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Tony Honoré, Sex Law

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BOOK REVIEW

SEX LAW

By Tony Honoré. London: Duckworth, Ltd., 1978. Pp. 180.

As the topic stimulates a fair amount of interest among social scientists and as it is explored by one of the most thoughtful and entertaining of legal academics, this book could hardly fail to please. Yet, in several rather subtle ways, this generally excellent study misses its aim: niggling doubts arise with regard to the author's methodology and the book's content and conclusions. Tony Honoré—Anthony in his more formal days—is Regius Professor of Civil Law at Oxford, and we therefore approach his book with the expectation of a sophisticated comparative treatment of some very thorny problems, as in his essay on the concept of ownership in the *Oxford Essays in Jurisprudence.*[1] These expectations are largely unsatisfied, although the book is successful as an interdisciplinary survey—a new tack in Honoré's scholarship.

The titles of his chapters are: Marriage, Living Together, Women as Victims, Sex for a Living, Offenders and Trials, and Trends, Rights and Limits. They show that Honoré's analyses attempt to span such traditional legal divides as family law, criminal law and procedure, criminology, sociology of law, jurisprudence and constitutional law. The chapter headings also illustrate a penchant for catchy or self-consciously *avant garde* phrases which are often effective but occasionally mar the analysis. For example, a definition of marriage as a "restrictive practice" with regard to sexual competitions[2] contains a useful insight, while the contention that "women are not expected to take rape lying down"[3] may be offensive and adds little to the general proposition that victims of crime are expected to complain at the first reasonable opportunity.

The breadth of coverage in what is a short book (compared to other legal texts covering only a portion of the field) is justified in two separate ways. "For laymen," Honoré argues initially, "sexual experience is an aspect of life which possesses a certain unity," as

1. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A. Guest ed. 1961).
2. T. HONORÉ, SEX LAW 9 (1978).
3. *Id.* at 153.

"itches and urges" which "have to be expressed or controlled."[4] On the contrary, we would have thought, many "laymen" regard their sexual experiences as isolated, fragmented, private, intensely personal and thus immune to generalization and systematic social control. Fortunately, Honoré's second justification, which only emerges clearly during the course of his analysis, is more successful. It is that, while there are many inconsistencies and absurdities to be found in sex laws, the rules as a whole serve to implement a fairly consistent set of policies. This argument is carefully qualified: "No one moral theory has a monopoly of the law, which is a patchwork . . ."[5]; and lawyers and legislators must exercise caution in order not to pitch the required standard of behavior too high or to enforce rules which lack a "reasonable aim."[6] Even so, and while "the aims of traditional sexual morality are not spelled out [,] they will be found for the most part to consist in a desire to promote population growth, marriage or production."[7]

This assertion presupposes the contradiction in terms of a self-conscious or goal-oriented tradition. Honoré fails to discuss those factors which account in large measure for the perpetuation of traditions: irrationalities, religious and philosophical preferences unrelated to the objectives he enumerates, and societal inertia. His detailed analyses of "the underlying themes and aims of that Western sexual morality which underlies much of our sex law"[8] and which is currently in a state of flux are useful nonetheless, once the limitations inherent in his approach are understood. Honoré's "Western sexual morality" turns out to be an overwhelmingly English conception, an illustration, perhaps, of attitudes encompassed by the famous London *Telegraph* headline: "Fog in the [English] Channel; Continent Isolated." The mores of "primitive" communities are mentioned briefly for purposes of contrast, and general discussions of German and American laws and sexual attitudes are offered. There is, however, a conspicuous absence of analyses of the laws and values associated with Mediterranean Catholicism (especially those of France and Italy, countries which whet the appetite of conventional comparativists) and with the peculiarities found in particular American states.

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4. *Id.* at 1.
5. *Id.* at 4.
6. *Id.* at 5.
7. *Id.* at 3.
8. *Id.* at 2.

