in another; sometimes the changes are made by legislative enactment, at other times by judicial interpretation, and perhaps even more frequently by policy changes at the police or prosecutorial level. Neither laws, nor courts, nor enforcement policies are always in pace with the attitudes, beliefs, and more important the sexual practices of a society, particularly when the society is heterogeneous, its mores in conflict and in flux, with little agreement as to sociosexual standards. Such a society will find itself confronted with difficult problems due to this disjunction of laws and attitudes, enforcement and conduct.

Legal changes, on the one hand, and what has been perhaps exaggeratedly described as the "sexual revolution," on the other, are given greater clarity and meaning by the proliferating body of significant research into the dynamics of human sexual behavior, and specifically into sexual criminality, published in the past thirty years. Before the landmark work of Alfred C. Kinsey and his colleagues was published in 1948, sex research was sporadic, seldom scientific, frequently confined to reports on a handful of bizarre case histories, and even more frequently imbued with an all too evident moral indignation that brought into question the objectivity of the data and interpretations. Now, however, a body of solid research is available: on rape, on child molestation, on prostitution (male and female), on homosexuality, and on pornography. Not all of this material is impeccable (scientific research rarely is); ideology is not absent (though the author bias is now more likely to be permissive than punitive); but cumulatively it provides a strong input toward an understanding of the triad around which this study is organized: sex, crime, and the law.

There is available today not only this strong body of useful research but also an even larger bibliography of thoughtful and informative volumes on all aspects of sex-related criminality. A mere listing of recently published books on rape would be as extensive as many of them are impressive; probably the number of titles dealing with homosexuality exceeds those concerned with rape; and

there are literally dozens of works on prostitution and pornography and a somewhat smaller but still significant listing devoted to child molestation, exhibitionism, incest, and some of the lesser paraphilia. Nevertheless, it is difficult to find significant studies since Morris Ploscowe's *Sex and the Law* (1951) and Isabel Drummond's *The Sex Paradox* (1953) that have reviewed the entire problem, taken note of changes in the law and in the mores, summarized the voluminous new literature, and placed the problems of sexuality and crime in a combined legal, sociological, and psychological frame of reference.

There comes a time in social science (and within this rubric we would include law, criminal jurisprudence, corrections, and therapy) when it appears useful to summarize the distant and recent past, to attempt to capture the direction in which social currents are flowing, to note both the consensus and the dissensus in society, to the end that further research, the legislative determination of social policy, and perhaps even more important the socialization of the young and the resocialization of some of their elders may be based on empirically derived evidence rather than on myth and prejudice, superstition and tradition. It is upon such a foundation that we believe social and creative thinking, leading to a sexually more mature and tolerant society, can be solidly based. It is this yawning gap in the literature on sex, crime, and the law that we seek to bridge in this modest volume. If parts of what we report are overtaken by fast-moving events, judicial or legislative, before our work can reach the hands of scholars, students, and those seriously concerned with the sociosexual mores, this is the more reason, rather than less, for bringing such a book into being at this time.

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NYC June 1977

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1 Sex, Crime, and the Law

Sexual behavior that violates the prevailing norms in a society has been a matter for social control, and in modern societies for legal control through criminal sanctions, in all countries of the world. There is a widespread belief that the United States, with its Puritan tradition, has been more repressive and more regulatory with regard to sex than most other nations, but this view is generally not supported by comparisons of penal codes, prosecutions, and sentences actually meted out to transgressors. The Communist nations, some but not all countries with a strong Catholic Church influence, and the Islamic world generally have sex laws and punitive sanctions as repressive and severe as ours.

The social and legal control of sexual behavior is based, on the one hand, on the need felt in many societies for the channeling of sex drives into forms of conduct leading to procreation, stable family units, and care and socialization of the child (with unquestioned knowledge of paternity in order to ensure proper passing on of property); and, on the other, on the assumption that the libido, or sexual drive, is a force that has antisocial potential. This assumption is expressed succinctly by Kingsley Davis.

> The development and maintenance of a stable competitive order with respect to sex is extremely difficult, because sexual desire itself is inherently variable. Erotic relations are subject to constant danger—a change of whim, a loss of interest, a third party, a misunderstanding. Competition for the same sexual object may inflame passion and stir conflicts; failure may injure one's self-esteem. The intertwining of sex and society is a fertile ground for joy, happiness, paranoia, homicide, and suicide.[1]

Not all social thinkers agree with Davis. Some, particularly John Gagnon and William Simon,[2] argue that human sexuality is "socially scripted," that without social intervention there would be neither the instability nor the anarchy that Davis has described. Nevertheless, in modern societies in which legal controls have been extended over many other aspects of social life, there is general agreement that such controls and the punitive sanctions that support them are needed in order to discourage certain forms of sexual behavior.

