CHAPTER 1

Introduction

> As it is clear from Divine Scripture that our omnipotent God, detesting the sin of sodomy and wishing to demonstrate that fact, brought down his wrath upon the cities of Sodom and Gomorrah and soon thereafter flooded and destroyed the whole world for such horrible sins, our most honorable ancestors sought with their laws and efforts to liberate our city from such a dangerous divine judgment.
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> Sec. 8.1–212 (1981) Crimes against nature... If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.
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> Sec. 16-6-2 (1984)... (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another... (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years...

Unlike the first text, a Decree of the Council of Ten of Venice in 1458,[1] the latter two provisions are not quaint relics of medieval law, but sections from the current Criminal Codes of the states of Virginia and Georgia (26 States have such legislation). In 1986 the United States Supreme Court declared them constitutional exercises "of the legislative authority of the state."[2] The Court noted that law is

[1] Quoted in Ruggiero (1985: 109).

[2] *Bowers* v. *Hardwick* (1986: 2847), Burger C. J. concurring. *Bowers* upheld the Georgia statute, noting that, "The law... is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed (2846)." The Court placed great weight upon the fact that 25 States had sodomy statutes similar to the one challenged in *Bowers*. The Virginia

"constantly based on notions of morality,"[3] indicating that in contemporary America the question of whether or not "the states have an interest in regulating private morality sufficient to override a right to privacy"[4] still plays a central role in determining the limits of individual liberty. Conceptions of justice which can tolerate such legislation are not confined to American jurisprudence. In Britain, recent decisions have asserted a traditional power of the courts to regulate immorality even in the absence of legislation or judicial rulings defining the conduct in question as illegal. As Lord Morris of Borth-y-Gest put it in upholding the conviction of a man who published a directory of London prostitutes,

> ... the law is not impotent to convict those who conspire to corrupt public morals ... There are certain manifestations of conduct which are an affront to and an attack upon recognised public standards of morals and decency, and which all well-disposed persons would stigmatise and condemn as deserving of punishment.[5]

Such decisions threaten to dissolve the distinction between public and private spheres, which, in the western tradition since Kant, has defined the limits of permissible state intervention into the lives of citizens. More specifically, these cases pose the question of the justification of punishing immorality as such, of imprisoning citizens for consensual, non-violent, but unorthodox, sexual acts or other kinds of purported immorality. By what right can a secular state use the coercive force of the criminal law to regulate such behavior? Does it follow that, because "all well-disposed persons" would condemn an immoral act, or find it offensive, that it ought to be punished?[6] To what extent is it proper for a community or state to establish standards of orthodoxy for moral conduct? What realms of

statute was summarily affirmed by the Supreme Court in 1976 in *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901. For an analysis of these cases see Fuller (1985); also Note, *Miami Law Review* (1985).

[3] *Bowers* (1986: 2846).

[4] Note, *Miami Law Review* (1986: 637). Since the landmark case of *Griswold* v. *Connecticut* in 1965, the issues of a right to privacy and the valid scope of state power to regulate private morality have been among the most controversial and dynamic in American constitutional law and jurisprudence. Chapters 4 and 8 will briefly take up *Griswold* and its aftermath.

[5] *Shaw* v. *Director of Public Prosecutions*, House of Lords (1961) A.C. 220. The principle of Shaw was affirmed in *Knuller* v. *Director of Public Prosecutions* (1973). There is, of course, extensive jurisprudential commentary on *Shaw*, e.g. Hart (1963), Devlin (1965).

[6] As the dissenting opinion of Blackmun J. in *Bowers* puts it, "'... mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's liberty'" (quoting *O'Connor* v. *Donaldson*, 422 U.S. 563, 575). As in *Shaw*, the *Bowers* majority apparently did not find such arguments persuasive.

behavior, if any, should remain immune in principle from regulation, and why should they enjoy such immunity? Such questions lie at the heart of the problem of the enforcement of morals.

In the Anglo-American world, discussion of such issues has taken place within a framework largely defined by the liberal tradition. Since the classic nineteenth-century debate between J. S. Mill and J. F. Stephen, philosophers and jurists have debated the legitimacy of imposing punishment on individuals who engage in "immoral" conduct such as prostitution, homosexuality, sodomy, fornication, or adultery. From the historical perspective, this process represents the attempts of an increasingly secular society to decide what classes of activities condemned by ecclesiastical authority were also to be regulated by the state. This ecclesiastical heritage, as the French philosopher and legal historian Pierre Legendre has shown, attempted to construct juristically an ideal morality, avowedly divorced from the social facts of actual human relations, and impose it as a system through instruments like ecclesiastical law and the confessional. It is largely this legal and theological historical experience which causes us to think of the "enforcement of morals" as an imposition of moral principles through the coercive power of the law.

