Adorno's Sexual Taboos and Law Today, 60 years on

I come to Adorno's famous text as a feminist criminal lawyer: someone with a general interest in social theory and some interest in psychoanalytic theory but with no particular expertise in critical theory. So in what follows, I will offer, first, some general reflections on how the text strikes me, as a feminist criminal law theorist, before moving on, second, to draw out several themes from the article which still seem remarkably relevant to unpacking the worlds of crime, sexuality and law today. Taking some recent examples from case law, legislation and debates about sexual practices and 'identities', I emphasise, first, the enduring resonance of Adorno's identification of the volatility of this field of legal regulation and public discourse, along with the various contradictions which it entails; second, his observations on the 'desexualisation of sexuality'; third, his theme of the persistence yet diversification of taboo; and fourth, the strangeness or even 'impossibility' of sexuality as an object of criminalisation or legal definition/regulation.

Revisiting Adorno's text

Turning first, then, to Adorno's text: His essay is of course strongly marked by the German context in which it was written, with its particular recent political history and the survival of an extraordinarily encompassing definition of sexual crime.[1] In this country, Adorno's text emerged not long after Patrick Devlin's Maccabaean Lecture, 'Morals and the Criminal Law'[2]– a striking essay engaging with the recent conclusions of the Wolfenden Committee,[3] and exemplifying the hold of sexual taboos on the popular imagination. It was over a decade before a government felt able to risk implement Wolfenden's modest reform proposals regarding the legal treatment of same-sex consensual sexual relations between men in the face of persisting prejudice; and just a few years after Devlin's lecture, the Lady Chatterley trial would present another spectacular public rehearsal of the power of sexual taboos. While pubishers George Allen Lane and Penguin prevailed in their defence of D.H. Lawrence's book against a charge of obscenity, the rhetoric of the prosecution, with the infamous questions about whether the jury would be content for their wives or servants to read Lawrence's book, is testament to the fact that class, gender and sexual attitudes we might today associate with Edwardian[4] or even Victorian era were by no means entirely a thing of the past.[5] Evidently, we now live in a very different world. Yet Adorno's analysis still feels, to the feminist criminal lawyer, remarkably fresh. Indeed the first few sentences of the essay could easily have been written in the last decade. Sexual taboos have indeed survived the ensuing six decades of continued 'liberalisation' of sexual norms and diversification of legally recognised forms of sexuality – and, as I shall argue below, have themselves diversified and proliferated.

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[1] Theodor W. Adorno, 'Sexual Taboos and the Law Today', (hereafter, 'Adorno'), p. 79 fn b

[2] (1959) *Proceedings of the British Academy xlv,* reprinted in Devlin's *The Enforcement of Morals* (OUP 1965), and the subject of a lively debate with liberal legal philosopher HLA Hart: 'Immorality and Treason' *The Listener* (30 July 1959) p. 162; *Law, Liberty and Morality* (Oxford University Press 1963). For discussion of the social context in which this debate took place, including its attitudes to sexuality, see Nicola Lacey, 'Patrick Devlin's *The Enforcement of Morals'* in Lindsay Farmer and Chloe Kennedy (eds.), *Leading Works in Criminal Law* (Routledge 2023) Chapter 5.

[3] Wolfenden Report (1957), *Homosexual Offences and Prostitution* Cmnd 247, HMSO. The Committee's joint brief itself presents an interesting picture of contemporary taboos.

[4] The trial transcript was published by Penguin the following year (*The Trial of Lady Chatterley: Regina v Penguin Books Limited: The transcript of the trial* (Penguin Books, 1961)) and the papers are now in the Penguin Archive at the University of Bristol: https://archives.bristol.ac.uk/Record.aspx?src=CalmView.Catalog&id=DM1679. For a vivid literary reconstruction of the trial, see A McLeod, *Tenderness* (Bloomsbury, 2021).

[5] D Kynaston, *Modernity Britain* (Bloomsbury, 2015), 475-483.

