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# **SEXUAL ETHICS AND CRIMINAL LAW**

**A Critique of the Sexual  
Offences Bill 2003**

**Francis Bennion**

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OXFORD**

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# Sexual Ethics and Criminal Law

A Critique of the Sexual Offences Bill 2003

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Sex, a force in all our lives,  
demands respect - and sacrifice.

- *Francis Bennion*

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# Introductory

1. *The Sex Hate Bill?* This report sets out some objections to proposals contained in Part I (Sexual Offences) of the Sexual Offences Bill introduced by the Government into the House of Lords on 28 January 2003. In the main, the Bill extends only to England and Wales. The objections presented here are not exhaustive; many more could have been put forward. However it has been necessary to put together this report in haste, so that it might be available to peers considering the Bill on second reading. It therefore had to be sent for printing only three days after the Bill was introduced.
2. The following remarks are based on the fundamental proposition laid down in my book *The Sex Code: Morals for Moderns*<sup>1</sup> that sex positivism or the happy acceptance of human sexuality, seeking its fulfilment, is largely absent from our society – even though it is essential for human happiness. Directly or indirectly, that absence of sex positivism is the root cause of most of the sex crimes that trouble us. Do the Government acknowledge this, and investigate that cause with a view to its removal? The answer is no. Instead they offer us this deeply flawed Bill.
3. My basic objection to the Bill is that much of it is fuelled by public hysteria<sup>2</sup> and founded on what might be termed a Victorian spinster's view of sex, namely that it is frightening, horrendous, and fit only for life with one's head beneath the bedclothes desperately hoping no wicked man will approach. I do not make that complaint lightly. The essential fuel of the deficiencies put forward in this report is what is called sex negativism – or even sex hate. One might plausibly call this pathetic effort the Sex Hate Bill.
4. *The nature of sexuality* Let us pause for a moment and ask an essential

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<sup>1</sup> Weidenfeld & Nicolson 1991. Extracts from reviews of the book are set out in Annex One to this report.

<sup>2</sup> See pp. 7, 14-16 below.

essential question. What really does our sexuality amount to? It is the force that impels the human race to reproduce itself, for otherwise it would die out. It achieves this by making orgasms pleasurable, though pleasure is not truly the criterion. What I am concerned with, when it comes to sex, is the solemn fact that this is the way the human race goes on into the future. For that reason alone, sex demands respect. What we are discussing here goes far beyond mere fleshly pleasure, or what the Bill sneeringly calls sexual gratification.<sup>3</sup>

5. Unhappily failure to grasp the truth of that has led some, notably in this Bill, to treat sex with a twisted, even grotesque, significance. They think that children, if merely touched by sex, are somehow thereby irredeemably scarred and marred. Yet the truth is that children are far more robust than that. They need to be, for they like all of us are sexual creatures – and sex needs toughness.
6. We should not altogether blame the Home Office, sponsors of the Bill, for its crass approach. It is the way the vast majority of the British people see sex, at least when they have reached middle age. Yet what truly mars many children who encounter sex even in a non-violent, consenting, way is the horrified attitudes to this occurrence of the adults around them. The grown-ups raise their hands and shriek, so the poor innocent terrified children are damaged – often for life. It is not sexual acts that mar them, but the stupid unknowing hysterical attitudes of the adults who rule their lives. So the cycle continues . . .
7. If left alone, infants by themselves harmlessly arrive at the truth about sex. They perceive it as a part of life, like hunger, thirst, wonder, and enquiry. A developing, growing part, which they master bit by bit. Not in any way obnoxious or to be shunned, but just an aspect of the way things are. No primitive community is troubled by sex. Why should we who think ourselves civilised trail so far behind them?
8. Unhappily in our community adults come along, very early in life, to knock the natural sensible attitudes out of the heads of the

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<sup>3</sup> See, e.g., clause 13.

poor children – with the intention of making them suffer. Sex hate is the cause of their suffering, and sex hate is what we are up against when it comes to this Bill.

9. It is not usual to combine treatment of a Government Bill with a literary legacy such as the writings of Shakespeare. This is regrettable. Our public affairs need all the help they can get, and much help is to be got from our literary heritage. But still there is the great divide of custom. Leaping this, I venture to quote Shakespeare in the present context of the need to fight those who would wrong sex –

Diseases desperate grown  
By desperate appliance are relieved,  
Or not at all.<sup>4</sup>

10. Of course I acknowledge the deviant urges that drive sex offenders, while deeply regretting the absence of any Government initiative to investigate their causes, and possible cures. It would be useful to probe what impels sex offenders to do what lamentably they do. Governments often bypass the obviously useful, and have done so in this case, drearily repeating long-accustomed patterns.

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<sup>4</sup>Hamlet IV.3.

## Law and ethics

11. *No ethical basis* A primary objection to the Bill is that the Government's proposals are not based on any discernible system of morals and values. They are grounded in a low view of human sexuality. They display sex-negativism – or even sex hate – in many obvious or indirect ways. While some sexual acts are obviously immoral and criminal, the vast majority are innocent and healthy. A few others are on the borderline. Here there is a grey area, which needs to be addressed very carefully by those who lay down the criminal law for our nation. The proposals in the Bill fail to do that. If implemented they are likely to cause much unnecessary suffering and unhappiness. They ignore the essential point made in the couplet set out on a preliminary page of this report. They are opposed to sex positivism and are therefore unsound.
12. The Bill proposes fundamental changes to the criminal law governing how our people should behave sexually. A nation's laws, particularly its sex laws, need to be based upon accepted morals and values: what other sound basis could there be? Law does not (or should not) operate in a moral vacuum. Its function is to uphold agreed norms. So a proposed new law, particularly a sex law, must be assessed by reference to these. Yet on this question of a basis of agreed common morality the Bill is strangely silent, as was the white paper on which it is based.<sup>5</sup>
13. A large number of ethical propositions in the sex field would command general acceptance in most societies (e.g. rape is immoral). The difficult area is where there is no general agreement (e.g. incest by consenting adults is/is not immoral). It is particularly in the latter grey area that those proposing a new criminal law need

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<sup>5</sup> *Protecting the Public*, subtitled “Strengthening protection against sex offenders and reforming the law on sexual matters” (CM 5668). This document, published in November 2002, is referred to below as the white paper.

to be clear about its ethical foundation. Total absence of any such clarity is the principal defect of this Bill.

14. The Bill proposes not one new sex crime but many. In fact there are no fewer than fifty-seven varieties of new sexual offences contained in the Bill. Some, but not many, replace existing offences that would be abolished by it. Various current enactments laying down when human sexual behaviour in England and Wales is to be treated as criminal, many dating from the distant past, are to be swept away.<sup>6</sup> The Bill introduces a much larger raft of new criminal offences to replace them, which in turn is likely to subsist on our statute book for many years to come. So the promulgation of the Bill is an important development in the life of our nation, which we need to judge with close attention and a great deal of caution. Sex is a vital matter for every human being, and we must not get it wrong in this enterprise. The criminal law has coercive effect. People who fall foul of it may be imprisoned for many years. Even if that does not happen, they may lose their reputation and standing in the community. So we have to be very careful here. This is no light enterprise.
15. One problem with testing the Bill against our nation's morals and values, as emphatically needs to be done, is that the nation is now multicultural. This means those among its people have many different sets of morals and values, some directly opposed to one another. Many are based on various religions, mainly Christian, Muslim, Hindu or Jewish. Yet the majority of our people are not close adherents of any particular faith and would be classed by an impartial assessor as secular in their values. In a democracy the majority must prevail, which indicates that the Government's proposed new sex laws should be based upon secular, rather than religious, ideals and ethics. Moreover they should be western secular values, since those are the ones held by the vast majority of British citizens.
16. The only general basis I can detect for the Bill's proposals is derived

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<sup>6</sup> See Schedule 5 to the Bill.

from the white paper. This suggests that they deal with conduct which the Home Office concludes is “unacceptable”.<sup>7</sup> That is a weasel word, elastic and varying. It at once demands the question “unacceptable to whom?”. This the white paper does not attempt to answer. If it means “unacceptable to the majority” that is not good enough. To rank as a crime, sexual conduct needs to be far worse than merely unacceptable to the majority. It needs to be vile and vicious. That does not apply to many of the actions branded as criminal by this Bill.