Because this intellectual heritage has formed our very way of defining what the issues are, it has, for the most part, gone unchallenged. Both sides of the debate about enforcing morals accept that the law *can* impose a morality on a given society, even when that morality bears little relation to actual social practices. Further, both sides evince little interest in the empirical realities of moral values or behavior as expressed in the social practices of the society in question. Instead, one typically makes assumptions based upon vague generalizations about "community standards," "the average citizen," "all decent persons," or "the legislator as representative of the community." In Britain, Lord Devlin and Lord Morris could assert with assurance that all decent persons despised prostitution or homosexuality as immoral, yet both were surely aware that they themselves were members of a social class which, in its behavior, condones the discreet exercise of these practices. Likewise, the massive failure of American attempts to regulate or eradicate prostitution, homosexuality, or the use of marijuana or cocaine through the criminal law, bears witness to the necessity for rethinking such assumptions.

This study departs from traditional treatments in suggesting that law cannot "enforce" morality. In fact, the more the moral standards embodied in the law diverge from social practice the less influence law is likely to have. The law can imprison a few prostitutes but it cannot eradicate prostitution in a society which supports it. The law can impose suffering upon a few individuals, but it cannot change or "preserve" the moral order of a society. The "morality" the law "enforces" is only one part of the normative order of the society as embodied in its practices and its understanding of itself. In America these clearly tolerate discreet forms of prostitution, drug use, homosexuality, and other acts outlawed by American sodomy statutes,[7] in complicated and contradictory patterns that only a more differentiated methodology can adequately describe. Similarly, to explain the way an ancient society evaluated, regulated, or censured immoral activities, the historian must look beyond the proscriptions embodied in legal statutes.

This book does not propose yet another abstract jurisprudential definition of privacy or of the legitimate limits of state enforcement of morality. Nor does it explore the philosophical basis of claims about rights to sexual autonomy and privacy.[8] Instead, I shall argue that the kinds of questions enumerated above should not and cannot be answered in a purely juristic framework. Thus I shall attempt to analyze the concrete ways in which Athenian society actually defined and "enforced" norms relating to unorthodox sexual and religious behavior. In examining the interplay of systems of social and legal norms, and their relationship to political ideology in a particular historical setting, I aim at contributing to our understanding of how the moral structures of a society are actually reproduced.[9] Further, studying the way in which a culture defines what is deviant or abnormal reveals the conceptions of normalcy which underlie such definitions. But this study is not designed either

[7] Since Kinsey, the discrepancy in America between "official" views of immorality and moral standards as reflected in actual sexual practices has been clear.

[8] It is beyond the scope of this book to attempt to advance the vast philosophical discussion on privacy. Scholars like David Richards have done much to clarify the complicated issues in this area, and the brief discussion of these philosophical questions in Chapter 4 relies upon their efforts. This study can only contribute to the philosophical discussion by pointing to certain dimensions of social life which philosophers sometimes ignore. For a recent survey of the literature see Parent (1983a).

[9] The word "reproduction" is preferable to "enforcement" because "enforcement" tends to imply a model of externally imposed order. The shortcomings of such an approach are set out in Chapter 2, which also explains what it means to "reproduce" a system of norms.

as a "historical survey" of legal or philosophical ideas about the enforcement of morals, or as an antiquarian description of "how the Greeks did it." Rather, it is an exercise in historical legal sociology. It aims at explaining why Athenian law and society marked certain forms of sexual and religious behavior as deviant, how this deviance was regulated and/or punished, and how this process, taken as a whole, relates to the democratic ideology which dominated Athens during most of the classical period. It shows how modern theory can help illuminate the past, and, in turn, how this understanding of another culture can enrich our theoretical perspective.

