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## COMMERCIAL SEX AND THE RIGHTS OF THE PERSON: A MORAL ARGUMENT FOR THE DECRIMINALIZATION OF PROSTITUTION \*

by

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It is a remarkable fact, although usually not perceived as such, that the often eloquent literature calling for the decriminalization of "victimless crimes"<sup>1</sup> generally relies on efficiency-based arguments aimed at ending either the pointless or positively counterproductive waste of valuable and scarce police resources expended in the enforcement of these laws. The pattern of argument and litany of evils are familiar. H. L. A. Hart, for example, in his defense of the *Wolfenden Report*,<sup>2</sup> makes the tactical concession that some "victimless crimes" are immoral, and then discusses in detail the countervailing and excessive costs of enforcing the ends of legal moralism in this area.<sup>3</sup> In the United States, commentators stress implicitly utilitarian pragmatist arguments, identifying tangible evils that intangible moralism appears quixotically to incur.<sup>4</sup> The core of

<sup>1</sup> Examples of illegal conduct sometimes described as "victimless crimes" are drug and alcohol abuse, gambling, prostitution, and homosexuality. See N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 2-6 (1970); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 266 (1968); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967). See also MODEL PENAL CODE, §§ 207.1-6, Comments (Tent. Draft No. 4, 1955); COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, CMND. No. 247 (1957) [hereinafter cited as WOLFENDEN REPORT].

<sup>2</sup> WOLFENDEN REPORT, *supra* note 1.

<sup>3</sup> See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 45, 52, 67-68 (1963).

<sup>4</sup> See N. MORRIS & G. HAWKINS, *supra* note 1; H. PACKER, *supra* note 1; KADISH, *supra* note 1.

these enforcement evils is that these crimes typically are consensual and private. In consequence, the absence of either a complaining victim or witness requires costly forms of enforcement, including police work that is colorably unconstitutional, often clearly unethical, and eventually corruptive of police morals (for example, entrapment).<sup>5</sup> Such high enforcement costs also include the opportunity costs foregone in terms of the more "serious" crimes on which police resources could have been expended.<sup>6</sup> When these costs are considered in light of the special difficulties in this area of securing sufficient evidence for conviction and of deterring the strong and ineradicable motives that often explain these acts, the utilitarian balance sheet condemns the criminalization of such acts as simply too costly.

Such arguments proselytize the already converted and do not seriously engage the kind of justification to which proponents of criminalization traditionally appeal. Such proponents may reply that the mere consensual and private character of certain acts, even coupled with the consequent higher enforcement costs, is not sufficient to justify decriminalization, for many consensual acts clearly are properly criminal (for example, dueling) and many non-consensual acts are also correctly criminal despite comparably high enforcement costs (for example, intrafamilial homicide, which involves high enforcement costs in intrusion into privacy and intimate relations).<sup>7</sup> If there is a good moral reason for criminalizing certain conduct, quite extraordinary enforcement costs will justly be borne. Accordingly, efficiency-based arguments for decriminalization appear to be deeply question-begging. They have weight only if the acts in question are not independently shown to be immoral; but the decriminalization literature concedes the immorality of such acts, and then elaborates efficiency costs that have little decisive weight<sup>8</sup> in the absence of an evaluation of the morality of the acts themselves.

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<sup>5</sup> See generally J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966).

<sup>6</sup> See note 4 *supra*.

<sup>7</sup> For one statement of this form of criticism, see Junker, *Criminalization and Criminogenesis*, 19 U.C.L.A. L. REV. 697 (1972). Cf. Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 U.C.L.A. L. REV. 719 (1972) (supporting excess cost rationale).

<sup>8</sup> H.L.A. Hart does distinguish between conventional and critical morality, but does not explicate the latter concept. See H.L.A. HART, *supra* note 3, at 17-24. For purposes of his argument, he assumes the immorality of the acts in question, and then makes various points about the costs that strict enforcement of these moral judgments would inflict.