17. We see that the Home Office’s pragmatic unprincipled approach is not a good enough basis when the matter is so important for our nation and every individual in it. These changes in our law need to be closely assessed morally in order to be justified. So far, that form of validation is not seen to be present in Home Office thinking. Its absence is alone enough to undermine confidence in the Bill’s proposals.
18. In this vacuum I feel bound to fall back on the moral precepts set forth in *The Sex Code*.<sup>8</sup> Although some people may have reservations about certain things said in that book I believe it presents on the whole a convincing account of western secular sexual ethics in our time. The basis of the book is a code of sixty ethical principles. Certain of these, set out in Annex Two to this report, are peculiarly relevant to the proposals in the Bill. When reading them it is important to bear in mind that each principle is considerably amplified in the book itself, to which reference should where necessary be made.
19. I drew the Home Office’s attention to the book in the following letter published in the New Law Journal in August 2000<sup>9</sup> –

Martin Bowley QC (article July 28 2000, page 1134) seems complacent about *Setting the Boundaries*, the report of his Home

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<sup>7</sup> See, e.g., paras. 9 and 14.

<sup>8</sup> See footnote 1 above.

<sup>9</sup> 150 NLJ 1218.

Office group on reforming sex offences law.<sup>10</sup> He thinks that regardless of responses received during the consultation period its recommendations should form the basis for a new Sexual Offences Act. I wonder? Judging from his account, the report seems redolent of the sex negativism condemned in my book *The Sex Code*.

Here is just one example. The report proposes “a specific offence of sexual activity with a person with such severe mental disability that there is no capacity to consent to sexual relations”. The effect of this would be that such a person, in addition to the suffering arising from his or her mental condition, would be permanently deprived of lawful sexual fulfilment. Obviously the researches undertaken by Mr Bowley’s group did not extend to the lengthy treatment my book gave to this point, ending with the following conclusion:

Apparent consent by a mentally incapacitated person to a sexual act cannot be taken as true consent where the incapacity is too great to permit the person to understand the full emotional and ethical significance of the act. Where however such a person would otherwise be condemned to involuntary celibacy or chastity it is not immoral to afford them sexual fulfilment with no more than their apparent consent, since in such circumstances the usual requirement of true consent is prevented from applying.<sup>11</sup>

Mr Bowley and his colleagues might like to be glancing through my book, which was an attempt to frame a code of modern secular sexual ethics. Ethics must always underlie law.

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<sup>10</sup> The white paper on which the Bill is based was in turn based on *Setting the Boundaries* (2000) and *Review of Part I of the Sex Offenders Act 1997* (2001).

<sup>11</sup> See para. 18 in Annex Two to this report.

## Specific proposals in the Bill

20. *Sex with children*<sup>12</sup> The Bill's proposals relating to sexual activity with a child, that is a young person who has not yet attained the age of sixteen, demonstrate the great danger involved in drawing up legislative proposals concerning sex without first laying down the moral principles that are to be followed. Antony Grey wrote in his book *Speaking of Sex*<sup>13</sup> –

Children are sexual beings. Adolescents are highly sexual beings.<sup>14</sup>

21. That is obviously true, and should be accepted as postulating a compelling guiding principle when remodelling the laws governing sexual behaviour. Adolescence begins well before the age of consent (sixteen), yet the Bill insists it should be a criminal offence for anyone, even an age mate, to engage in any sexual activity whatever, even though consensual, with such a “highly sexual being” as an adolescent aged under sixteen. I find it incredible that the Government should really think this is the right way to proceed when laying down our sex laws for the twenty-first century. No one who had read and absorbed chapter 12 of *The Sex Code* could seriously put forward such a sex-negative proposition as that. Anyone knows who remembers their own childish consensual sex play, and sexual experimenting and exploring with age mates, that such activities are a universal and important part of everyone's growing-up. The criminal law should not interfere with it. The criminal law should have no part to play in it: nor should the state's social services. Yet the white paper says that “where a person [of any age] engages in sexual activity with the ostensible consent of the child then one of two offences – “Adult sexual activity with a child”

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<sup>12</sup> See the Bill, clauses 2, 4, 6, 8-32, 52-55, 76.

<sup>13</sup> Cassell, 1993.

<sup>14</sup> P. 109. See also para. 49 of Annex Two to this report and the detailed analysis in chapters 12 and 13 of *The Sex Code*.

or “Sexual activity between minors” – can be charged.<sup>15</sup> I go on to discuss these in reverse order.

22. *Sexual activity between minors* This proposed criminal offence, punishable with up to five years imprisonment, deals inter alia with sexual activity between pubescents from eleven to fifteen. It “will cover a range of behaviour including, for example, any activity with a child that a reasonable person would deem to be sexual or indecent in all the given circumstances. This will cover a range of behaviour, including, for example, inducing a child to take off their clothes in circumstances which would reasonably be considered as sexual *and outside the bounds of normal family life*.”<sup>16</sup>
23. The italicised words are a giveaway. Consensual sex play between young siblings or friends who are age mates, say within the age range eleven to fifteen years, is considered by the Home Office to be outside the bounds of normal family life. Or is it? Is the new law really going to leave vital questions like this to be finally settled only after years of delay and a final appeal to our highest court of justice, the House of Lords? That would surely be a gross dereliction of duty by Parliament – handing the final decision to non-elected judges rather than deciding for themselves. Yet deliberate ambiguity is often used in legislation when clarity might arouse dissent.<sup>17</sup> It should not be so used in the present case, when so much depends on being clear.
24. Much childish sex play between consenting age mates is within the bounds of normal family life. That is my view, but many would differ. I suspect that most parents, scared by current propaganda in the media and elsewhere, would indeed differ from that opinion. They would run away from any display of sexuality by their supposedly innocent little children.<sup>18</sup> Yet if they only knew it, a child

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<sup>15</sup> Para. 49.

<sup>16</sup> White paper, para. 50 as applied by para. 52. Emphasis added.

<sup>17</sup> See *Bennion on Statute Law* (Longman, 3rd edn 1990), chap. 17.

<sup>18</sup> For an account of the hideous damage those blinkered attitudes cause I refer once again to chapter 12 of *The Sex Code*.

is incomplete without awareness of its sexuality. Usually nature does not permit such ignorance. We should respect nature, in this as other spheres.

25. A typical current attitude to child sex is that shown in the following comment by the American academic John Pesciallo –

For siblings close to the same age, incest may merely be sexual exploration that is a part of normal development *but socially unacceptable or undesired*. However, when there is coercion or a significant age difference, then it is considered abuse. Generally, the difference of five or more years would constitute abuse by the older child (even if the younger child were willing). Anytime an older sibling manipulates a younger child into sexual behavior that is not age appropriate *or socially acceptable*, it is sexual abuse.<sup>19</sup>

26. This is confused, even contradictory, – and that is symptomatic of the chaotic attitudes to this vexed topic. The italicised words suggest that something that is part of normal development can nevertheless be socially unacceptable or undesired. Yet if conduct is part of normal development it obviously should not be socially unacceptable or undesired. If nevertheless it is socially unacceptable or undesired then obviously society has got things wrong, and its mistaken attitudes should not be reflected in legislation enacting criminal offences.
27. The Bill shows many signs that the Government is being driven by unbalanced, indeed uncivilised, attitudes to human sexuality widely held today by the British public. Yet the Government dismisses and disregards similar inhuman attitudes widely held on matters such as capital punishment, homosexuality, racism, corporal punishment, immigration and asylum. Surely it should in the same way insist on enlightened attitudes to sex when it frames new legislation concerning that difficult topic. It should be sex positive, but it is not.

