

velop as a principle of law and morality, it flowers into the politics of human rights. For the condemnation of "inhumane acts committed against any civilian population" and "persecutions on political, racial or religious grounds" need not be restricted to Holocaust-size events in its gravitational force. It extends to human rights violations in general.

By contrast, Article 6(a), as Justice Pal predicted,

flowers into a deification of the status quo and allows the notion of state criminality to slip through its conceptual net. The choice between the two should not be a difficult one.

—David Luban

This article is condensed and adapted from David Luban's paper, "The Contested Legacy of Nuremberg."

Adultery

According to a 1980 survey in *Cosmopolitan*, 54 percent of American wives have had extramarital affairs; a study of 100,000 married women by the considerably tamer *Redbook* magazine found that 40 percent of the wives over 40 had been unfaithful. While such surveys are, to some extent, self-selecting—those who do it are more likely to fill out questionnaires about it—sexual mores have clearly changed in recent years. Linda Wolfe, who reported the results of the *Cosmopolitan* survey, suggests that "this increase in infidelity among married women represents not so much a deviation from traditional standards of fidelity as a break with the old double standard." Studies show that men have always strayed in significant numbers.

Yet 80 percent of "COSMO girls" did not approve of infidelity and wished their own husbands and lovers would be faithful. Eighty-eight percent of respondents to a poll taken in Iowa in 1983 viewed "coveting your neighbor's spouse" as a "major sin." It seems that while almost nobody approves of adultery, men have always done it, and women are catching up.

The increase in female adultery doubtless has to do with recent and radical changes in our attitudes toward sex and sexuality. We no longer feel guilty about enjoying sex; indeed, the capacity for sexual enjoyment is often regarded as a criterion of mental health. When sex itself is no longer intrinsically shameful, restraints on sexual behavior are loosened. In fact, we might question whether the abiding disapproval of infidelity merely gives lip service to an ancient taboo. Is there a rational justification for disapproving of adultery which will carry force with everyone, religious and non-religious alike?

Trust and Deception

Note first that adultery, unlike murder, theft, and lying, is not universally forbidden. Traditional Eskimo culture, for example, regarded sharing one's wife with a visitor as a matter of courtesy. The difference can be explained by looking at the effects of these practices on social cohesiveness. Without rules protecting the lives, persons, and property of its members, no group could long endure. Indeed, rules against killing, as-

sault, lying, and stealing seem fundamental to having a morality at all.

Not so with adultery. For adultery is a *private* matter, essentially concerning only the relationship between husband and wife. It is not essential to morality like these other prohibitions: there are stable societies with genuine moral codes which tolerate extra-marital sex. Although adultery remains a criminal offense in some jurisdictions, it is rarely prosecuted. Surely this is because it is widely regarded as a private matter: in the words of Billie Holiday, "Ain't nobody's business if I do."

However, even if adultery is a private matter, with which the state should not interfere, it is not a morally neutral issue. Our view of adultery is connected to our thoughts and feelings about love and marriage, sex and the family, the value of fidelity, sexual jealousy, and exclusivity. How we think about adultery will affect the quality of our relationships, the way we raise our children, the kind of society we have and want to have. So it is important to consider whether our attitudes toward adultery are justifiable.

Several practical considerations militate against adultery: pregnancy and genital herpes immediately spring to mind. However, unwanted pregnancies are a risk of all sexual intercourse, within or without marriage; venereal disease is a risk of all non-exclusive sex, not just adulterous sex. So these risks do not provide a reason for objecting specifically to adultery. In any event, they offer merely pragmatic, as opposed to moral, objections. If adultery is wrong, it does not become less so because one has been sterilized or inoculated against venereal disease.

Two main reasons support regarding adultery as seriously immoral. One is that adultery is an instance of promise-breaking, on the view that marriage involves, explicitly or implicitly, a promise of sexual fidelity: to forsake all others. That there is this attitude in our culture is clear. Mick Jagger, not noted for sexual puritanism, allegedly refused to marry Jerry Hall, the mother of his baby, because he had no intention of accepting an exclusive sexual relationship. While Jagger's willingness to become an unwed father is hardly mainstream morality, his refusal to marry, knowing that he did not

wish to be faithful, respects the idea that *marriage* requires such a commitment. Moreover, the promise of sexual fidelity is regarded as a very serious and important one. To cheat on one's spouse indicates a lack of concern, a willingness to cause pain, and so a lack of love. Finally, one who breaks promises cannot be trusted. And trust is essential to the intimate partnership of marriage, which may be irreparably weakened by its betrayal.