This absence of critical discussion of the focal issue that divides proponents and opponents of criminalization has made decriminalization arguments much less powerful than they can and should be. Indeed, such efficiency-based arguments have not been decisive in the retreat of the scope of "victimless crimes," whether by legislative penal code revision or by judicial invocation of the constitutional right to privacy. In those areas in which there has been wholesale or gradual decriminalization, such as contraception,<sup>9</sup> abortion,<sup>10</sup> and consensual non-commercial sexual relations between or among adults,<sup>11</sup> the most important basis of change has been a shift in moral judgments to the effect that these acts, traditionally believed to be morally wrong per se, are not morally wrong.<sup>12</sup> In order to improve decriminalization arguments so that they have the full force that they should have, we must supply the missing moral analysis. The absence of such analysis has prevented us from seeing the kinds of moral needs and interests that decriminalization in fact serves. To this extent, legal theory has not responsibly brought to critical self-consciousness the nature of an important and humane legal development.

This glaring lacuna in legal theory derives, I believe, from deeper philosophical presuppositions which the decriminalization literature appears often to assume: those of the utilitarian pragmatism associated with America's indigenous jurisprudence, legal realism.<sup>13</sup> American legal theory has been schizoid about the proper

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<sup>9</sup> See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>10</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>11</sup> The Supreme Court recently upheld the refusal to extend the constitutional right to privacy to consensual adult homosexuality. *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court). However, there has been a gradual movement toward decriminalization of consensual sodomy by legislative repeal. As of 1976, at least 18 states had decriminalized sodomy. See Rizzo, *The Constitutionality of Sodomy Statutes*, 45 *FORDHAM L. REV.* 553, 570 n.93 (1976). A more recent overview indicates that 21 states have decriminalized. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799, 950-51 (1979).

<sup>12</sup> I have tried to explain the nature of these changes in moral judgments in Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *HASTINGS L.J.* 701 (1979) [hereinafter cited as Richards, *Sexual Autonomy*].

<sup>13</sup> See, e.g., G. JACOBSON, *PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT* (1977). It would be a mistake to regard legal realists as doctrinaire utilitarians when, in fact, they were antagonistic to Bentham's ahistorical approach to jurisprudence. See, e.g., M. WHITE, *The Revolt Against Formalism in American Social Thought of the Twentieth Century*, in *PRAGMATISM AND THE AMERICAN MIND* 41 (1973). See generally W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). But the appeal to social policy considerations was, for them,

analysis of moral values in the law since the publication of Holmes' *The Common Law* in 1881.<sup>14</sup> On the one hand, traditional moral values underlying existing legal institutions have been "washed in cynical acid"<sup>15</sup> so that the legal institution may be analyzed without begging any questions about its moral propriety; on the other hand, the enlightened moral criticism of legal institutions has been conducted in terms of implicitly utilitarian calculations and has sought to maximize the greatest happiness of the greatest number.<sup>16</sup> In discussions propounding the virtues of decriminalization, this pattern of schizoid moral analysis is shown, first, by the dismissive concession of the traditional immorality of the acts in question, and second, by the discussion of moral reform exclusively in terms of efficiency-based considerations that lend themselves to implicit calculations of utility maximization. It is supposed that there cannot be any serious non-utilitarian critical analysis of the moral values thought to underlie "victimless crimes" simply because utilitarianism is presumed to be the only enlightened critical morality.<sup>17</sup>

Today, the pervasive utilitarian presuppositions of American legal theory are under attack both from within jurisprudence<sup>18</sup> and from external developments in normative and moral theory.<sup>19</sup> In moral theory, powerful philosophical objections have been made to the adequacy of utilitarianism as a normative theory,<sup>20</sup> and plausible

implicitly utilitarian. See Richards, Book Review, 24 N.Y. L. SCH. L. REV. 310 (1978).

<sup>14</sup> O.W. HOLMES, *THE COMMON LAW* (M. HOWE ed. 1963).

<sup>15</sup> The famous appeal to wash the law in cynical acid derives from Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

<sup>16</sup> See generally O.W. HOLMES, *supra* note 14.

<sup>17</sup> H.L.A. Hart appears to acknowledge the existence of a critical morality that is not necessarily utilitarian, although he does not explore the content of this morality in his discussion of decriminalization. See H.L.A. HART, *supra* note 3. But see H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968), where he repeatedly insists that principles of fairness and equal liberty, independent of utilitarian considerations, are needed to account for the principles of punishment, *id.* 72-73, and the form of excuses in the criminal law, *id.* 17-24. For a striking attempt by Hart to construct a nonutilitarian theory of natural rights from Kantian premises, see Hart, *Are There Any Natural Rights*, in *SOCIETY, LAW, AND MORALITY* 173 (F. Olafson ed. 1961).

