

tourist resorts for prostitutes and hustlers to serve the guests, even though similar behavior would not be tolerated in a native village fifteen miles away. Also, the availability of teenaged partners to the foreigner may reflect only the circumstance that children are virtually forced into prostitution by families for whom this form of exploitation is a lucrative source of income. Such a situation has nothing in common with the "sexual freedom" on which the leaders of the sexual reform movement liked to expatiate, it is rather a survival of slavery and feudalism in the Third World. Also, even if certain practices are tolerated, the circle of persons who may engage in them without being repudiated by their families or punished by the civil authority is much narrower than Westerners—furnished with a foreign passport and a source of income from outside the country—can ever be aware. Everywhere wealth and power do impart a degree of freedom to gratify one's sexual desires, including even those tabooed by the larger society, but this is not an egalitarian right, it is a privilege of the elite in a hierarchical, class regime of the kind that the left would abolish if it could—at least in theory. The concrete practice of the states in the socialist bloc is another matter. Finally, many cultures have puberty rites that entail exceedingly painful practices such as circumcision, subincision, clitoridectomy ("female circumcision"), tattooing, mutilation, and the like—scarcely the Western ideal of an uninhibited adolescence.

What probably forms a line of demarcation is whether asceticism ranks as an ideal of behavior for everyone, or only as a norm for those with a religious vocation that does not affect the rest of the community. Medieval Christianity did profess an ascetic ideal that would forever place homosexual activity outside the pale of morality, since it can never serve the end of procreation within lawful marriage, and all other forms of attachment were denied the right of sexual expression.

Other cultures have seen pleasure as a good in itself, quite apart from the procreative aspect, but the pursuit of pleasure, as in the case of the prostitute, could also entail becoming a social outcast with no prospects of conventional marriage. So the freedom of one was purchased at the price of another's degradation or servitude.

All these considerations reveal only how far modern Western civilization is from a solution to the "sexual problem," a solution that must take into account the risk of contracting **sexually transmitted diseases**, the possibility of unwanted pregnancy, and similar misfortunes. Even if a future society adopts a wholly positive attitude toward sexual pleasure, the need to shield both the individual and the collective from the negative consequences of unregulated sexual practice poses a problem that cannot be wished away.

Warren Johansson

## SEXUAL LIBERTY AND THE LAW

Sexual liberty has been of particular interest in Anglo-Saxon thought. The reception of the **Enlightenment** from the Continent, from **Beccaria**, Filangieri, the French *philosophes*, and the Code Napoléon mandated a reexamination of **common law** traditions that long resisted the wave of criminal law reform.

The ideas of John Stuart Mill (1806–1873) have been enormously influential in this sphere. Perhaps unaware of his father James' friend Jeremy **Bentham's** incisive unpublished treatises arguing for the decriminalization of sodomy, Mill defended individual liberties and in the tradition of the *philosophes* urged minimal state interference with speech and conduct of individuals. Mill's ideas have not gone unchallenged. Champions of traditional **Judeo-Christian** morality, including Sir James Fitzjames Stephen in 1874 and Baron Patrick Devlin in the 1960s, argued that a society that failed to control the morality of individuals would disintegrate.

*Hart's Defence of Liberty.* In *Law, Liberty and Morality* (1963) Professor Herbert Lionel Adolphus Hart sets forth the best analytical argument against the suppression of victimless sexual offenses: the criminal law itself inflicts suffering by requiring that some persons repress their "anti-social" urges. This is of particular importance in the case of the laws enforcing a sexual morality that may create misery of a special degree. For both the difficulties involved in the repression of sexual impulses and the consequences of repression are quite different from those involved in the abstention from "ordinary crime." The imposition of sexual morality by state power interferes with the personality of the individual far more than do laws simply meant to curb the criminal underworld.

As to the outrage of tradition-minded and religious individuals Hart replied: "For offence to feelings, it may be said, is given not only when immoral activities or their commercial preliminaries are thrust upon unwilling eyewitnesses, but also when those who strongly condemn certain sexual practices as immoral learn that others indulge in them in private." The law can offer no relief to those who experience moral outrage at the thought that others may be engaging in conduct which they deem immoral. "To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle is liberty to do things to which no one seriously objects. Such liberty is plainly quite nugatory." Individual liberty entails the right to engage in conduct which others find objectionable or distasteful; this is inseparable from the very notion—"unless, of course, there are other good grounds for forbidding it. No social order which accords to individual liberty any value" could also confirm the adherents of the Judeo-Christian tradition in the right to live in a society free of

behavior which that tradition condemns. They may rightly insist on being protected from public display of such behavior, but not from private.

*Rebuttal of Devlin.* In reply to Devlin's assertion that a society requires a shared morality, Hart claims that "[t]here seems, however, to be central to Lord Devlin's thought something more interesting, though no more convincing, than the conception of social morality as a seamless web. For he appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society to the unacceptable proposition" that any change in the moral code of a society is coterminous with its destruction.

Devlin's views evidently reflect the wish to restate the sexual morality of medieval or Reformation **Christianity** in the guise of an abstract concept of morality as tantamount to the loyalty which the citizen owes to the modern state: "It is clear that only this tacit identification of a society with its shared morality supports Lord Devlin's denial that there could be such a thing as private immorality and his comparison of sexual immorality, even when it takes place 'in private,' with treason. No doubt it is true that if deviations from conventional sexual morality are tolerated by the law and come to be known, the conventional morality might change in a permissive direction, though this does not seem to be the case with homosexuality in those European countries where it is not punishable by law." For the Christian moralist, though not the liberal thinker, any departure from a moral code held revealed and immutable is divine *lèse-majesté*, which a secular state must convert into the notion of "treason" to find an equivalent.