Honoré does note that, as under Roman law, a "promiscuous" woman is regarded as a prostitute in Utah, even though—unlike the English "common" prostitute—she does not offer her body for reward to an indefinite number of clients. Beyond this, numerous American divergences which would have added more flesh and blood to his comparative analyses and served as minor qualifications on his conclusions are ignored. While arguing that contracts of marriage and cohabitation are too inflexible to keep up with changes in the facts of social life, Honoré notes in passing that "there is no great difference between US [*sic*] and English law on these matters."[9] Surely it is a mistake to assume that the administration of "US" laws or, for that matter, the facts of American social life display a monolithic uniformity with regard to adultery, divorce and cohabitation. The people and courts of Marin County, California are not those of (say) a county in rural Indiana nor should they be, at least under the pluralist theories so admired by the majority of American political scientists. In his analysis of marriage, Honoré admits to using "American writing and case law when it is more explicit than, but not substantially different from, the English."[10] This is just the kind of selective and self-serving search for materials which Honoré, the thoroughgoing comparativist, would presumably condemn.

These qualifications apart, American academics will find Honoré's analyses thoughtful and provocative because there is, of course, much common ground in English and American sexual orientations. Three "themes and aims of Western sexual morality" are identified: the maintenance and increase of our numbers by prohibiting forms of sex through which children are not conceived; the strengthening of the family for purposes of child rearing and because it "gives society its main structure";[11] and the ascetic argument, "quite prominent in religious thinking," that sexual activity ought to be reduced to a minimum.[12] The latter strand merges with another one, which is "specially prominent in protestant Christianity and Marxism": sexual indulgence ought to be repressed "because it interferes with the production of material things."[13] Arguably, this statement should have been qualified still further. Recent developments have cast doubt on the wisdom of these three aims, as Honoré notes: the growing economic emancipation of women in in-

9. *Id.* at 50.
10. *Id.* at 37 n.6.
11. *Id.* at 2.
12. *Id.* at 3.
13. *Id.* at 3.

dustrial societies has reduced the need for the lifelong support of women that has constituted a major rationale of the family; and more effective contraceptive methods, applied in the face of the material desires of individuals and world overpopulation, have lessened the perceived need for large families.

Thus far, the book presents a generally accurate—and not altogether original—analysis. This writer parts company with Honoré, however, when he moves on to discuss two "ideas which have some influence on present-day thinking" and which are opposed to traditional aims.[14] One is the advocacy of utilitarian principles in order to "increase pleasure—either the pleasures of the majority or the minimum pleasures of all."[15] At what point will the liberty of the "majority" be sacrificed in order to promote the equality "of all" in this and other areas of social life where liberty and equality inevitably conflict? What amounts to "pleasure" is far from clear: does it arise from sexual self-determination as Honoré argues, or from within societies which attempt to repress individual pleasure-seeking in order to promote some projected general welfare? Answers to these two questions are likely to be complex and messy, involving numerous tradeoffs between the stark contrasts offered by Honoré. His only example of a "Benthamite argument" is rather strained: prostitutes are among the most socially productive and even the most moral of community members, promoting the greatest pleasure for the greatest number and, on balance, keeping families together. "If productivity is a sign of economic health, why not sexual productivity?"[16] These are only a few of the relevant factors in what amounts to a complex calculus of the desirability of prostitution, and one outcome of this kind of subjective calculating is that utilitarianism commands much less respect today than Honoré would have us believe.

He does add that "far more weighty in Western societies today is the idea of human rights, especially the right of each human being to express and develop his or her own personality."[17] Even while we await the maturation of the (dubious) fruits of President Carter's human rights policies, it is difficult to detect much movement on the sexual rights front. True, Honoré notes that the German courts and *Bundestag* have recognized certain sexual 'rights'—the Dutch experience, which he ignores, is much more instructive in this

14. *Id.* at 3.
15. *Id.* at 15.
16. *Id.* at 133.
17. *Id.* at 4.

regard—but he goes too far when basing the genesis of an American right of sexual self-expression on the isolated *Griswold v. Connecticut*.[18] Further, he seems to ignore the practicalities involved in "taking rights seriously": "a positive right to sexual freedom . . . must be based on a legal text or on the fact that we live in society and have wants which may conflict with the wants of others."[19] Assuming that Honoré used the disjunctive "or" intentionally, we can only conclude that these rights are precarious in his latter formulation, resting as they do on a consensus tolerance which can evaporate quickly—as in present-day England.