Adorno's text also, of course, reminds us that the precise shape of taboos has changed. Indeed, the text includes its very own 'taboos' by our standards today; for example its statements about women's and children's fantasies and capacity for deception, and its breezy statement on the obvious demerits of limiting access to pornography.[6] Yet much of the text seems remarkably prescient, particularly in relation to some of his proposals. Some of his comments prefigure the growing concern among some feminists with the downsides of sexual 'liberation', reflecting an anxiety that amid prevailing power relations, the new sexual freedoms accorded by access to contraception and safe abortion may have invited an expectation of women's sexual availability. Adorno's critique of the free will/determinism antinomy, already resonant with the emergence of a partial defence of diminished responsibility in the Homicide Act 1957, has been followed up by the further development of partial defences and a lively ongoing debate on how far defences can and should be adapted to account for the social pressures and circumstances of particular defendants.[7] Therapeutic milieux have been created in a range of prisons and community responses to crime, particularly in the field of sexual offences, and have been the object of important research.[8] Contemporary criminology features new blends of biological and social positivism which, in some of its forms, places the psyche at the centre of our understanding of crime, and opens up new fields of research.[9]

Conversely, this quasi-positivist, scientific tone of the last few pages of the article,[10] along with its celebration of psychology and sociology, seems in stark contrast to its primary critical, psychodynamic voice. Moreover Adorno's turn in the latter part of the article to the importance of harm and preventing or reducing it, seems strangely inattentive to the fact that our conceptions of harm are themselves shaped by prevailing taboos. But, as I shall hope to show in the next section, the essay nonetheless has much to say to the criminal lawyer today.

Themes for the worlds of crime, sexuality and law today

1) The polarisation of sexuality issues and confusions in the field

As Michel Foucault famously noted,[11] the history of sexuality is full of paradoxes, not least among them the fact that the sexual controls, prohibitions and 'unspeakability' of nineteenth century sexual moralism issued in a whole new world of talk about sex, and of institutions/psy professionals trained to facilitate, direct and handle that talk. Today, it seems to me, we confront a continuing tension in the field, as well as a parallel paradox. The tension arises from a fundamental ambivalence about whether the concern of criminal law (and indeed other normative orders) in this field is primarily to protect sexual autonomy or to enforce sexual norms/public order. The paradox is that the increasing 'liberalisation' of sexuality and emphasis on sexual freedom and diversity go hand in hand with a field of public discourse and legal regulation marked by extreme volatility and polarization. And this field of public discourse exhibits just the 'violent affects' Adorno associates with taboo. Extreme, judgmental sexual moralism has seamlessly survived the diversification of tolerated or

[6] Adorno pp. 88, 81-2 respectively.
[7] For example, particularly in relation to the context of domestic abuse, in relation to which the debate about the adequacy of reform continues: Howes SK, Williams KS and Wistrich H, 'Women Who Kill: Why Self-Defence Rarely Works for Women Who Kill Their Abuser' [2021] *Criminal Law Review* 945
[8] Elaine Genders and Elaine Player, *Grendon: A Study of a Therapeutic Prison* (Oxford, Clarendon Press 1995)
[9] See Tim Newburn, *Criminology* (Third edition: Oxford University Press) Chapters 7 and 8.
[10] Adorno p. 85 ff.
[11] *The History of Sexuality*: *An Introduction* (Peregrine Press translation, 1976).

officially mandated sexual relationships, leading to a fragmented world of ugly contestation which eludes rational discussion and is marked by fury, disgust, persecution, rage, indignation.