Sigmund Freud, most notably in *Civilization and Its Discontents,* contended that civilization itself is made possible by the "renunciation of instinctual gratifications," including particularly the demand for sexual gratification. "The existence of civilization," Freud wrote, "presupposes the nongratification of powerful instinctual urgencies." [3] For those who have not been socialized to make such renunciation, there is the law, as well as religion, to guide, channel, deter, threaten, and punish—thereby to encourage and assist in resisting the drives toward disapproved sex behavior.

The Scope of Law and Typologies of Sex Crime

Sexual conduct can take a variety of forms differentiated by the degree of consent, the number of partners, their ages, previous relations, responsibilities, and gender, the physical nature of the contact between partners' bodies, and the use of animals, inanimate objects or oneself to obtain gratification. Some types of sexual behavior meet social approval and in fact are encouraged. A modern society with written penal codes must decide which acts, from among the multitude that do not meet the standards of an accepted code of sexual conduct, should be discouraged without the use of law and which are to be defined as criminal and prosecuted as such. Not every society is a conglomerate of persons with strong agreement on such matters, nor are sexual mores and folkways fixed over long periods of time. There are opposing emphases not only in different countries but also within the same society among various segments of the population, and opposing views are set forth by philosophers, scholars, and social commentators. While concurrence is occasionally found within this array of differing views—as, for example, on the need to illegalize and punish sex obtained by violence and without the consent of the partner—disagreement is more frequent.

In the United States, any examination of sex crimes involves the problem of the multitude of jurisdictions (fifty states, a federal code that covers both interstate and District of Columbia activities, a military code, and others), which differ in nomenclature, definition, interpretation, inclusion or exclusion of various types of behavior, sentencing, laxity or severity of prosecution, and police-arrest policies, for example. Add to this list the differences among neighborhoods, cities, and counties within a single state and the putative differential prosecution and sentencing linked to the social class and race of offender and victim, and one can readily see that a single, overall survey of sex crime is far from simple. For example, in all states except Nevada prostitution is illegal; still, prostitution in Nevada is legal only in certain counties and only in brothels. Age of consent differs as one travels across state borders—a complex matter because merely crossing the state line with a consenting partner of the other sex for the purpose of engaging in sexual relations constitutes a federal offense (a violation of the Mann Act) unless the partner is one's spouse. Adult consensual homosexual relations in private are illegal, as of this writing, in thirty-six of the fifty states, but several states are considering new permissive penal codes. Even in the states in which such acts are legal, however, there are diverse definitions and interpretations of what constitutes adulthood, consent, and privacy, and there are numerous laws, under such headings as public disorder, public indecency, lewd and lascivious conduct, and solicitation for immoral purposes, that can be invoked in the absence of a law against homosexuality per se.

To focus on these differences, important and often tragic as their results are, would give a false picture of sex and American law if one were not at the same time to take note of the direction in which the laws and courts are going. There is a new sexual morality, or an old morality that has become self-assertive and is no longer pretending to be what it is not. There are trends toward uniformity in interpretations of law, traceable in large measure to the decisions of the Supreme Court of the United States (the movement that came to be known as the nationalization of the Bill of Rights).* Furthermore, there is a powerful progressive force in

* The first ten amendments to the Constitution were interpreted in the early years of the nineteenth century as being applicable only to federal law. Thus, historically the individual's rights to be free from unreasonable search and seizure, not to have excessive bail imposed, and not to be subject to cruel and

judicial circles, led by the American Law Institute, for hammering out a model penal code and urging its adoption by the various states, with such minor modifications as may reflect local needs.* Geographic mobility, industrialization, and ease of communication seem to be fostering the homogenization of American society, not along age and other lines, but across state and regional ones. The result is a movement, slow but of unmistakable direction, toward uniformity of definitions and punishments in the penal codes and similarities in police practices. Moreover, the trend toward national homogenization does not proceed in a unilinear manner; for example, it was set back when the Supreme Court declared that it was not unconstitutional for a state to legislate against sodomy—i.e., so-called unnatural acts or crimes against nature, including homosexual activity.