<sup>18</sup> See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); D.A.J. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977) [hereinafter cited as D.A.J. RICHARDS, *MORAL CRITICISM*]; Richards, *Taking Taking Rights Seriously Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U. L. REV. 1265, 1331-38 (1977).

<sup>19</sup> See J. RAWLS, *A THEORY OF JUSTICE* (1971); D.A.J. RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971) [hereinafter cited as D.A.J. RICHARDS, *REASONS*]; A. GEWIRTH, *REASON AND MORALITY* (1978).

<sup>20</sup> The critique of utilitarianism was a prominent focus of English intuitionism, which powerfully and persuasively showed that utilitarian concerns could not

alternative theories have been proposed that better account for the moral point of view.<sup>21</sup> In American legal theory, these general developments in moral theory are currently being harnessed to the examination of the central place of moral ideas in American law, so that American legal institutions like the countermajoritarian design of American constitutional law, inexplicable on utilitarian grounds, are shown to rest on sound, non-utilitarian moral foundations.<sup>22</sup> This new and aggressive use of moral theory in the understanding of the normative structure of legal institutions is of quite general significance in many areas of the law.<sup>23</sup> This Article is part of my own on-going effort to develop a comprehensive moral framework for American law based on a non-utilitarian theory.<sup>24</sup> In it, I will demonstrate the significance that such moral theory has for one part of the substantive criminal law concerned with "victimless crimes."

Anglo-American criminal-law theory has generally focused on certain pervasive structural features of the substantive criminal law,<sup>25</sup>

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account for the constraints of equality and fair distribution or for the moral force of promising or gratitude. See H. PRICHARD, *MORAL OBLIGATION* 169-79 (1949); W. ROSS, *FOUNDATIONS OF ETHICS* 87-113 (1939); W. ROSS, *THE RIGHT AND THE GOOD* 37-47 (1930). See also J. SMART & B. WILLIAMS, *UTILITARIANISM FOR AND AGAINST* 77-150 (1973); note 19 *supra*.

<sup>21</sup> See note 19 *supra*.

<sup>22</sup> See, e.g., D.A.J. RICHARDS, *MORAL CRITICISM*, *supra* note 18.

<sup>23</sup> See note 18 *supra*. See also G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); C. FRIED, *RIGHT AND WRONG* (1978).

<sup>24</sup> See D.A.J. RICHARDS, *REASONS*, *supra* note 19; D.A.J. RICHARDS, *MORAL CRITICISM*, *supra* note 18; Richards, *Autonomy, the Right to Education, and Minimum Standards*, 10 N.Y.U. EDUC. Q. No. 3, at 2 (forthcoming 1979); Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973) [hereinafter cited as Richards, *Equal Opportunity*]; Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974) [hereinafter cited as Richards, *Free Speech*]; Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, SOCIAL THEORY AND PRACTICE (forthcoming); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, U. GA. L. REV. (forthcoming); Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAY. L. REV. (forthcoming 1979); Richards, *Reverse Discrimination and Compensatory Justice: An Essay in Constitutional and Moral Theory*, in THE VALUE OF JUSTICE (C. Kelleby ed. 1979) [hereinafter cited as Richards, *Reverse Discrimination*]; Richards, *Rights and Autonomy: A Prolegomenon to the Theory of Rights*, 14 HARV. C.R.-C.L. L. REV. No. 3 (forthcoming 1979) [hereinafter cited as Richards, *Prolegomenon*]; Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GEO. L. REV. 1069 (1977); Richards, *Sexual Autonomy*, *supra* note 12; Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 CARDOZO L. REV. (forthcoming 1979); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977) [hereinafter cited as Richards, *Unnatural Acts*].

<sup>25</sup> Primary emphasis is usually given to such questions as the nature and role of the requirements of mens rea and actus reus, the proper form of excusing conditions and justification defenses, and the appropriate relation between inchoate and

but has not considered in any depth the question that is at the heart of much continental European criminal-law theory<sup>26</sup>—that of the role of moral wrongdoing in the definition of criminal offenses. Although general concessions are made that criminal sanctions properly apply to morally wrong acts,<sup>27</sup> little critical attention is given to how moral wrongdoing is to be interpreted as the necessary limiting predicate for the proper scope of the criminal penalty. In particular, advocates of decriminalization tend bizarrely to concede to opponents a conventionalistic definition of moral wrongdoing<sup>28</sup> and then to present, as we have seen, utilitarian arguments about special enforcement costs. To make such a concession, however, is unconditionally to surrender the war. It is a mark of the unhappy separation of legal and moral theory that legal theorists accept a definition of morality that, for a moral theorist, is, as we shall see, transparently inadequate.<sup>29</sup> The recent reintegration of anti-utilitarian moral concepts into legal theory enables us to reconsider these questions in a new and inspiring way. We may now critically investigate what should be the central issue in a sound theory of the criminal law: the concept of moral wrongdoing and its role in the just imposition of the criminal sanction.