Two examples serve to illustrate this claim. First, in the (in)famous case of *R v Brown*[12], the House of Lords decided (by a majority) that the consensual sado-masochistic practices in which the defendants had engaged had been correctly charged as (non-sexual) assaults, since the conduct involved reached the threshold of bodily harm to which individual consent cannot be valid other than in special, e.g. medical, contexts. The result, inter alia, reflected criminal law's continuing preoccupation with homosexuality as a potential threat to 'public order', as well as the inconsistent way in which consent enters into the delineation of criminal liability. (It is instructive to contrast the *Brown* case with that of *R v Wilson*[13], in which the 'loving context' of a man's branding of his wife's buttocks was seen as distinguishing the two cases, and the consent defence was allowed.) But of most relevance in relation to Adorno's essay are the spectacular expressions of judicial disgust at the behaviour at issue in *Brown:* 'cruelty', degradation', 'danger'. Even Lord Mustill, dissenting and arguing on the basis of the European Convention of Human Rights that willing consent to harm inflicted for the gratification of sexual desire should fall within a sphere of 'private morality', commented that 'whatever the outsider might feel about the subject matter of the prosecutions – perhaps horror, amazement or incomprehension, perhaps sadness – very few could read even a summary of the other activities [not the subject of charges] without disgust'.[14] It is hard to think of a better example of the affect of taboo; and note that this case also demonstrates the relevance of taboo well beyond the explicitly sexual offences.[15]

My second example is drawn from public discourse, which regularly displays a continuing popular association of homosexuality and, particularly, transsexuality with the risk of sexual violence and exploitation, particularly of children. (Indeed this popular association is itself reflected in the judicial rhetoric of 'contamination', 'disease' and 'danger' in the *Brown* case and beyond.)[16] This particular debate also reflects the continuing centrality of the penis - notwithstanding the modification of the sexual offences to include a wide range of penetrative assaults - as the emblem or marker of sexual abuse or danger. A related example is the manifestation of anxieties about paedophilia amid the debate about transgender rights, as well as the ongoing debate about transgender rights in prison. Another case in point is the distaste with which judges have reacted to cases in which a female party to a sexual encounter has impersonated a man – a form of impersonation which has, unlike deceptions about important matters such a fertility or infectious diseases – been assumed to negate consent. [17] Indeed the regrettably polarised debate between some transgender activists and some gender critical feminists – a debate in which both sides are, alas, occasionally blemished by hateful speech – strikes me as another iteration or variation of taboo as understood by Adorno.

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[12] [1993] 2 All ER 75, HL.

[13] [1996] 2 *Cr. App. R. 241*

[14] Ibid p. 101

[15] Though Brown was decided some decades ago, it remains good law, as evidenced by a recent case in which a man was sentenced to five years' imprisonment for the removal of a consenting man's genitals: https://www.bbc.co.uk/news/uk-england-london-67961089

[16] See for example Matthew Weait, ,Criminal Law and the Sexual Transmission of HIV: R v Dica' (2005) 68 *Modern Law Review* 121

[17]See for example *R v McNally* [2013] EWCA Crim 1051; cf the very severe sentence handed down in the similar case of *Newland* in 2017 – a case in which the victim gave evidence that "I hated myself. I felt filthy, disgusting. There were not enough showers in the world to clean me."
https://www.theguardian.com/uk-news/2017/jul/15/gayle-newland-retrial

2) The desexualisation of sexuality

Another theme from Adorno's text which resonates strongly today is that of the 'desexualisation of sexuality'. In a remarkably prescient way, Adorno anticipates the commodification of sexuality: sex as sport, as a marketing mechanism, as an object of consumption. Remarkably, one might even suggest that this desexualisation – or apparent 'de-tabooing' – reaches even to the sexual offences themselves. In this country, the first Sexual Offences Act had been enacted less than a decade before Adorno's essay was published; and criminal law textbooks continued to exclude the sexual offences until the mid 1960s.[18] In 2003, there was a wide-ranging reform in the new Sexual Offences Act, which made limited moves beyond the genital paradigm and enacted a range of offences in which breaches of sexual autonomy were aggravated by abuses of trust or the exploitation of imbalances of power. The language of indecency was out; the language of free agreement, abuse of trust, abuse of power was in. It would be hard to imagine a clearer case of desexualisation.