On Defining Sex, Crime, and Sex Crime

Crime is here defined in the legal and common-sense meaning of the word: an act that violates the penal code of a governmental jurisdiction and that is punishable by the criminal courts of that government. This definition embraces, in addition to sexual assaults and the molestation of children, such obsolete and unenforced laws as involve seduction, fornication, and adultery, for example, although they are closer to what are sometimes called infractions, violations, or offenses than to crimes. These are "minor crimes," for the most part ignored, no longer reflecting (if ever they did) the moral judgment of the people but deserving of attention if only because they have been, and in some cases still are, part of the penal laws governing sexual conduct. Those sex crimes that arouse the greatest indignation and public concern involve force and violence,

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unusual punishment, for instance, were not applicable to state prosecutions for violations of state laws. In a series of decisions starting in the 1930s, the Court ruled piecemeal that some of the amendments and sections thereof protected those accused in state prosecutions, as a result of the due process clause of the fourteenth amendment.

The early case that denied Bill of Rights protection to persons in matters involving state rather than federal law was *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). An entire series of cases starting about a century later reversed the impact of *Barron;* among the most important were two appeals that reached the Supreme Court in the *Scottsboro* case: *Powell v. Alabama*, 287 U.S. 45 (1932), and *Norris v. Alabama*, 294 U.S. 587 (1935).

* The proposals of the Model Penal Code of the American Law Institute as they apply to sex crime are described and discussed in several of the chapters that follow.

actual or threatened; exploitation of children and others; an important and gross affront to the moral beliefs and standards prevalent in a society (as incest); the possible presence of psychological disturbance (exhibitionism, voyeurism, sadomasochism, bestiality, fetishism, necrophilia); and the pursuit of sex in a manner that has come to be defined as a social problem (e.g., prostitution and homosexuality). Nonsexual acts related to sexuality are often criminalized and considered by many to be sex crimes (abortion, sale of contraceptives, dissemination of birth control advice, production of erotic entertainment, sale or even possession of pornography, nudism, and the advertising of aphrodisiacs, among others).

A further difficulty in defining sex crime is determining whether a given illegal act should logically be classified as sexual. Whatever analytic or therapeutic purposes are served by conceptualizing arson as a sex crime because of the arsonist's unconscious motivations or murder as a sex crime motivated by sexual jealousies and passions, the criminologist would not find such a classification system useful. In the penal codes, conduct is defined or categorized not according to its motivation but only according to its overt forms. Thus, sex crimes would be limited to violations of the law in which the behavior is designed to obtain immediate and conscious sexual gratification, release, or pleasure or to profit from another's obtaining such gratification.

As Max Weber pointed out, to describe something as legal does not imply that it is good or bad, necessary or expendable.[4] There are many illegal sexual acts that, by what has come to be common consent, are not treated as crimes but that, for various reasons, have not been removed from the penal codes. At the other end of the spectrum, there are acts that are widely, if not universally, condemned but that many contend are not the rightful business of the law and should be considered matters of private morality and dealt with by education or propaganda from public health, social, educational, or religious sources. Between these extremes there are a few acts that it is agreed ought to be condemned, discouraged, and punished (as forcible rape); others that can be seen as essentially harmless (although they may or may not be such) except to the person or persons involved, as teenage consensual sex, homosexual relations, and masturbation; and some that overwhelming evidence suggests are manifestations of psychological disturbance whether or not they are in and of themselves antisocial (as transvestism and exhibitionism).

At one time or another, and in one society or another, almost every type of interpersonal sexual activity except adult heterosexual acts between socially recognized mates, directed toward procreation and performed in the so-called "missionary position," has been condemned as immoral and has been punishable as a crime. Indeed, some procreative heterosexual acts were condemned if they were not conducted between legally recognized mates who would be capable and willing to care for the child that could issue from such a union. But it can also be said that almost all types of sexual activity—with important exceptions that will be brought out shortly—have been accepted, even encouraged, by one group or another. Thus, Clellan Ford and Frank Beach,[5] in their cross-cultural study of the varieties of sexual norms and behavioral patterns,* pointed to societies in which masturbation, premarital fornication, adult-child sexuality, oral-genital relations, and other types of conduct have been condoned, and others in which condemnation has been strong.† While their study focused primarily on primitive, nonindustrial, or unsophisticated societies, the punishment meted out to transgressors can be considered the analogue of criminal prosecution in the modern world. Nevertheless, though acknowledging the varieties of approval and disapproval cited by Ford and Beach and many other anthropologists, one should not overlook the significance of cross-cultural similarities. There is universal or near universal condemnation of the rape of women of one's own society; the incest taboo has had some very specialized types of exceptions that do not upon investigation invalidate the claim that it is universal (there have been major trends toward decriminalization of incest); and all societies have favored adult heterosexual relations while not necessarily criminalizing all other forms of sexuality.