Devlin upholds the view now totally disavowed by reputable historians that "history shows that the loosening of moral bonds is often the first stage of [social] disintegration." This kind of generalization about the dangers of deca-

dence filled the moralizing history textbooks of past generations, and was even the standard explanation of the fall of Rome. Today this myth lies buried under the weight of the accumulated mass of anthropological, sociological, historical, and other scholarly evidence and is invoked only by the half-educated when they need a generalization to support their resistance to change—which is an inescapable characteristic of human institutions. Devlin's wish to confer immutability upon the Judeo-Christian condemnation of homosexuality through claiming that morals do not change, only the degree of society's toleration of their violation, amounts to a play on words. The increased toleration is a proof that people's ideas about the validity of the principle have in fact changed, even if religious conservatives who believe in the divine origin of moral norms would like to maintain that having once been "revealed" they cannot change throughout eternity.

*Legislation and Public Opinion.*

Hart next takes up the argument—a serious one when one considers the motives of legislators who must submit their voting records to the approval of their constituents—that the irrational aversion and disgust caused by homosexuality justify the retention of penal sanctions: "The conviction that such practices [homosexuality] are morally wrong is surely inseparable in the mind of the majority from instinctive repulsion and the deep feeling that they are 'unnatural.'" Devlin maintained that English law had a standard of its own—the reasonable man, the right-minded man, "the man in the Clapham omnibus"—who should not be obliged to argue why conduct that he instinctively feels to be abominable is abominable." Such thinkers as Kurt Hiller in his legal dissertation on *The Right Over One's Self* (1908) and Coenraad van Emde Boas in his thesis on *Shakespeare's Sonnets and the Double Disguise Plays* (1952) had earlier discussed this issue of the subjective response to homosexual behavior ("the vital aversion")

which exists quite independent of anything in the book of Leviticus or in the canon law of the Christian church, freely admitting that the barely educated "masses" still shared the medieval beliefs and attitudes, and that only an enlightened minority of intellectuals were actively promoting the new credo of sexual freedom. In this matter Hart seems to retreat into the defense that the minority should be allowed the right to its tolerant views, even if the majority persists in rejecting them.

*Intellectual Liberty.* The free play of ideas in the marketplace, Hart pointed out, has undermined traditional platitudes: "The real solvent of social morality, as one critic of Lord Devlin has pointed out, [Richard Wollheim, *Crime, Sin, and Mr. Justice Devlin*, p. 40] is not the failure of the law to endorse its restrictions with legal punishment, but free critical discussion. It is this—or the self-criticism which it engenders—that forces apart mere instinctive disgust from moral condemnation. If in our own day the 'overwhelming moral majority' has become divided or hesitant over many issues of sexual morality, the main catalysts have been matters to which the free discussion of sexual morals, in the light of the discoveries of anthropology and psychology, has drawn attention." This amounts to little more than saying that because the sexual reform movement has called the traditional beliefs into question by undermining the complacency with which they were accepted—since this rested in the last analysis on their supposed divine origin—they should no longer be enforced even if the majority still upholds them. Moreover, Hart replicates Mill's and the eighteenth-century liberals' fear of the tyranny of the majority: "It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live. This is a misunderstanding of democracy which still menaces individ-

ual liberty." In other words, if the authoritarian state of the **Middle Ages** had the right to legislate personal morality, it has not bequeathed it to the majority in a modern democratic one, though conservatives may in this case appeal to the tradition-minded majority against the reformers.

Hart summarized: "Whatever other arguments there may be for the enforcement of morality, no one should think even when popular morality is supported by an 'overwhelming majority' or marked by widespread 'intolerance, indignation, and disgust' that loyalty to democratic principles requires him to admit that its imposition on a minority is justified."

*Conclusion.* Although National Socialist and Communist totalitarians have repressed both religion and sexual freedom, the history of the struggle for homosexual rights within democratic societies has been in some sense a duel between the sexual reform movement on the one hand and the church and its heirs and allies on the other. The latter have been able to win not a few victories at the polls and in the legislatures by appealing to the residue of medieval "intolerance, indignation, and disgust" in the electorate. Gay liberation is confronted with the task of fighting an uphill battle against the defenders of traditional sexual morality, in no small measure because in the English-speaking world classical liberalism long shirked its task of reforming criminal laws of sexual offenses.

On the positive side, President Reagan's nominee, Robert Bork, failed to gain confirmation by the Senate to the Supreme Court (1987) in large part because he was regarded as the leading exponent of attempts to legislate morality in the Judeo-Christian tradition of Stephen and Devlin, against the pragmatic tradition of minimizing societal control over the individual embodied in the American Bill of Rights and later amendments, and so eloquently supported by Bentham and Mill in the nineteenth century and Hart in the

twentieth. Modifying his views, Devlin himself was later to write in *The Judge* (1979): "It is generally agreed that there was no consensus, probably not even a bare majority, . . . for the reformation of the laws against homosexuality. Nevertheless [the change was made and] has surely helped to promote a more tolerant attitude to homosexuals." He thus conceded that legislative reform could justifiably be enacted in advance of changes in public opinion, and that the effect of such legislation might feed back onto that public opinion in a salutary way.

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## SEXUALLY TRANSMITTED DISEASES

Sexually transmitted diseases (STDs), also called venereal diseases, are among the most common infectious disorders in the world at the end of the twentieth century. They affect men and women of all backgrounds and economic levels. However, they are most prevalent among teenagers and young adults; nearly one-third of all cases occur in teenaged subjects. Homosexual men suffer disproportionately from STDs, while lesbians are scarcely affected by them, for reasons having to do with the anatomical and