But of course, persisting taboos and prejudices fundamentally shape the prosecution of these offences; the selection of cases; the assessment of credibility; the view of what counts as relevant evidence (e.g. most recently, the widespread police practice of confiscating mobile phones and trawling them for any evidence of previous sexual activity as potential evidence of consent/unreliability). We might also remind ourselves of the appalling 'Yorkshire Ripper' case, in which serial killer Peter Sutcliffe was apprehended only after he had killed thirteen women and attempted to kill seven more over a period of five years. The majority of his victims were sex workers: Sutcliffe claimed to have heard the voice of God urging him to kill prostitutes. Both the reporting of the case and the initial approach to the investigation are testimony to an enduring view of sex workers as 'less worthy' victims.[19]

3) The persistence yet diversification of taboo

As the themes already mentioned themselves suggest, we may well conclude, re-reading Adorno's essay today, that each newly permitted (or even, mandated) form of sexual expression or activity calls forth its own taboo. Taboos are very much still with us, but the form they take changes. What is more, in another paradox, might we not suggest that the diversification of socially permitted forms of sexuality has actually meant a proliferation as well as a modification of taboos? Just as 19th Century repression gave birth to the psy professions and their talk of sexuality, so the liberalisation of sexuality and increased sexual pluralism has given birth to a range of new taboos. Take for example the rage and sense of stigma reflected in the 'Incel' movement; the fears already mentioned in relation to the trans community. Doubtless the digital enablement of new forms of sexual encounter will produce their own taboos in time.

4) The strangeness or even 'impossibility' of sexuality as an object of criminalisation or legal definition/regulation.

I would like to consider, finally, one further point which Adorno's essay raises for the criminal lawyer today. Criminal law generally aspires to regulate conduct; the defendant's state of mind conditions their liability, but it is not generally in itself the object of criminalisation. Indeed, the criminalisation of thoughts and desires is generally regarded as the ultimate illiberalism. Yet at root, in Adorno's

[18] See Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press 2016, p. 280; more generally, see Chapter 9.
[19] Nicole Ward Jouve, *The Streetcleaner: The Yorkshire Ripper Case on Trial* (Marion Boyars 1986).

Freudian conception, drives and desires, integrated, repressed and sublimated in various ways, are the core of sexuality. So, in one sense, we might regard criminalisation of any form of sexuality as fundamentally misconceived – or, perhaps, as inevitably missing its real target.

Current English law's solution to the conundrum of drawing a line between legal and criminal sex – between 'normality' and taboo – uses several concepts; but the central one is undoubtedly that of consent. Today, most of the sexual offences are not cast as indecencies or obscenities or outrages but as violations of individual autonomy, or exploitations of power. But the law's definition of consent is, perhaps inevitably, open textured, and leaves plenty of spaces through which the powerful dynamics of taboo can re-enter the criminalising picture. It also, arguably, presents a quite unrealistic and transactional picture of sexual relationships: sexual encounters as an individual 'contractual' choice as opposed to something deeply socially embedded and affective. For example, we can contrast the sexual practices at issue in the *Brown* case – where consent was invalidated by the fact that the practices in question involved 'actual bodily harm' – with cosmetic surgery: often far more physically intrusive than the *Brown* practices; yet where consent is construed as valid; or with intersex surgery, where consent was in many countries for many years not even investigated, being rather subsumed to a norm of binary sex coding and a set of assumptions about how this norm shaped the best interests of the child.[20]

In conclusion

In short, Adorno's densely packed (if somewhat elliptical!) essay still speaks to us powerfully, sixty years on. While the shape of the taboos he identified have changed, their force persists, and continues to echo through the practice and regulation of, reactions to, as well as discourse about, sexuality. I would be prepared to guess that, should another symposium be convened in 40 or another 60 years, precisely the same will be true. Perhaps most fundamentally, however, Adorno's essay puts its finger on what we might call the ultimate taboo, or trauma, of criminal law's effort to define sexual offences and to regulate sexuality: that the real targets of its project are the desires and drives underlying 'criminal' conduct; and hence, that that wherever it is invoked, it has already failed. We might see this as the tragedy of criminal law: and perhaps this is one of the places where, in this field, the rage and punitiveness associated with taboo originates.

[20] See for example Mireia Garces de Marcilla Muste 'You Ain't Woman Enough, Tracing the Policing of Intersexuality in Sports and the Clinic' *Social and Legal Studies* (2022) (first release: https://doi.org/10.1177/09646639221086595)