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<sup>19</sup>“Understanding Sibling Incest” at <http://www.bmi.net/jgp/USI.htm>. Emphasis added.

28. A further element is that much public agitation in the sex field is driven by hysteria, and is therefore unreliable as a basis for legislation. In this connection I cite as just one example facing pages in the *Daily Telegraph* for 15 January 2003. On page 22 Andrew Marr wrote –

I can't be the only one completely bemused by the paedophilia mania sweeping the country. It cannot surely be that paedophilia is a new thing. So either it has always been going on . . . or we are in the grip of something like mass hysteria. Talking to older people . . . you hear of a Britain in which child sex abuse – what they'd call 'mucking about' – went on all the time . . . but was simply repressed, ignored and certainly not publicly discussed . . . but are there so many serious paedophiles about? I simply do not believe it.

29. On the facing page 23 the editorial said –

As Andrew Marr writes opposite, paedophilia mania is sweeping the land . . . This mania prompted the ludicrous recent decision by Edinburgh City Council to ban parents from making video recordings of their children's Nativity plays without the consent of the parents of the whole cast. It inspired the disgraceful campaign by Rebekah Wade . . . to 'name and shame' convicted paedophiles in the pages of the *News of the World* – a campaign that moved some of her more moronic readers to attack the home of a paediatrician in Newport. It has led some councils to insist that any parent who offers to help out at a school fete must first be vetted by the police.

30. These Government proposals raise the question what lawful sexual outlets is it supposed that pubescents in the age range eleven to fifteen should have? If these borderline creatures are, as must be admitted, "highly sexual beings",<sup>20</sup> they obviously require suitable opportunities to fulfil their sexuality.<sup>21</sup> This could be called one of their human rights, if that topic had been fully developed in the region of sexuality. While many girls may, if unawakened sexually, happily

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<sup>20</sup> See above, p. 13.

<sup>21</sup> See para. 15 in Annex Two to this report.

continue in an “asexual” condition until they reach the age of consent or later, this does not apply to most boys. The Bill’s proposals limit the lawful sexual activity of pubescent boys to solitary masturbation, which surely cannot be right. I believe it is horrifyingly wrong.

31. Here the Government’s defence might partly lie in para. 37 of the white paper<sup>22</sup> –

... in some circumstances, particularly where the partners are close in age and apparently agree to take part in sexual activity, it may be more appropriate to pursue the matter through child protection rather than criminal justice processes, out of concern for the welfare of both the children involved. In other cases, even when both parties are children, one may already have a history of abusive sexual behaviour towards other children, which justifies the involvement of the criminal law or his or her behaviour may have been sufficiently exploitative or abusive to merit prosecution. The Crown Prosecution Service already has discretion about whether prosecution is in the public interest ...

32. This apparently applies to all forms of sexual activity between children even where consensual and free from objectionable features such as the infliction of bodily harm (comparatively very rare). So it covers what is described above as “sexual exploration that is a part of normal development”.<sup>23</sup> It is surely quite wrong that the police and Crown Prosecution Service should be involved at all in such cases. The fact that the CPS might eventually decide that it is not in the public interest to proceed with a prosecution even though technically a crime has been committed is no answer. The existence of this residual CPS discretion should never be used as an excuse for labelling conduct as criminal when truly it is not. The right of any citizen to bring a private prosecution also has to be borne in mind here. This right might be exercised for example by a spiteful neighbour.

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<sup>22</sup> See also para. 52.

<sup>23</sup> See above, p. 15.

33. Nor in such cases is it “appropriate to pursue the matter through child protection . . . processes”. This still brands the children’s conduct as criminal, calling for intervention by state services. Such intervention can do immense harm to the children, and is uncalled for. It needs to be recognised and stated that such childish consensual conduct is not in any way wrong, immoral or criminal. On the contrary it is to be accepted *and welcomed*.<sup>24</sup> Otherwise the child is inflicted with *sex-guilt*, a pernicious and very common feature of the way we treat sexuality.<sup>25</sup> This brings me back once again to the question of the undeclared and apparently non-existent moral basis of the Government’s proposals.
34. A final point on sexual activity between age mates who are both under sixteen concerns gay boys. When the Bill for the Sexual Offences (Amendment) Act 2000, which lowered the gay age of consent to sixteen, was going through the House of Commons Mr Simon Hughes MP for the Liberal Democrats made much play with the fact that clause 2 (later section 2 of the 2000 Act) removed the stigma of criminality, as he put it, from under-16s who became involved in sexual activity with a male homosexual over that age.<sup>26</sup> The present Bill proposes to repeal section 2 without replacing it. So that safeguard for gay boys will go. It is puzzling anyway that it did not apply to protect a boy under sixteen who engaged in consensual sexual activity with another under-age boy, which as we all know very commonly happens.
35. *Adult sexual activity with a child* According to the white paper this new criminal offence, punishable with up to fourteen years imprisonment, will cover “a range of behaviour including, for example, any activity with a child that a reasonable person would deem to be sexual or indecent in all the given circumstances.”<sup>27</sup> This sets the standard at that of the reasonable person, so often used in our law – and used throughout this Bill. Here it is inappropriate as a

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<sup>24</sup> See in particular paras.7, 12 and 15 in Annex Two to this report.

<sup>25</sup> See para. 8 in Annex Two to this report.

<sup>26</sup> Commons Hansard 10 February 2000, quoted on Mr Hughes’s website.

<sup>27</sup> Para. 50.

test simply because, as noted above, so many people are unreasonable when it comes to sex. Putting it another way, in the grey area there is no agreement on what would be “indecent in ... given circumstances”. On the contrary if this question were asked at random a wide variety of answers could be expected. That is no proper basis for the criminal law.

36. The Bill does not apply technical terms usually employed in this area, such as “paedophilia”. We might be thankful for that. One sign of the confusion the nation is in over sexual relations between adults and the immature is that in the media they are all covered by the blanket term “paedophilia”. This masks the fact that many very different types of action are involved here, verging from the horrific to the trivial. Broadly they are of three types. A paedophile is a man who is sexually attracted by little children well below the age of puberty – usually girls. A pederast is a man or youth (or occasionally a woman) who is sexually attracted by handsome pubescent boys, good-looking young males between the ages of eleven and fifteen who are just beginning to ripen and bloom in their nascent sexuality. A third type of man suffers from the Lolita syndrome, named after the character in Vladimir Nabokov’s 1955 novel of that name. This draws him to nubile girls aged again between the ages of eleven and fifteen, with whom he desires otherwise normal sexual intercourse. Conduct so differently based demands carefully graduated responses, but the Bill ignores these distinctions and applies a blanket approach. That is one more ground for condemning it.
37. *Grooming of children* Another new target is what the Bill calls sexual grooming of children, which will have a maximum penalty of five years imprisonment.<sup>28</sup> This new offence seems to be aimed at internet prowlers, but could also apply in real life. The object is to catch adults who try to make friends with children so as later to have sex with them. Sex offenders with dire motives have, says the white paper, always found ways of gaining the trust and confidence of children with the object of abusing them sexually. The offence will

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<sup>28</sup> Bill, clause 17; white paper, para. 54.

will only arise “where it is clear that this is what the offender intends”. But how is that clear intention to be proved? If the suspect goes on to carry out a sexual assault that can be charged as an offence in itself, but there is then no need for the preliminary offence of grooming. Where no assault later ensues how can preliminary grooming be established? How do the acts in question differ from what any kindly adult might do to befriend a child, who is perhaps visibly in distress? Some people like children.