This Article will address this more general question as it arises in the context of arguments for the criminalization of prostitution. I have chosen prostitution for this purpose because it represents the most striking example of a "victimless crime" with respect to which decriminalization advocates<sup>30</sup> have made no substantial pro-

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consummated offenses. The classic text is G. WILLIAMS, *CRIMINAL LAW* (2d ed. 1961). See also J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960); W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* (1972).

<sup>26</sup> For a comparison of continental and Anglo-American approaches to criminal law theory, with a focus on the role of Kantian moral theory in the former and utilitarianism in the latter, see G. FLETCHER, *supra* note 23.

<sup>27</sup> See, e.g., J. HALL, *supra* note 25, at 385: "It is pertinent to recall here that the criminal law represents an objective ethics which must sometimes oppose individual convictions of right."

<sup>28</sup> For a striking conventionalistic definition of the morally wrong as that which an ordinary man chosen at random from the Clapham omnibus would intuitively find disgustingly immoral, see P. DEVLIN, *THE ENFORCEMENT OF MORALS* 9-13 (1965).

<sup>29</sup> See text accompanying notes 198-221 *infra*.

<sup>30</sup> See note 1 *supra*. For specific arguments for the decriminalization of prostitution per se, see Bode, *New Life for the Oldest Profession*, *THE NEW REPUBLIC*, July 8 & 15, 1978, at 21; Haft, *Hustling for Rights*, 1 *CIV. LIB. REV.*, winter/spring 1974, at 8; Jennings, *The Victim as Criminal: A Consideration of California's Prostitution Law*, 64 *CALIF. L. REV.* 1235 (1976); Roby & Kerr, *The*

gress<sup>31</sup> despite sound arguments of excessive and wasteful enforcement costs. This failure may be because, unlike the otherwise comparable areas of contraception, abortion, and non-commercial sex between or among adults,<sup>32</sup> there has been little serious critical moral argument attacking the moral judgment of the per se immorality of commercial sex.<sup>33</sup> Yet there are forceful moral arguments to this effect that demonstrate that laws criminalizing commercial sex violate certain basic rights of the person. In order to justify these claims, however, we must consider foundational issues such as the proper interpretation of the public morality that the criminal law expresses and the proper legal force that ideas of romantic love should have in this area. In particular, analysis of this question will disclose a uniquely American attitude to these matters that explains the remarkable fact that the United States is one of the few comparably developed countries that criminalizes prostitu-

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*Politics of Prostitution*, 1972 THE NATION 463; Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373 (1973); Vorenberg & Vorenberg, "The Biggest Pimp of All": *Prostitution and Some Facts of Life*, THE ATLANTIC, January, 1977, at 27; Wade, *Prostitution and the Law: Emerging Attacks on the "Women's Crime,"* 43 U. MO. KAN. CITY L. REV. 413 (1975); Wandling, *Decriminalization of Prostitution: The Limits of the Criminal Law*, 55 OR. L. REV. 553 (1976); *Prostitution: A Non-Victim Crime?*, 8 ISSUES IN CRIMINOLOGY No. 2, at 137 (1973); Note, *The Principle of Harm and Its Application to Laws Criminalizing Prostitution*, 51 DEN. L.J. 235 (1974).