The second reason for regarding adultery as immoral is that it involves deception, for example, lying about one's whereabouts and relations with others. Perhaps a marriage can withstand the occasional lie, but a pattern of lying will have irrevocable consequences for a marriage, if discovered, and probably even if not. Like breaking promises, lying is regarded as a fundamental kind of wrongdoing, a failure to take the one lied to seriously as a moral person entitled to respect.

Open Marriage

These two arguments suffice to make most cases of adultery wrong, given the attitudes and expectations of most people. But what if marriage did not involve any promise of sexual fidelity? What if there were no need for deception, because neither partner expected or wanted such fidelity? Objections to "open marriage" cannot focus on promise-breaking and deception, for the expectation of exclusivity is absent. If an open marriage has been freely chosen by both spouses, and not imposed by a dominant on a dependent partner, would such an arrangement be morally acceptable, even desirable?

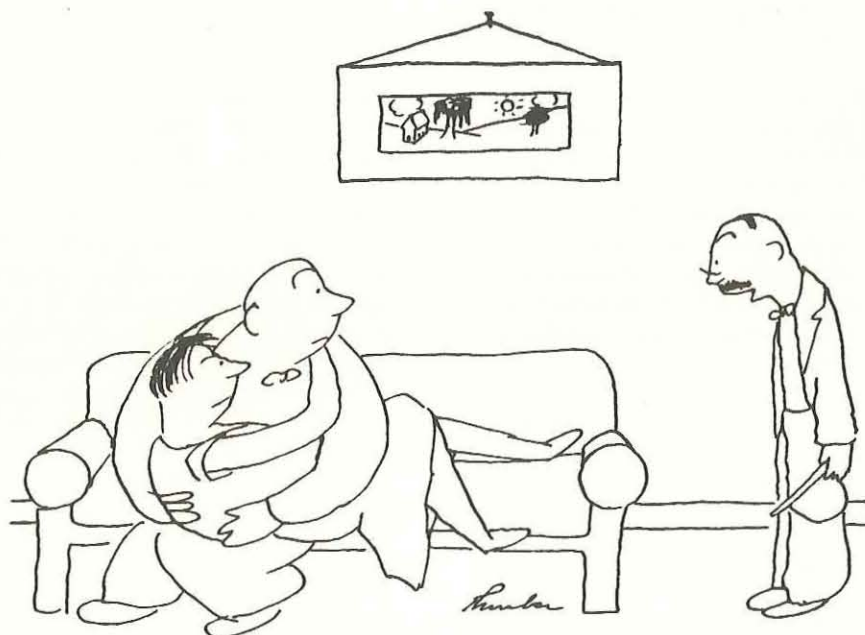
The attractiveness of extramarital affairs, without dishonesty, disloyalty, or guilt, should not be downplayed.

However satisfying sex between married people may be, it cannot have the excitement of a new relationship. ("Not *better*," a friend once said defensively to his wife, attempting to explain his infidelity, "*just different*.") Might we not be better off, our lives fuller and richer, if we allowed ourselves the thrill of new and different sexual encounters?

Perhaps the expectation of sexual exclusivity in marriage stems from emotions which are not admirable: jealousy and possessiveness. That most people experience these feelings is no reason for applauding or institutionalizing them. Independence in marriage is now generally regarded as a good thing: too much "togetherness" is boring and stifling. In a good marriage, the partners can enjoy different activities, travel apart, and have separate friends. Why draw the line at sexual activity?

The natural response to this question invokes a certain conception of love and sex: sex is an expression of affection and intimacy and so should be reserved for people who love each other. Further, it is assumed that one can and should have such feelings for only one other person at any time. To make love with someone else is to express feelings of affection and intimacy that should be reserved for one's spouse alone.

This rejection of adultery assumes the validity of a particular conception of love and sex, which can be attacked in two ways. We might divorce sex from love and regard sex as a pleasurable activity in its own right, comparable to the enjoyment of a good meal. In his article "Is Adultery Immoral?" Richard Wasserstrom suggests that the linkage of sex with love reflects a belief that unless it is purified by a higher emotion, such as love, sex is intrinsically bad or dirty.



"The party's breaking up, darling."