38. Here we have another indication of the vicious trend of these proposals. The whole grooming scenario is well on the way to inhibiting, even destroying, that wide social intercourse between adults and children that hitherto has been a constant feature of human life. Until this period in our increasingly sick society the adult-child conjunction has been regarded without question as a valuable, even necessary, feature of human behaviour. Adults who wish to groom children for sexual purposes are in a tiny minority. Are they to drive out the vast majority of adults who only have children’s welfare at heart? If this pernicious proposal is carried into law every teacher, church or charity worker, every police officer or other person who sees a child in need of comforting will shrink from administering that necessary solace for fear it might be considered as “grooming”. This could apply to grandparents of the child, or other relatives. It could even apply to parents themselves. The prospect is appalling. It is a prime example of the cure being worse than the disease.
39. That is not all. It gets worse. The Bill goes on to adumbrate a further hurdle for adults wishing to befriend children.<sup>29</sup> There will be introduced “a new civil order intended to protect children under 16 from inappropriate sexual behaviour by adults aged 18 or over”. This will include any acting by the adult “in such a way as to present a risk of sexual harm to children”. It will cover “explicit communication with children via email or in chatrooms or hanging around schools or playgrounds”. The penalty for breach of the order will be a maximum of five years imprisonment.

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<sup>29</sup> See white paper, para. 55.

40. I acknowledge there is a problem here. A comparatively minute proportion of adults do indeed pursue children in this undesirable way. Yet we must all preserve a sense of proportion. The best is the enemy of the good. Under Gresham's law bad currency drives out sound. The Home Office seem unaware of the terrible dangers of Gresham's law when introduced, at this late day, into the realms of human sexual behaviour.
41. *Familial sexual abuse of a child*<sup>30</sup> Not content with the new offences outlined above, the Bill proceeds to duplicate them by creating the further new offence of "Familial sexual abuse of a child". It will protect children up to the age of 18 from abuse by a "family" member of any age. This will include all "who have a 'familial' relationship with a child by virtue not only of blood-ties, adoption, fostering, marriage or quasi-marital relationship but also by virtue of living within the same household as the child and assuming a position of trust or authority". The maximum penalty will be 14 years imprisonment. My criticisms given above also apply here. This proposed offence certainly over-eggs the pudding.
42. *Mistaken belief in child's age* The Bill proposes changes in the law regarding mistaken belief in a child's age.<sup>31</sup>

For the offences of abuse of a position of trust and familial sexual abuse of a child, the defendant will have to prove that he held an honest *and reasonable* belief in age if he is to be acquitted. We think it right to put the onus on the defendant in these circumstances *because the defendant will normally know the child well and therefore the child's age.*<sup>32</sup>

43. As the white paper says<sup>33</sup> this reverses two House of Lords decisions. It is astonishing. There obviously ought not to be two different systems regarding mistake in age, for some offences requiring the

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<sup>30</sup> White paper, para. 58.

<sup>31</sup> See white paper, paras. 56, 57.

<sup>32</sup> Emphasis added.

<sup>33</sup> Para. 57.

matter to be proved by the prosecution beyond reasonable doubt and for others requiring it to be proved by the defendant according to a different standard of proof, the balance of probabilities. This is a recipe for unbounded confusion and is inherently unjust. Furthermore it is unsound. If it is proved that the defendant did indeed know the child well, and therefore its age, the plea of ignorance is likely to be unconvincing and therefore fail. If in fact the defendant, although in a position of trust, did not in know the particular child well or at all (as might happen) he should not be prejudiced just because “normally” a person in that position would know the child well.

44. *Prohibited adult sexual relationships*<sup>34</sup> This offence, with a maximum penalty of two years imprisonment, will cover sexual activity between certain adult “blood relatives”. The well-known term incest is for some unexplained reason dropped. Again the reasons given display sloppy thinking –

Despite involving consensual adults it is generally believed that all such behaviour is wrong and should be covered by the criminal law. Furthermore, there is evidence to suggest that some adult familial relationships are the result of long-term grooming by an older family member and the criminal law needs to protect adults from abuse in such circumstances.

45. It is certainly not generally believed that all such behaviour is wrong and should be covered by the criminal law. Even if it were, that is not in itself a reason for sending people to prison. Much more cogent reasoning is required to justify this proposed offence, which in any case should not be a blanket offence covering all types of sexual activity however trivial.<sup>35</sup>

46. *Sex with mentally disabled*<sup>36</sup> There is to be a new offence, carrying life imprisonment, of “Sexual activity with a person who did not, by

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<sup>34</sup> White paper, para. 59.

<sup>35</sup> See para. 34 in Annex Two to this report.

<sup>36</sup> Bill, clauses 33-51; white paper, para. 62.

reason of a learning disability or mental disorder, have the capacity to consent”.<sup>37</sup> I have already given the text of one letter by me objecting to this proposal.<sup>38</sup> Here is another, which I sent to the *Daily Telegraph* on 22 November 2002 but was not published –

David Congdon of Mencap says he welcomes the Home Secretary’s sex law reform proposals (letter November 22 2002). Then he makes two conflicting statements: (1) they are a victory for people with a learning disability; (2) they “will not infringe on people’s rights to have a fulfilling sexual relationship”. The white paper proposes (para. 62) that there should be a new criminal offence, with a maximum penalty of life imprisonment, of sexual activity with “a person who did not, by reason of a learning disability or mental disorder at that time, have the capacity to consent”. There will thus be no possibility of such persons having “a fulfilling sexual relationship”, or indeed any sexual relationship whatever, except with a criminal who risks life imprisonment. This can only add to the deprivation arising from their condition. It is an example of the sex-negative attitude which pervades the Bill. Attention is all on the exploiter seeking his own gratification. The possible needs of the other party are ignored, indeed denied. I have known for example such needs to be discreetly attended to by a sympathetic nurse. Is such a sympathiser now to risk imprisonment for life?

47. When this letter was shown to David Congdon, who is Head of External Relations at Mencap, he replied briefly that if say such a person had sexual relations say with someone also with such a disability, and where it was clear that it was not abuse, then the prosecuting authorities would not prosecute. The alternative he thought would be to provide an abuser’s charter.
48. This again is muddled thinking. As stated above,<sup>39</sup> it is improper to evade the difficulties of framing an offence accurately by relying on the CPS exercising their discretion not to prosecute. This is because

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<sup>37</sup> Bill, clause 33.

<sup>38</sup> See p. 11 above.

<sup>39</sup> See p. 17.

the act in question, though *ex hypothesi* innocent, is still branded as criminal – which obviously it should not be. Again, why should the afflicted person be forced to consort only with another person similarly afflicted? Why should not sympathy – even love – be shown by one who does not suffer the disability? This again is sex-negative. Finally, the alternative is not necessarily to provide an abuser’s charter. Speaking as an experienced parliamentary draftsman, I can say that it would be perfectly possible to frame an offence suitably limited to the cases which really ought to be penalised.

49. The maximum penalty for this offence is to be life imprisonment, the same as for murder. For another similar offence, “Obtaining sexual activity by inducement, threat or deception with a person who has a learning disability or mental disorder” the maximum penalty is also to be life imprisonment.<sup>40</sup> I consider it to be grossly disproportionate, and a further sign of unhealthy sex-negativism, to allot the highest penalty possible to these two offences, bearing in mind that really serious cases could be treated as rape. I also question the need for the second offence, meant to deal with persons who are capable of giving consent to sexual activity but might be persuaded to do this by gifts or other inducements. Such persuasion is often employed in relations between normal people, and can be seen as part of usual courtship patterns. Once again we find the Bill threatening ordinary behaviour out of exaggerated fears fuelled by sex-negativism.
50. A further objectionable new offence is “Breach of a relationship of care”.<sup>41</sup> “This is necessary to protect those with a learning disability or mental disorder who have the capacity to consent but who are particularly vulnerable to exploitative behaviour and thus may agree to sexual activity solely because they are influenced by their familiarity with and dependency on the carer.”<sup>42</sup> This again is taking the nanny state far beyond the area where it has any business

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<sup>40</sup> Bill, clauses 38-42; white paper, para. 63.