Although western societies provide the examples mentioned above,[10] the issue of the legal enforcement of morality arises wherever there is a formal institutionalized differentiation[11] of legal norms. That is, the content of the valid legal norms and the patterns of their enforcement represent a conscious or unconscious decision as to which areas of social and moral life the law will regulate. Nearly all legal cultures punish certain categories of violent moral wrongdoing like murder, assault, robbery, rape, or arson. As Demosthenes explained to an Athenian jury, such acts, because of their inherent violence, represent offenses against the whole community.[12] Very few societies apply sanctions to immoral conduct like lying (outside of certain categories of economic relations), betrayal of friendship, non-physical cruelty, and so on. Sexuality, on the other hand, is perhaps the area where one finds the greatest cross-cultural divergence in patterns of legal enforcement of societal norms.[13] In the ancient world, for example, most Near Eastern legal codes prohibit a wide range of sexual activities (e.g. incest, bestiality,

[10] For the different way in which, for example, German legal scholars approach issues of law and morals, see the excellent survey by Geddert (1984), and the collection of essays edited by Drier (1983).

[11] See Luhmann (1972: 217ff.) on "Ausdifferenzierung."

[12] Demosthenes 21.44–5. Of course in some societies one or another of these offenses is not treated as a public offense. In Hittite law, murder is not directly punished as a crime, and in Athens, its traditional formal status is that of a private lawsuit, though by the fourth century its "public" nature was apparent. Homicide is so treated by Plato in his proposed revision of Athenian law in *Laws* 871. On Plato's treatment of homicide see Gernet (1976: cxcvff.).

[13] Different cultures generate widely divergent arguments for or against the legal regulation of sexuality: the autonomy of the individual, the autonomy of the family, "rights" to privacy or sexual self-expression, theological doctrines such as pollution or sin, etc. The standard view is that Athenian society had no conception of a "private sphere beyond the reach of the state" (Finley, 1985b: 116). The argument in Chapter 9 seeks to challenge and modify this position.

and homosexuality) which Athenian law leaves unpunished.[14] Yet within Greece, as Plato reminds us, there were also considerable differences: some cities prohibited homosexuality, some permitted it, and in others the situation was ambiguous.[15] Because *within* particular cultures it frequently gives rise to controversy over the propriety of regulation, sexuality can serve as a useful focal point for the investigation of a particular society through a comparative methodology.[16]

In societies where legal norms, procedures, and punishments do not constitute a normative coercive mechanism separate from other means of social control, the problem of the legitimate scope of the *legal* enforcement of morality cannot, of course, arise. But, on the other hand, the fact that in a developed legal culture legal norms do incorporate moral standards does not imply that they, so to speak, pre-empt the field of social control. This may seem obvious, yet juristic discussions of law and morality often ignore its implications. The law embodies only one mode of social regulation, and one cannot discuss the problem of law and morals as if it existed in a vacuum, independent of politics, ideology, or, as Weber put it, of economy and society.[17] One might, of course, argue that this narrow focus is legitimate if one proposes to analyze only the specific relation of *law* to morality. Nonetheless, such a claim *assumes* the relative autonomy of the legal sphere: that is, that one can meaningfully consider the legal enforcement of morality apart from the more general social processes of which the moral practices of a society and their relations to patterns of legal enforcement are but a part. It is one of the central arguments of this book that this is not feasible. Legal norms[18] do not exist in a state of autonomy vis-à-vis social

[14] For Biblical Law see Leviticus 20:9ff. For the Hittite Code see Neufeld (1951: 53–7, secs. 187–200). For the Middle Assyrian Code, see Driver and Miles (1975: 70–1, 391, sec. 20). For Babylonian law, see Driver and Miles (1952: 318ff., sec. 154–8). The Athenian sources will be set out in subsequent chapters.

[15] *Symposium* 182.

[16] Most modern treatments of the enforcement of morals through the criminal law likewise focus upon sexual offenses, particularly homosexuality and prostitution. See e.g. Hart (1963), Devlin (1965). Because sexual offenses like homosexuality, adultery, and prostitution involve consensual relations between adults they most clearly pose the antinomy of privacy/autonomy v. regulation. The present study includes the regulation of religious belief through the prosecution of impiety so as not to skew the analysis through a too exclusive concentration on sexuality.

[17] See Weber (1968: 311–19, 325–32, 753–900), and the lengthy discussion of legal and ethical norms in the *Critique of Stammler* (1977).

[18] I speak here of the legal norms of the criminal law which pertain to actual wrongdoing. The question of the autonomy of purely regulative offenses and the like is another matter.

norms and the coercive and non-coercive processes through which they are articulated into the social practices and principles according to which individuals orient their conduct.[19] This study describes in a concrete historical context the way in which normative structures are reproduced, and the dynamic inter-relationship of legal and social norms as one aspect of this complex process.