But this is an overly simplistic view of the connection between sex and love. Feelings of love occur between people enjoying sexual intercourse, not out of a sense that sexual pleasure must be purified, but precisely because of the mutual pleasure they give one another. People naturally have feelings of affection for those who make them happy, and sex is a very good way of making someone extraordinarily happy. At the same time, sex is by its nature intimate, involving both physical and psychological exposure. This both requires and creates trust, which is closely allied to feelings of affection and love. This is not to say that sex necessarily requires or leads to love; but a conception of the relation between love and sex that ignores these factors is inadequate and superficial.

Alternatively, one might acknowledge the connection between sex and love, but attack the assumption of exclusivity. If parents can love all their children equally and if adults can have numerous close friends, why should it be impossible to love more than one sexual partner at a time? Perhaps we could learn to love more widely and to accept that a spouse's sexual involvement with another is not a sign of rejection or lack of love.

Exclusivity seems to be an intrinsic part of "true love." Imagine Romeo pouring out his heart to both Juliet and Rosalind!

The logistics of multiple involvement are certainly daunting. Having an affair (as opposed to a roll in the hay) requires time and concentration; it will almost inevitably mean neglecting one's spouse, one's children, one's work. More important, however, exclusivity seems to be an intrinsic part of "true love." Imagine Romeo pouring out his heart to both Juliet and Rosalind! In our ideal of romantic love, one chooses to forgo pleasure with other partners in order to have a unique relationship with one's beloved. Such "renunciation" is natural in the first throes of romantic love; it is precisely because this stage does *not* last that we must promise to be faithful through the notoriously unromantic realities of married life.

Fidelity as an Ideal

On the view I have been defending, genuinely open marriages are not *immoral*, although they deviate from a valued ideal of what marriage should be. While this is not the only ideal, or incumbent on all rational agents, it is a moral view in that it embodies a claim about a good way for people to live. The prohibition of adultery, then, is neither arbitrary nor irrational. However, even if we are justified in accepting the ideal of fidelity, we know that people do not always live up to the ideals they accept and we recognize that some

failures to do so are worse than others. We regard a brief affair, occasioned by a prolonged separation, as morally different from installing a mistress.

Further, sexual activity is not necessary for deviation from the ideal of marriage which lies behind the demand for fidelity. As John Heckler observed during his bitter and public divorce from former Health and Human Services Secretary Margaret Heckler, "In marriage, there are two partners. When one person starts contributing far less than the other person to the marriage, that's the original infidelity. You don't need any third party." While this statement was probably a justification of his own infidelities, the point is valid. To abandon one's spouse, whether to a career or to another person, is also a kind of betrayal.

If a man becomes deeply involved emotionally with another woman, it may be little comfort that he is able to assure his wife that "Nothing happened." Sexual infidelity has significance as a sign of a deeper betrayal—falling in love with someone else. It may be objected that we cannot control the way we feel, only the way we behave; that we should not be blamed for falling in love, but only for acting on the feeling. While we may not have direct control over our feelings, however, we are responsible for getting ourselves into situations in which certain feelings naturally arise. "It just happened" is rarely an accurate portrayal of an extramarital love affair.

If there can be betrayal without sex, can there be sex without betrayal? In the novel *Forfeit*, by Dick Francis, the hero is deeply in love with his wife, who was paralyzed by polio in the early days of their marriage. Her great unspoken fear is that he will leave her; instead, he tends to her devotedly. For several years, he forgoes sex, but eventually succumbs to an affair. While his adultery is hardly praiseworthy, it is understandable. He could divorce his wife and marry again, but it is precisely his refusal to abandon her, his continuing love and tender care, that makes us admire him.

People do fall in love with others and out of love with their spouses. Ought they to refrain from making love while still legally tied? I cannot see much, if any, moral value in remaining physically faithful, on principle, to a spouse one no longer loves. This will displease those who regard the wrongness of adultery as a moral absolute, but my account has nothing to do with absolutes and everything to do with what it means to love someone deeply and completely. It is the value of that sort of relationship that makes sexual fidelity an ideal worth the sacrifice.

Neither a mere religiously based taboo, nor a relic of a repressive view of sexuality, the prohibition against adultery expresses a particular conception of married love. It is one we can honor in our own lives and bequeath to our children with confidence in its value as a coherent and rational ideal.

—Bonnie Steinbock

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