<sup>41</sup> Bill, clauses 43-51; white paper, para. 64.

<sup>42</sup> White paper, para. 64.

to intrude. The proper sanctions against misconduct here are moral and social rather than criminal.

51. *Bestiality* “Sexual activity with animals is generally recognised to be profoundly disturbed behaviour. A new offence of ‘Bestiality’ will criminalise those who sexually penetrate animals or allow an animal to penetrate them. This offence will complement existing non-sexual offences of cruelty to animals.”<sup>43</sup> *The Daily Telegraph* published the following letter from me on 10 December 2002 –

Tom Utley (December 7 2002) pillories the sloppy thinking behind David Blunkett’s white paper *Protecting the Public*, which proposes fundamental changes to our criminal law governing sexual behaviour. A nation’s laws need to be based upon its accepted morals and values, yet on these the white paper is strangely silent. Blunkett’s proposals are based on no discernible moral framework, which invalidates them at the outset. Utley alludes to paragraph 79 of the white paper, which introduces a new imprisonable offence of bestiality on no better basis than that sexual activity with animals “is generally recognised to be profoundly disturbed behaviour”. This is the language of psychiatry, not criminal law.

In my book on secular sexual ethics *The Sex Code: Morals for Moderns* I suggested that it is contrary to the moral duty of respect for one’s sexuality for a human being to have sex with an animal.<sup>44</sup> I did not suggest that therefore this should be a criminal offence, additional to the offences relating to cruelty to animals. Tony Honoré, Regius Professor of Civil Law in the University of Oxford, said in his 1978 book *Sex Law*, that there is no satisfactory reason for including in modern law a crime of having sexual relations with an animal. He added that though the law books would be poorer if they ceased to mention Coke’s great lady who supposedly had sex with a baboon and conceived by it, the crime of bestiality should be consigned to the scrap-heap.

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<sup>43</sup> White paper, para. 79. See Bill, clause 72.

<sup>44</sup> See para. 14 in Annex Two to this report.

52. *Sexual interference with human remains* The final paragraph of the white paper complains that there is currently no law that covers sexual interference with human remains, so it proposes to create one carrying a maximum penalty of two years imprisonment.<sup>45</sup> The only justification given is that such conduct is “deviant”. The defendant should be “treated and monitored as a sex offender both in prison and after release”. Again, such strange behaviour seems to demand medical treatment rather than the full weight of the criminal law.

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<sup>45</sup> Para. 80. See Bill, clause 73.

## Drafting points on the Bill

53. *Monosexual drafting* The Bill runs to 128 clauses and five Schedules (87 pages). The first point to strike one about the drafting is that, as always in the British tradition, it is resolutely monosexual. It is high time this tradition was abandoned in favour of sexless drafting, which is what we are now accustomed to in all other fields. In a Bill entirely concerned with sex it is grotesque that the language employed should suggest that males are the only people with which it is concerned.
54. *Meaning of “sexual”* A common formulation in the Bill is that a person commits an offence “if he (a) engages in an activity, and (b) the activity is sexual”.<sup>46</sup> One wonders why the simpler form “if he engages in a sexual activity” was not used – or even “if he commits a sex act”. This vital word “sexual” is the subject of an elaborate definition.<sup>47</sup> This definition is so important that I must set it out here.

For the purposes of this Part, penetration, touching, or any other activity is sexual if –

- (a) from its nature, a reasonable person would consider that it may (at least) be sexual, and
- (b) a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations.

55. This is legislative drafting at its most desperate (though one has every sympathy with the driven drafter). What can be the meaning of “it may (at least) be sexual”? Does this complex definition mean anything more than “an activity is sexual if a reasonable person would consider it sexual?” If not, it gets us no farther. Here it is worth noting that the Oxford English Dictionary (2nd edn) has no fewer than six quite different definitions of the adjective “sexual”.

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<sup>46</sup> See e.g. Bill, clause 10.

<sup>47</sup> See Bill, clause 80.

The Bill's elaborate definition gets us no nearer grasping which of the six is intended here. We are forced to turn for guidance to the official explanatory notes.

Clause 80 defines “sexual” for the purposes of this Part. This definition is relevant to many of the offences under this Part. For example, clause 3(1)(b) refers to penetration which is sexual and clause 9(1)(b) refers to touching which is sexual. Paragraph (a) requires the reasonable person to look at the nature of the activity in question. If, from looking at the nature of the activity, it would not occur to the reasonable person that it would be sexual, it does not meet the test, even if a particular individual may obtain sexual gratification from carrying out the activity. The effect of this is that obscure fetishes do not fall within the definition of sexual activity. The nature of some activities is such that they are obviously sexual, such as sexual intercourse, and they would meet the test. Other activities may or may not be sexual depending on the circumstances and the intentions of the people carrying them out, for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason. These activities would meet the test in paragraph (a) since the reasonable person need only think that the activities may be sexual; he does not need to come to any conclusion about the matter. Activities which meet the test in paragraph (a) must then be considered under paragraph (b). In order to assess whether the activity is sexual, the reasonable person must look at any or all of the following factors: the nature of the activity; the circumstances in which the activity is carried out; and the purpose of any of the participants. Where the activity is, for example, oral sex, it seems likely that the reasonable person would only need to consider the nature of the activity to determine that it is sexual. But where it is digital penetration of the vagina, the reasonable person would need to consider the nature of the activity (it may or may not be sexual), the circumstances in which it is carried out (if it is in a doctor's surgery, it is probably not sexual) and the purpose of any of the participants (if the doctor's purpose is medical, the

activity will not be sexual; if the doctor's purpose is sexual, it will be sexual).

56. This weighty note overlooks the point made above that there are many meanings of "sexual". Under some of them a doctor's digital penetration of the vagina for purely medical reasons would certainly be termed sexual, since it relates to the sexual organs of the patient. We see that the Bill's definition of "sexual" is useless unless you also have the explanatory note. That should not be the case, because most users of the intended Act will not have that note. Anyway the preface to the explanatory notes is at pains to point out that they have no authority, and should not be relied on.
57. We have here yet another example of the sex-negative nature of these proposals. What the Bill means by "sexual" is having to do with sexual desire and what in some places it calls sexual gratification. Yet it is afraid to say so.
58. *Marriage* Several provisions of the Bill remove penalties on persons aged between sixteen and eighteen if they are married.<sup>48</sup> Under present social conditions to treat a person as a criminal who is living in a settled relationship akin to marriage, where he or she would not be treated as a criminal for the same act if married is illogical and unjust.
59. *Overlapping offences* The Bill lays down offences or groups of offences which wholly or partially overlap with other offences or groups of offences. Thus clause 3 (assault by penetration) and clause 5 (sexual assault) overlap with clause 1 (rape) and with each other. This is a frequent occurrence in the Bill. It is confusing to have these overlaps, which are unnecessary. They could easily be avoided by suitable drafting.
60. *Unnecessary complexity* In an effort to dot every i and cross every t the Bill engages in unnecessary complication. For example, can as many as nineteen clauses really be needed to deal with sexual abuse

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<sup>48</sup> See clauses 16, 25, 31 and 49.

of the disabled?<sup>49</sup> When dealing with their care workers alone the Bill takes up no less than nine of these clauses. Sledgehammers and nuts come to mind.

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<sup>49</sup> See clauses 33-51.