From this perspective, the crucial question is thus not how the law was used to enforce morality in classical Athens, but rather how Athenian citizens oriented their behavior and expectations towards norms, how they reacted towards and characterized those who violated such normative expectations, and the role which the law played in that process. Of course, the practices and institutions which contribute in one way or another to the reproduction of the normative aspects of a social system are too many and too complex to receive comprehensive treatment here. For example, there will be some discussion of education (particularly Plato's insistence on its importance), though other aspects of socialization will scarcely receive mention. Instead, the principal focus centers upon the system of social and legal norms relating to adultery, incest, homosexuality and homosexual prostitution, and impiety, the ways in which these norms influence social behavior, and the larger patterns of social practices in which the norms and behavior are embedded.[20] Consideration of each of these areas gives rise to a series of questions which guides the subsequent analysis: what legal norms regulated (for example) homosexual behavior? In what way were these norms interpreted and enforced? What were the normative expectations of the community, or different parts of the community, in regard to homosexuality? How were they translated into patterns of social control and definitions of deviance and normality? How did the ideologies, values and social norms upon which such expectations rest diverge from one another, and what contradictions, conflicts, ambiguities, or ambivalences did they embody? How do these systems of legal and social norms relate to one another, and what is their relative importance in societal processes of normalization and

[19] Watson makes the case for autonomy in his three books on the civil law tradition (1981, 1984, 1985).

[20] In Goffman's or Giddens' terms, social control should be viewed from the perspective of interaction, not of behavior *determined* by institutional or other mechanisms (Goffman and Giddens will be discussed at length in Chapter 2). When I speak of social control it is in this voluntaristic interactional sense of normative expectations, behavior purposively oriented towards these expectations, and responses to such behavior.

social control? A broad definition of the problem of the enforcement of morals can thus raise important questions which an approach focusing solely upon law or solely upon society could address only incompletely. It can serve as a sort of analytical wedge for illuminating broader aspects of social order in Athens.

How does one go about answering such questions for an ancient society like classical Athens? The existing secondary literature provides little help, for classical scholars have almost entirely neglected such issues.[21] As always in the ancient world, the amount and types of extant evidence strongly influence the approach, but in regard to Athens we are fortunate to have some knowledge not only of the substantive law and social practices relating to these areas, but also of what some members at least of that society thought about such problems.[22] Their testimony helps to reassure us that this question of the enforcement of morals is not merely a modern preoccupation which we impose upon the ancient sources, but rather one to which the Athenians themselves attached considerable significance (even if they might have formulated it somewhat differently).[23] This fact makes classical Athens particularly interesting for comparative investigation, for, as will be seen, here one finds

[21] Dover (1974) surveys popular morality; see also Ferguson (1958). Adkins also discusses some aspects of Greek morality in *Merit and Responsibility* (1960) and *Moral Values and Political Behaviour in Ancient Greece* (1972), but none of these books concerns itself with the relation of law and morals or with mechanisms of social control. Morality is largely treated as an abstract system of concepts rather than sociologically. Dover's *Greek Homosexuality* (1978) is the most interesting attempt to show how law and morality interacted in a particular area of Greek life, but this is a secondary focus of his study (see also his "Eros and Nomos," 1964). There are, of course, extensive discussions of Aristotle and Plato's treatment of morality, but only Hamburger (1971) discusses law and morality at any length (see e.g. Part III), and his treatment far from exhausts the field. The only recent work to frame the general problem of law and morals (but which then dismisses it as outside its scope) is Finley's *Democracy Ancient and Modern* (1985b: Chapters 4 and 5).

[22] For other Greek cities we are almost utterly ignorant as to all three of these aspects. Of course there are a few individual statutes from one city or another, but the preservation of isolated provisions is of no real use; it is the *system* that matters. For Sparta there is more evidence (see e.g. Cartledge 1981a and b), but I believe that we have no way of disentangling myth, propaganda, ideology, idealizations, and social reality in a discussion of, say, homoeroticism in Sparta. Moreover, the crucial dimension provided in Athens by members of the culture discussing and criticizing its practices is entirely absent from classical Sparta. It is for these reasons that the study is confined to classical Athens. (See for example Cartledge's [1986] criticisms of MacDowell's [1986] inadequate attempts to reconstruct Spartan law, and Cohen [1989].) This position also rests upon the presupposition that one can only speak of the law of each individual Greek *polis*, not of *Greek law per se*. For a review of the literature on this matter see Cohen (1983: Chapter 4).