Honoré's threshold assumptions have been discussed in detail here because they invariably dictate the course of his subsequent descriptions and analysis. His catalog of legal rules is, in keeping with the length and tone of the book, a brief and painless introduction to a potentially vast subject matter. Much new and relevant social science research is also summarized briefly and, if the few citations checked are representative, accurately. Honoré avoids the pitfall found in many socio-legal studies, that of failing to integrate the insights gleaned from several disciplines. One shortcoming could have been remedied with ease, however, given the accessibility of many excellent studies about political pressure groups in Britain. The roles played by various groups in maintaining or changing laws concerning sex form a vital link between substantive legal content, policing and sentencing practices, and the values subscribed to by politically significant segments of the community. The militancy of many groups—the (pro-) Paedophile's Information Exchange and the reactions to it provide the most recent examples—also suggests that predictions of an emerging English sexual consensus are premature.

In the book, marriage is viewed as a "domestic partnership" contract, in which "standard terms" cannot be altered, one party can dissolve the contract without the consent of the other, and the contract can be set aside for "fundamental breach." Sexual duties within marriage are defined to include the creation of a "mutually tolerable" sex life, in addition to the more familiar duties of consummation and faithfulness. Cohabitation contracts are also treated as species of domestic partnerships, concerned with housing, furnishings, expenses, chores and, in some instances, child rearing. The enforceability of these agreements, a question which will increasingly come to concern legal practitioners, is explored in detail, while the grounds on which a court might imply an agreement are neglected.

18. 381 U.S. 479 (1965).
19. T. HONORÉ, SEX LAW 172 (1978).

Honoré then distinguishes between his domestic partnerships: "so long as marriage is the central institution of our society it will be necessary to have some differential between married and unmarried couples. But it need not be a wide one."[20] This is a useful perspective to adopt, for the legal polar opposites—marriage and non-marriage—will undoubtedly continue to converge.

While Honoré's discussions of marriage, cohabitation and the causes and effects of sex crimes contain much material that will be new to most readers, his legal analyses of sex crimes are fairly conventional. A few new points are made, however, and old points are made in effective new ways. Incest is treated as an abuse of authority, and this highlights what Honoré terms the "mysterious" prohibition of sex relations between brother and sister. The crime of bestiality is considered to be an anomaly, since it does not endanger the position of wives or families (or, presumably, husbands). Objections to homosexuality are traced to their origins in the Old Testament: the Israelites viewed it as treasonous (retarding population growth), and the term "buggery" derives from a Bulgarian word meaning a religious heresy.

These and other considerations lead Honoré to conclude that homosexuality is not merely a matter of taste, deviance or breaking rules, but of a dissent akin to religious or political dissent, a failure to acquire or a rejection of a set of orthodox and conformist feelings. As a result, he argues, many of the so-called crimes against nature should be abolished; "natural" should mean conformity to the individual's nature or makeup.

The chapter on prostitution is of particular interest, if only because this is a rarely-surveyed legal topic. After considering a brief history of prostitution, Honoré argues that, where prostitution itself is not criminalized, ancillary activities such as pimping, running a brothel, etc., ought not to be penalized: "The law is not to be used to stamp it out by creating a void round the prostitute in which no one can deal with her."[21] Reforms are needed so that prostitutes can be treated as normal members of society who practice a profession of which many disapprove, like the army or the liquor business. Nevertheless, the state ought not to regulate prostitution, even though overcharging and the spread of disease may result: prostitution usually entails breaches of a duty owed by husbands to wives, and the state should not "encourage" these breaches. This

20. *Id.* at 51.
21. *Id.* at 128.

argument seems to rest on a fallacy, under which the state necessarily approves of or even encourages those things which it regulates; in any event, Honoré neglects the defense of his value preferences.