## Summary

61. I accept, having been one myself, that the Bill was conscientiously put together by competent higher civil servants. However the downside is that they were acting under the influence and advice of do-gooding voluntary bodies or NGOs, each solely concerned with its own clientele. Children's NGOs think the child should be sacrosanct. Disabled NGOs think the smitten should be shrink-wrapped. Animal NGOs think their beastly clients should have no contact with human sexuality. And so on. All such bodies think only of their own clients, and ignore the humans those clients engage with. Our country must not act blindly on the findings of this conglomeration where the vital matter of sex is concerned, especially when they take the negative view of our sexuality that emerges from the Bill.
62. In my book *The Sex Code* I suggest that sex positivism, largely absent from our society, is essential for human happiness. If you search the world wide web for "sex positive" you will find many campaigning sites, but almost all are in the United States. Here in Britain we remain resolutely sex negative, as the Bill shows.
63. A nation's laws, particularly its sex laws, need to be based upon accepted morals and values. Law does not (or should not) operate in a moral vacuum. Its function is to uphold agreed norms, so a proposed new law must be assessed by reference to these. Yet on this question of a basis of common morality the Bill and white paper are strangely silent.
64. The majority of our people are not close adherents of any particular religion, being secular in their values. They are western values, so these are what should prevail when we recast our sex laws. However the white paper is not based on any ethical system. It merely looks to what is thought to be "unacceptable". Yet to rank as a crime, sexual conduct needs to be far worse than "unacceptable". It needs to be vile and vicious.

65. The Bill's proposals relating to sexual activity with a young person under the age of sixteen demonstrate the great danger involved in drawing up legislative proposals about sex without first laying down the governing moral principles. It insists that for a child to engage in any sexual activity with an age mate, even though consensual, is to be a crime punishable with up to five years imprisonment. So when two pubescent children in the age range eleven to fifteen explore each other's bodies, in the way we have all done in our time, they are to be branded as criminals – however trivial their behaviour. The fact that trivial behaviour is unlikely to be prosecuted, or even to attract the attention of the social services, is irrelevant. If the law brands what they innocently do as criminal there is a risk of the law being activated – even if only by a spiteful private prosecutor.
66. The white paper shows many signs that the Home Office is here being driven by unbalanced, indeed uncivilised, attitudes to human sexuality widely held today by the British public. Yet the Government dismisses and disregards similar inhuman attitudes widely held on matters such as capital punishment, homosexuality, racism, corporal punishment, immigration and asylum. Surely it should in the same way insist on enlightened attitudes to sex when it frames new legislation concerning that difficult topic. It should be sex positive, but it is not.
67. These Government proposals raise the question what lawful sexual outlets pubescents in the age range eleven to fifteen should have? If these borderline creatures are, as must be admitted, highly sexual beings they obviously need suitable opportunities to fulfil their sexuality. This could be called one of their human rights, if that topic had been fully developed in the region of sexuality. Yet the white paper ignores this aspect. It sets the standard as that of the reasonable person. We all know that most people are unreasonable when it comes to sex.
68. The Bill forbids what it calls grooming of children. Here we have yet another indication of the vicious trend of these proposals. The whole grooming scenario is well on the way to inhibiting, even destroying, that wide social intercourse between adults and children

that hitherto has been a constant feature of human life. Until this period in our increasingly sick society the adult-child conjunction has been regarded without question as a valuable, even necessary, feature of human behaviour. Adults who wish to groom children for sexual purposes are in a tiny minority. Are they to drive out the vast majority of adults who only have children's welfare at heart?

## Conclusion

69. Obviously in this report I have only been able to scratch the surface of the problem. My main object has been to alert the public to the radical and extensive nature of these intrusive proposals. What should be done? I believe this grossly defective Bill should not be given a second reading. It should be scrapped, and the Home Office should start again. Belatedly, it should work out what ought to be the ethical basis of its proposals. It should acknowledge that human sexuality is a delicate issue, not to be wrapped in bureaucratic red tape. It needs to recognise that though much harm is done by sexual predators, who need to be contained, sex is essentially an intensely private and personal matter. State forces should not come bursting into the bedroom unless the need is dire. Children should not be frightened by hysterical adults as they strive to come to terms with the life force, as all past children have done. The mentally handicapped, who suffer enough, should not, on top of their other deprivations, be denied sexual fulfilment. Sex should not be seen as a bogey by anyone.
70. When, at the age of eighty, I read through this Bill I was dismayed. Plonking clause after plonking clause, framed in crass civil service language, brings the police officer and social worker into our nation's bedrooms, to the peril of our cherished humanity. Civilisation can surely do better.
71. Early media comment bears out my view of the Bill. In its *Thunderer* column the Times said –

Queen Victoria's alleged scuppering of the criminalisation of lesbianism on the ground that it would be impossible to imagine such grossness in the female sex had much to be said for it. There are some things that the law should just steer clear of, on the ground that they would not normally occur to people. David Blunkett's Sexual Offences Bill, however, brings on to the statute book new crimes of having sex with corpses and animals, as well as

penetrating people's orifices with a bottle. Is this really Mr Blunkett's idea of bringing law up to date, to reflect the way we live now? ... This is before we get to the exciting new offence of "grooming a child for sex". Any man who can be shown to have "met or communicated with that child on at least two earlier occasions" will be suspect, particularly if he leaves the house equipped with "ropes, condoms or lubricants"<sup>50</sup> ... the new Bill will introduce what would be a de facto raising of the age of consent, by criminalising prostitution and pornographic photographs involving 16 and 17-year olds who are now to be regarded as mere children.<sup>51</sup> Somehow I cannot help thinking that it might be a good idea to enforce the perfectly good laws we have, before introducing rafts of politically correct nonsense."<sup>52</sup>

72. I end with the view of the *Daily Telegraph*.

There can be only two possible justifications for a new law: 1) that it meets a need unmet by existing legislation; and 2) that it puts right something that is wrong with the law as it stands. The Sexual Offences Bill fulfils neither criterion. At best, it is a fantastically silly measure that will do nothing to redress any respectable grievance. At worst it will give rise to very serious injustices ... Human beings have been confused about sex since Adam accepted the apple from Eve – and none more so than [Mr Hilary Benn MP] and his fellow ministers. They should tear up this unnecessary and uncalled-for Bill before it does serious harm.<sup>53</sup>

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<sup>50</sup> This, believe it or not, is a genuine quotation from the official explanatory note to clause 17.

<sup>51</sup> See clause 52.

<sup>52</sup> Robert Whelan, *The Times* 31 January 2003.

<sup>53</sup> Leader, 31 January 2003.

## Annex One

### Reviews of Francis Bennion's *The Sex Code*

‘... the first guide to secular sexual ethics. It celebrates human sexuality in all its forms as a positive force for good ... Bennion aims to change society with his sex code. He has written the book he would like to have been able to read when young.’

– Victoria Mather, *Evening Standard* 2 May 1991

‘Francis Bennion, as many of us know, has harnessed his high intelligence and his robust courage to an array of causes on whose behalf he tilts with Quixotic vigour. It is his nature to challenge and provoke what he deems to be foolishness. So one approaches Bennion on Sex with anticipatory relish, and is not disappointed ... With a training in law and philosophy, Bennion feels the need for a clear framework, so that his Code is, for him, the backbone of the book. But, like all Codes, it bears the stamp, in places, of a finger-wagging didactic moralist (whom I dubbed “Moses Bennion”) who emphasises our “duties” – whereas the stimulating and provocative commentary which surrounds it emanates from a more genial “St Francis Bennion” whose benign motto is “to understand all is to forgive all”. When he gets into his stride lambasting the evil fruits of so much Christian-inspired sex hate, he is splendid.’

– Antony Grey, *New Humanist* September 1991

‘This most readable book ... is written clearly, with an incisive wit that explores historical misapprehensions about sex ... I think Mr Bennion’s book should be read by all who have care of developing children ... I hope this book will be acquired by all medical, college and public libraries.’