[23] Chapter 9 discusses this problem through an examination of the conflict between the ideology of Athenian radical democracy and theories of the state and society which demand greater control over the lives of families and individuals (e.g. Plato, Aristotle, Isocrates).

a society which explicitly perceived conflict over the propriety of state regulation of sexuality and the family as a political issue inextricably connected to its conception of democracy. Plato and Aristotle discussed the enforcement of morals as a question of political theory and practical politics, not of jurisprudence or analytic philosophy. It played a central role in their critique of Athenian democracy, and to resolve the problems it posed they each called for a radical reorganization of the means of state control over the individual and the family.[24]

The method which I propose for exploring the issues sketched above is comparative in its approach. What does this mean? In the most general sense, it draws upon evidence from other societies and other legal systems wherever this may serve to explain or clarify a particular point. As Weber argued throughout his mature work, only through comparisons with other cultures can one come to understand the reasons why a particular society developed in the way it did.[25] Some classicists arrive, for example, at particularistic explanations for what they regard as unique or bizarre features of Athenian society like the "seclusion"[26] of women, or the marriage of heiresses to the nearest male relative of their deceased father. Comparative analysis, however, reveals that such institutions are typical products of certain forms of social organization, and helps us to understand their nature and role in the social system. This is not to suggest that the separation of male and female spheres in classical Athens is the same as in contemporary Saudi Arabia or Turkey. All three share important features and also differ widely. The point is that awareness of the similarities and recurrent features (both at the level of ideology and social practice) leads to an understanding of the differences, and this in turn assists in analyzing the way in which a particular society works.

Further, this study employs a comparative methodology in a more specific sense. Specifically, it builds upon the application of a comparative model drawn from social anthropological investigations of contemporary Mediterranean societies. This model, developed at

[24] These issues will be discussed at greater length in Chapter 9.

[25] This is one of the major methodological premises of *Economy and Society* (1968); again, Weber makes the point succinctly in the Introduction to the *Protestant Ethic* (1958: 27). For an illuminating discussion of the differences between evolutionist and comparativist theories of historical explanation see Schluchter (1985) 1–12. See K. Thomas (1963) on the value of comparative anthropological evidence in historical investigation.

[26] See Chapter 6.

length in Chapter 3, provides an analytical tool for describing the objective and subjective facets of normative order and some of the central social processes which maintain it. Such a method possesses greater explanatory power than conventional methods of description used in Greek historiography and has several further advantages. First, no historical account proceeds without theoretical presuppositions.[27] An articulated model, however, provides a basis for criticism, discussion, and modification, whereas implicit postulates do not. The potential gain here involves greater theoretical rigor and insight. Second, using a comparative model broadens the focus on the social processes of ancient Greek society, placing them in the context of the experience of other cultures. Given that the investigation of any topic in Greek social history resembles trying to put together a jigsaw puzzle when half the pieces are missing and without the convenient picture on the cover of the box, such a comparative context can assist the historian in providing possible "pictures." That is, by studying similar social practices in other cultures, one can generate hypotheses for Athenian society on the basis of the typical patterns of social organization to which such practices relate. The wealth of documentary evidence which social anthropological studies generate, when applied systematically through a well-constructed model, can thus be used to suggest how the isolated bits and pieces of Athenian material might fit together.

The depiction of Athenian society which such a procedure produces is not the only possible interpretation. The nature of the ancient evidence (and of historical evidence in general) is such as to permit a discrete series of inferences in any given case. All may be logically possible, and there exists no means of "proving" that only one is "correct."[28] My interpretation of Athenian society can therefore only aim at presenting an alternative perspective, a

[27] See Abrams (1982: 300): "As the acknowledged masterpieces of the discipline of history become increasingly theoretically explicit, and as the unity of theoretical method between history and sociology becomes thereby steadily more obvious, the continued insistence of a rump of professional historians that theory is not part of their trade becomes steadily less firmly the effective basis of the 'institution' of history and steadily more plainly an ineffectual nostalgia." See also Giddens (1986: 355–64), and Thomas (1963). On the general nature and role of presuppositions see Alexander (1983: vol. 1).

[28] See Schluchter (1985: 146) on the fallacy that when engaging in causal explanation the historian is somehow "recreating" something with an ontological status independent of his implicit or explicit interpretative categories: "But we must be aware that through this procedure we achieve only a mental reconstruction of our subject and not a portrayal of the actual course of events." For a brilliant application of a similar methodological approach to Roman law and intellectual history, see Nörr (1986).