The state purports to reflect certain characteristic differences between the sexes in its legal classifications of offenses, punishments, rights and duties. Throughout his study, Honoré reflects on these classifications to interesting effect, finding a trend towards a greater equality between the sexes and, at the same time, towards a greater measure of violence in sexual relations. A careful examination of the statistics shows that, while Englishmen continue to be significantly more "aggressive, daring and violent" than Englishwomen, the gap between them—measured in terms of convictions for "violent" and other "serious" crimes—has closed markedly from 1960 to 1975.[22] Discriminatory sentencing patterns seem to favor women, however. Of the men arrested for sex offenses in 1975, 34% were cautioned and released while 66% were found guilty. The corresponding figures for women were 61% and 39%.[23] Interestingly, the legalization in England (but not in Scotland or Northern Ireland) of sex relations between consenting homosexual adults in private has not led to a reduction in the number of convictions. Women are viewed as victims of crime inadequately protected under law. For example, Honoré (like most other commentators) is critical of the requirement imposed by *Morgan*:[24] a rape conviction requires proof that the man either knew that the woman did not consent or was indifferent to her consent.

This book reviews carefully the arguments that marriage is one-sided—favoring the husband or the wife, depending on the argument—or that the marital bond is too difficult to dissolve and requires too exclusive a commitment to one person. Some interesting facts emerge during the course of these analyses: *Redpath*[25] requires an English wife who has sex with a man not her husband to rebut the imputation of adultery by proving that she did not consent, while a 1963 New Zealand statute (the only example Honoré draws from this legally-innovative but socially-conservative country) allows the woman to set aside the marriage if her husband had impregnated another at the time of marriage.

22. *Id.* at 53-4, 170.
23. *Id.* at 156.
24. Morgan (1976) A.C. 182.
25. Redpath (1950) 1 All E.R. 600.

Homosexuals cannot live together "as man and wife" in the eyes of the law, and they are thus unable to take advantage of the constructive trusts and implied contracts which Lord Denning is inventing to implement property settlements for the benefit of cohabiting heterosexuals. There seems to be little reason for this rule, which is not commented upon by Honoré. He tacitly defends other discriminations by classification: marital rights of support and tax relief, the adoption of children and additional social security benefits are denied to homosexual couples. These differentials, Honoré argues, reasonably reflect the fact that heterosexual family life imposes special financial burdens and that heterosexual wives are entitled to special rights and privileges because of their childbearing potential. It is difficult to see how these justifications apply to the adoption of children, however, and adoption by homosexual couples would result in the familial financial burdens he discusses.

Sex acts between lesbians "are either not criminal or, if they are, are seldom prosecuted."[26] Rape (but not, *e.g.*, aiding and abetting) can only be committed by a man and against a woman, while a prostitute can only be a woman; parallel offenses, however, do exist for the opposite sex, including those which Honoré includes within the hypothetical crime of "badgering." In general, Honoré succeeds in his attempts to make sense of these and other discriminations, while reserving his harshest criticisms for sentencing anomalies and for the unsuccessful but highly dangerous types of "therapy" administered to sex offenders, many of whom display a stubborn recidivism. These discussions are quite good, except that he takes no account of the ideas of the "new wave" of English criminologists concerning "labelling" in deviancy theory. Honoré strenuously attempts a non-sexist analysis of sex and, apart from occasional lapses, this attempt succeeds.

Like other reviews, this one has focused on the reviewer's criticisms and, in trying to balance it out, it should be reiterated that Honoré's attempt to strike out in new directions of legal analysis is admirable. Having said this, it should be noted that Honoré's conclusion epitomizes much of the impracticality and just plain sloppiness found at many junctures in the book: "Just as nations like Scotland or Quebec have the right to settle their own destiny . . . , so people of a certain maturity have on this view the right to decide for themselves what form of sex, if any, they want

26. T. HONORÉ, SEX LAW 89 (1978).

and with whom they want it."[27] This grand analogy is particularly fragile—self-determination by "nations" and individuals have little in common—and it is constructed of unsupported value judgments of a most contentious order. Reasonable persons would be perfectly justified in rejecting either or both limbs of Honoré's argument. In particular, Prime Ministers Callaghan and Trudeau, a Puritan on the Labour benches and the husband of a public advocate of sexual self-determination, would have little sympathy for an analogy based on self-determination for Scotland and Quebec. These are the kinds of men who exercise an immense influence over their countries' laws. How, then, could Honoré's "right," that "each of us may use his body as he pleases provided he or she she [*sic*] does not touch another without their consent,"[28] ever come into being?

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27. *Id.* at 173.
28. *Id.* at 174.