– Kathleen Frith, *Humanist News* July 1991

‘The whole exercise bears the mark of the academically trained philosopher

and systematic lawyer. The result is superb – a lucid exposition of a complete sexual ethic. It is “donnish” in the best sense of the word, being shot through with a very dry, engaging wit, especially at the expense of traditional Christianity ... On prostitution he is magnificent, cutting through the thicket of prejudices which survive even amongst those who consider themselves enlightened. He is also excellent on childhood and adolescent sexuality ... I find myself reviewing a book which I very much wish had been available to me when I was fifteen or sixteen. What nonsenses it would have cleared out of my head ... if you know any kids who are still having the old crap dinned into them by their parents, and who are capable of responding to intelligent argument, slip them a copy of this book ... ’

– Graeme Woolaston, *Gay Times* July 1991

’ ... he is like a man busily and angrily planting explosive charges deep into the fabric of our cruel, stupid and joyless system of sex taboos. In his final chapter, as you withdraw with him to watch the almighty crash of its destruction, it is impossible not to cheer with a sort of mad, happy and half-frightened incredulity. Then, cheered hoarse, you join him to examine his ingeniously drafted sex code, the 60 moral precepts which could guide and govern our liberated love life and emancipated happiness ... It is, of course, an angry book, a polemic. But so was Tom Paine’s *Age of Reason*, and so was Darwin’s *Origin of Species* ... Mr Bennion’s could be a book as seminal as they. I wish I could communicate to you the plea for new thinking, for a concept of human happiness desperately awaiting such a spokesman. If they don’t take Mr Bennion to their hearts, they will wait a long time.’

– C H Rolph, *New Law Journal* 12 July 1991

‘ ... irritating but fascinating ... Bennion is most moving of all on sex for the old and for the disabled ... he makes a passionate plea for truthfulness and free trade in prostitution and other sexual services ... a brave beginning, with an honest touch.’

– Rabbi Julia Neuburger, *Sunday Times* 19 May 1991

‘This is a very positive book which has been well received. It examines the ethics of sex, and develops a sex code under 13 main headings with a total of 60 sub-headings covering pair bonding and marriage, fulfilling our

sexual natures, abortion and pornography. Recommended for all with an interest in sexual ethics.'

– Linnea Timson, *Humanist Book Service*, humbooks@ukgateway.net

'Conservative critics of *libertarianism*, like Professor Roger Scruton, frequently equate libertarianism with libertinism. It is implied or stated that libertarians adhere to Lenin's "glass of water" theory of sex, a philosophy of "if it feels good, do it", wherein sex is seen in purely physical terms, and any form of sexual morality or standards is rejected. The only alternative to such alleged libertarian nihilism is, it is then asserted, some form of Christian or "traditional" morality.

I suppose there might be, or have been, some such nihilists amongst libertarians but the conservative image is a straw man. Most of us adhere to some system of ethics, and for most that system is a basically Aristotelian/Natural Law one. Human nature is held to be universally constant and its requirements generate an objective value system and ethics which are "absolute", universal, and rationally demonstrable. It is precisely from this ethical basis (founded in turn upon Aristotelian epistemological and metaphysical views) that libertarians construct their political philosophy. This is the approach of Ayn Rand and her many disciples, such as Machan, Mack, Rasmussen, Den Uyl, Kelley, Binswanger, Peikoff, Rothbard and others.

*The Sex Code* is a standing refutation of the Conservative caricature of libertarian views on sex. A practising Barrister and Parliamentary draftsman, Bennion is also a noted rationalist and humanist active within the British Conservative Party. Amongst his eight previous books is a study of *Professional Ethics*, and he is currently a research associate at the Oxford University Centre for Socio-Legal Studies. He has also of late been instrumental in the campaign to get the Conservative Party to organise properly and field candidates in Northern Ireland.

The Conservative misrepresentation of the libertarian approach to sex stems primarily, I suppose, from the libertarian rejection of the Christian/Conservative view that sex is primarily evil. And certainly Mr. Bennion does not shrink from a vigorous rejection of what he terms "sex-negativism", a negativism "instilled by centuries of Judaeo-Christian teaching that sex is sinful". Such sex negation, he correctly points out, poisons our lives, and is manifest in "secrecy, prudery, guilt, shame and

hypocrisy”. We have a “duty” (in an Aristotelian sense) to ourselves, Bennion argues, “to overcome this negative conditioning, and train ourselves and our children to accept and welcome to the full the wholesome sexual nature of humanity”.

The acceptance of sex as a natural, and indeed good, human activity and value, does not imply some form of 1960s style total “permissiveness”, or an amoral view of sex. Unlike other secular writers on sex Bennion does not base his approach upon a relativistic, altruist, “social” or deontological ethics. He adopts the teleological Aristotelian approach founded upon human individual flourishing, an ethical egoism based upon a rational understanding of ourselves as a particular sort of entity. As he states: “Morality is objective, not subjective, and . . . its essence is true to the absolutes of human nature”. We thus, he argues, have the same obligation to act morally in our sexual lives that we do in all other areas of our lives. Bennion’s book is thus, as its title indicates, an attempt to outline explicitly a rational “sex code”, an application of his ethics to such manifold issues as nudity, prostitution, sexual “perversions”, contraception, homosexuality, masturbation, pornography and so on.

Does Bennion succeed in his task? My answer is a qualified “yes”. His ethical basis and his code seem to me basically sound. A more detailed exposition of the basis, and some drawing upon, and reference to, contemporary Aristotelians like Ayn Rand and the Objectivist School, Henry Veatch and David Norton would have improved and strengthened his case, in my view. He could also have drawn profitably from such Humanistic psychologists as Abraham Maslow and their study of the “self-actualising” person.

I would also have quibbles with some of the specific applications of his code. Thus, while accepting that there are such things as “perversions”, i.e. dysfunctional sexual activities that can be classified as unhealthy, I am not sure that, for example, S & M activity between consenting adults should be so classified. Bennion argues that “many disorders such as masochism are due to sex-negativism”. But he presents no evidence for the view that *all* S & M stems from such a root, and many participants in the S & M “community” would deny this. They would also contest his view that consensual S & M means one does not respect one’s partner.

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By far the best section of Bennion's work is that on children and sexuality. Any attempt to broach this issue of late has increasingly been met with accusations or implications of paedophilia and child molesting. However, the attempt to deny the existence of childhood sexuality is a central part of sex-negativism, and one of the major weapons utilised by reactionaries to stifle adult sexual freedoms and expression. Bennion courageously affirms that "children are sexual creatures and that in the process of having that sexuality denied them by adults the foundations are firmly laid for them becoming in due course themselves neurotic, perverted or malfunctioning adults". His discussion of how that sexuality can be recognised without opening the way to the abuse of power by adults is sensitive and perceptive.

Bennion's discussion of pornography is also incisive, containing a clear refutation of the "pornography causes crime" argument and a refreshing understanding of the anti-capitalist nature of those who object to the "exploitation of sex for commercial purposes". Why is such exploitation any different from the "exploitation of hunger for commercial purposes", Bennion asks. Moreover, Bennion also formulates the lesson long taught by libertarians: "Prohibition of a strongly demanded service merely ensures its provision at a debased level and high social cost".

However, I would dispute another of Bennion's assertions. He argues that while there is nothing wrong with pornography *per se* "If love is perfect, the lovers and their present love-making fill each other's minds to the exclusion of all else". This seems to me to be open to argument. Why shouldn't "perfect lovers" want to explore all the dimensions of their sexuality by utilising pornography, either together or singly? There does seem to be an undercurrent of feeling in Bennion's work (as there is in Ayn Rand's) that somehow "recreational sex" at a physical level is morally inferior to sex imbued with romantic love. But one does not have to accept a merely physicalist interpretation of sex to hold sexual physical pleasure as a value in itself in the absence of romantic love – as an appropriate and worthy end in itself.

But, whatever disagreements and suggestions for improvement I have, I heartily welcome *The Sex Code*. It is a readable, frequently incisive, well-argued and fundamentally correct attempt to delineate a rational and libertarian approach to matters of sex. It is a valuable addition to the armoury of all those who oppose what Bennion himself accurately terms "sexual fascism".