Unknown and Unreported Sex Crimes

Several factors make a study of sex crime particularly hazardous and the results of research often speculative. Like most forms of

* Their study was cross-specific as well, but only the cross-cultural is relevant here.

† Masturbation alone among these acts has not been a crime in modern societies although it has been severely punished by agents of social control as well as by family authorities. However, Alfred Kinsey and his colleagues pointed out that it has been criminal to encourage masturbation, "encourage" meaning teaching, counseling, or advising; they also demonstrated a class distinction in the social acceptability of the practice, with acceptability and frequency positively correlated with social class. See Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, *Sexual Behavior in the Human Male* (Philadelphia: Saunders, 1948), chaps. 10, 14.

criminal behavior, sex crimes generally are committed in privacy and in secrecy; hence, the researcher, the police, or the compiler of statistics may not know that the act has been committed. This is particularly applicable although not limited to what Edwin Schur refers to as "crimes without victims" in a 1965 book by that title.[6] The acts are crimes in that they are against the law; they are victimless in the sense that they are committed with the willing consent of the parties, and there are no complaining witnesses. Examples include a wide range, as adult homosexuality in private and (where the act is illegal) adultery and noncoital heterosexual activities. The lack of a complaining witness extends even further. One or both of the parties may be under the age of consent, in the adolescent or prepubertal years, but while technically the male has committed statutory rape, solicitation, public indecency, carnal abuse, or impairment of the morals of a child, his partner has been entirely willing and, unless apprehended *in flagrante delicto,* is unlikely to make a complaint.

The "dark figure" of unknown crime extends deeply into the area of sexuality. A very young child may not complain out of fear, lack of understanding, or for some other reason; if she (or sometimes he) does complain, adults may choose to disbelieve the child or may prefer, perhaps because the offender is a member of the family or a close friend, to downplay the incident and handle it without making an official complaint. Furthermore, some professionals have contended that reporting the incident may prove more traumatic for the child than suppressing it (a debated and debatable position) and may convince the parents accordingly. In cases of voyeurism, to take another example, or of transvestism, where this is a criminal offense, only the performer of the act may know of the commission, which certainly would generally be true of the rare (or believed to be rare) instances of necrophilia.

A number of additional, related problems confront the student of sex crimes. First, the percentage of instances of a given crime that has come to the attention of authorities and has found its way into the statistics cannot be determined with reassuring accuracy. Plea bargaining, on the one hand, or indictment and conviction for a lesser offense, on the other, may effectively obfuscate the official statistics—a charge of forcible rape becomes simple assault; exhibitionism, disorderly conduct. Thus, official statistics on the prevalence of various offenses and the nature of offenders and victims are less than reliable, which is not to assert that no accurate information exists: criminologists and other social scientists have

developed techniques of estimating prevalence and frequency and for gathering data about most sex crimes. Second, penal codes do not classify sex crimes in a manner that is helpful to the criminologist. A typical example is taken from the statutes of the state of Nebraska:

> Crimes Against Nature. Whoever has carnal copulation with a beast, or in any opening of the body except sexual parts with another human being, shall be guilty of sodomy and shall be imprisoned in the Nebraska Penal and Correctional Complex not more than twenty years.[7]

Such a law covers oral-genital heterosexual relations (including those between husband and wife), all or almost all forms of homosexuality, and bestiality, categories that are entirely different from a social and psychodynamic viewpoint but that would be linked with one another statistically if all arrests and indictments under this law were recorded and reported as a single figure. Obviously, an investigator who uses only such legal distinctions would be led astray. Finally, psychological classifications are of little help in analyzing the acts and in discovering the relationships between law and conduct although they are no doubt valuable for preventive and therapeutic purposes.

Typologies and Categories

A useful method of classification would have to take into account major social factors involved in the sexual activity and the legal categories encompassing such acts when these factors are present. In what might be considered a descending order of significance for society, we suggest that sex crimes could be analyzed as follows:

1. The presence of force or the threat or fear of force.
2. Obtaining sex by exploitation of the status or authority differences between victim and offender, as when the victim is considerably younger than the offender, is mentally impaired, or is in a patient-therapist, inmate-custodian, and in some instances student-teacher relationship with the offender.
3. The public visibility of what otherwise might be a private matter, in a manner grossly offensive to a considerable portion of the population, whether intentional, as in sexual ex-