– Chris R. Tame, Director, *The Libertarian Alliance*

## Annex Two

Selected principles of *The Sex Code*

### ETHICS AND SEX

#### *The concept of secular morality*

1. Though non-believers cannot accept religion, they acknowledge right and wrong. They wish to make the best of themselves, and out of common sympathy also wish the best for their fellow humans. Without any supposed divine command or revelation, they accept that human acts are moral, immoral or morally neutral. They perceive that this indicates the existence, in some sense that is real, of an objective standard of ethics (referred to in this book as ‘the ethical code’) whose sole base is in human reason and the human conscience.

#### *Secular sexual morality*

2. In the sexual field we all have a duty to be good, that is to act morally. This is part of our general duty, laid down by the ethical code, to act morally in every area of our life. Because the ethical code requires us to strive at all times and in all ways to be virtuous, it follows that we should strive to be virtuous in our sexual life. Indeed, since sexual wickedness can cause untold harm and distress, the duty to be good is particularly strong in this area.

#### *The duty of ethical understanding*

3. No one can be sure of acting morally in a given situation, or responding with moral correctness to the act of another, unless they know and understand what is called for by the ethical code. Therefore we should try to absorb its principles to the fullest extent of our capacity. This we may call the duty of ethical understanding.

### *The duty of ethical action*

4. We should comply with the ethical code not only directly but indirectly. It guides our own sexual acts and also our response to the sexual acts of others. What we must not do ourselves, we must not countenance others doing. What it is our duty to do, it is our duty to help others do also. All this may be called the duty of ethical action.

### *The present Code*

5. Because the ethical code cannot be known in precise detail its prescriptions may be unclear in particular cases, and cannot be free from dispute. The present text (referred to in this book as 'the Code') attempts to formulate the ethical code, so far as it relates specifically to human sexuality, in a form most likely to produce certainty and command agreement in the modern western secular culture.

### *Interpreting the Code*

6. It is important to bear in mind when reading the Code that its effect is intended to be cumulative. Each precept is subject to limitations stated elsewhere in the Code, and also by precepts of the ethical code not specific to sexual matters. The Code is concerned only with morality, and pays no regard to law or aesthetics. In the Code references to acts include omissions.

## ACCEPTING OUR SEXUALITY

### *The duty of sex-acceptance*

7. Since we are all sexual beings we should look upon our own or another's sexual organs, functions and desires positively, with welcoming acceptance that they exist and work (the duty of sex acceptance). We should never look on them negatively, with dislike, regret or contempt. This does not mean that remediable sexual disorders ought to be accepted as they are, or that immoral sexual behaviour should be tolerated.

### *Sex-guilt*

8. Because of negative conditioning, guilt about the mere existence of sexuality (sex guilt) is endemic in western culture. Yet the duty of sex-acceptance means we should eschew this guilt in ourselves. Moreover we are under a duty not to implant or nurture guilt in another person, particularly a child, because of their sexual organs, functions or desires, or because of their sexual acts where these are not immoral. When we encounter such guilt we should where possible help to alleviate it.

\* \* \*

### *Nudity and exhibitionism*

10. The duty of sex-acceptance requires us to tolerate the sight of the nude human body, even where because of the subject's advanced age or other factors it seems to us aesthetically unpleasing. We should refuse to countenance prudishness about the body or its functions, which can be harmful psychologically. On the other hand we need to recognise the effects of past negative conditioning, and not knowingly outrage another person by the sight or sound of any extreme sexual activity or display.

\* \* \*

## RESPECTING OUR SEXUALITY

### *The duty of sex-respect*

12. Since sexuality is the source of all human life, and is of profound emotional concern to all human beings in the living of their lives, we should treat our own or another's sexual organs, functions and desires with respect, even reverence (the duty of sex-respect). We should therefore not commit any act that degrades or trivialises them.

### *The right to sexual privacy*

13. It is immoral, as contravening the right to privacy and the duty of sex-respect, for anyone, without the consent of the person in question, to gaze at or listen to the sexual activity of another person, whether directly or by means of a recording or listening device.

### *Sex with animals*

14. It is contrary to the duty of sex-respect for a human being to have sex with an animal.

## FULFILLING OUR SEXUAL NATURES

### *The duty of sex-fulfilment*

15. Because sexuality is an essential and vital part of the human constitution, we should develop and fulfil our sexual nature throughout life (the duty of sex-fulfilment). This does not mean that remediable sexual disorders ought to be accepted as they are, or that immoral sexual behaviour should be tolerated. However it does follow that we should help and encourage others, particularly the young, to achieve fulfilment in the sexual field as in any other area of life. Equally we should not deny old people sexual fulfilment or denigrate their pursuit of it. We should not condemn any sexual relationship on the ground of a disparity in the ages of the partners.

\* \* \*

### *Sex for the disabled*

18. (1) Apparent consent by a mentally incapacitated person to a sexual act cannot be taken as true consent where the incapacity is too great to permit the person to understand the full emotional and ethical significance of the act. Where however such a person would otherwise

be condemned to involuntary celibacy or chastity it is not immoral to afford them sexual fulfilment with no more than their apparent consent, since in such circumstances the usual requirement of true consent is prevented from applying.

(2) The duty of sex-fulfilment indicates that it is immoral to deny people a full sex life merely on the ground of their mental or physical incapacity. Those having charge of such people therefore have a duty to ensure so far as practicable that they are afforded suitable opportunities for such fulfilment, provided necessary contraceptive and other precautions are taken.

\* \* \*

## SEXUAL ACTS

### *Consent to sexual acts*

22. We ought not to touch another person sexually without their consent, whether explicit or reasonably inferred. Nor should we do any other act towards a person sexually (such as showing them a pornographic picture or exposing their nakedness) which is out of scale with any indication they have given regarding their willingness for this. Special considerations apply where the person is too young, or is otherwise unable, to give informed consent.

### *Sexual harassment*

23. We should not make sexual overtures to any person beyond a point where the recipient indicates refusal, disapproval or distress. If for any reason the other is or may feel coerced or otherwise subservient, we need to realise that the signs of rejection may be faint. That does not mean they are to be disregarded.

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### *Harmful sexual acts*

27.-(1) Where it is known or suspected by either party to a prospective sex act that one or other is or may be infected with any sexually transmissible disease it is their duty to ensure that adequate precautions are taken against infection.

(2) If a person knows that an infected person is likely to contravene the previous rule (for example because they have themselves contracted disease from that person) it is their duty to help ensure that the infected person does not transmit the disease to others.

(3) It is immoral for a person who knows or suspects that they are infected with any sexually transmissible disease to have sex with another person without first informing them of the fact.

(4) It is immoral to have sex with another person by a method or technique that may cause either party physical or mental injury.

\* \* \*

### *Incest*

34. Incest may be morally objectionable on one or more of three grounds. It may (1) risk producing genetically defective offspring, or (2) grievously disrupt relationships within a family unit, or (3) constitute immoral exploitation of a younger person by an older relative. Where none of these conditions exist, incest is morally neutral.

\* \* \*

### THE YOUNG

#### *Consent by young people to sexual acts*

49. Apparent consent by a youngster to a sexual act with an older person is morally ineffective, and therefore counts as no consent, where

the youngster is too immature to understand the nature and quality of the act, that is its physiological, emotional and ethical significance. Apparent consent by a youngster to a sexual act with an age-mate is however to be treated as morally effective. A test for whether a youngster who apparently consents to a sexual act really understands its nature and quality is whether, when maturity is attained, he or she would be likely to regret having committed the act.

\* \* \*

## PROSTITUTION

### *Payment for sex*

53. It is not immoral to make or receive payment for a sexual service willingly rendered. The duty of sex-fulfilment may require a person to pay for what they need rather than go without.

### *Treatment of prostitutes*

54. The duty of sex-respect requires that prostitutes of both sexes should be well treated and never degraded. They serve a useful and valid social purpose.