<sup>31</sup> All American states except Nevada currently criminalize prostitution. For a review of the various forms of the prohibitions, see Rosenbleet & Pariente, *supra* note 30, at 422-27. There has been no substantial movement toward legislative decriminalization of the kind found in the area of consensual sodomy. See note 11 *supra*. In this connection, it should be noted that the *Model Penal Code*, which recommended the decriminalization of non-commercial consensual adult sexual relations, did not follow the *Wolfenden Report*, which recommended in addition that prostitution not be criminalized. Compare MODEL PENAL CODE § 207.51(1), Comment (Tent. Draft No. 4, 1955) (non-commercial sex recommendation) with MODEL PENAL CODE § 207.12, Comment (Tent. Draft No. 9, 1959) (commercial sex recommendation). Attacks on the constitutionality of anti-prostitution statutes, unsurprisingly, have also failed. See *Morgan v. City of Detroit*, 389 F. Supp. 922 (E.D. Mich. 1975); *United States v. Moses*, 339 A.2d 46 (D.C. 1975), *cert. denied*, 426 U.S. 920 (1976). *But cf. In re P.*, 92 Misc. 2d 62, 400 N.Y.S.2d 455 (Fam. Ct. 1977) (successful attack on the New York prostitution statute as applied to a 14-year old).

<sup>32</sup> See note 12 *supra*. For related attempts to argue that various of these activities are not immoral, see R. ATKINSON, *SEXUAL MORALITY* 132-79 (1965) (homosexuality and contraception); J. WILSON, *LOGIC AND SEXUAL MORALITY* (1965); Margolis, *The Question of Homosexuality*, in *PHILOSOPHY & SEX* 288 (R. Baker & F. Elliston eds. 1975). See also Wasserstrom, *Is Adultery Immoral?*, in *PHILOSOPHY & SEX*, *supra* at 207-21.

<sup>33</sup> For example, Bertrand Russell, who in general defended the much freer premarital and extra-marital expression of romantic love, regarded prostitution as intrinsically morally degraded. See B. RUSSELL, *MARRIAGE AND MORALS* 150-53 (1929).



tion.<sup>34</sup> When we have done the moral archeology<sup>35</sup> required to understand how this developed historically and why these American attitudes are an improper basis for the public morality of law, we will have stated a powerful moral argument why, at a minimum, prostitution must be decriminalized. We will then be in a position to inquire what alternative legal treatment of prostitution might be appropriate.

This Article will have the following structure: first, a description of prostitution as an empirical phenomenon in historical and anthropological perspective; second, a consideration of the legal treatment of prostitution, reviewing the main arguments for criminalization in the United States; third, a philosophical explication of the proper scope of the public morals as a basis for criminal sanctions, including an account of the role that human and moral rights necessarily play in this conception; fourth, an application of this analysis to the critical examination of the moral and paternalistic arguments for criminalization; fifth, a statement of the case for a right to sexual autonomy and of the appropriate limits to such a right; and finally, a review of alternative approaches to the regulation of commercial sex.

## I. PROSTITUTION: ANTHROPOLOGICAL AND HISTORICAL PERSPECTIVES

For contemporary purposes, prostitution is usually defined in terms of "an individual who indiscriminately provides sexual relations in return for money payments."<sup>36</sup> Older definitions strikingly

<sup>34</sup> See A. SION, *PROSTITUTION AND THE LAW* 43-50 (1977). For the treatment in other developed countries, see *id.* 33-43, 50-54. See also note 113 *infra*. Sion's discussion of comparably developed countries is limited to the nations of Western Europe that are committed to forms of effective parliamentary constitutional democracy. Communist countries tend not to criminalize prostitution, but to engage in forms of aggressive rehabilitation. For the experience in the People's Republic of China, which claims to have no prostitution, see R. SIDEL, *WOMEN AND CHILD CARE IN CHINA* 50-51 (1972). The Soviets appear to have used not criminal penalties but forms of stigmatizing publicity directed against patrons, identified by name in a public bulletin as "Buyers of the Bodies of Women." L. KANOWITZ, *WOMEN AND THE LAW* 17-18 (1969). One author alleges the United States is the only country in the world to criminalize prostitution as such. Sagarin, *Sexual Criminality*, in *CURRENT PERSPECTIVES ON CRIMINAL BEHAVIOR* 138, 150 (A. Blumberg ed. 1974).

<sup>35</sup> For a similar methodology, see M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A. M. Sheridan Smith trans. 1972).

<sup>36</sup> A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 595 (1948). Other authors have offered the following definitions in current literature: "Prostitution is the act of a woman repeatedly and constantly practicing the sexual relationship with anybody, on demand without choosing or refusing any partner, for gain, freely and without force, her principal object being profit and not pleasure," J. MANCINI, *PROSTITUTES AND THEIR PARASITES* 14 (1963); "Prostitution

omit the gender-neutral "individual" (or "person") and even the commercialism requirement. For example, one commentator defined it in 1951 as "the indiscriminate offer by a female of her body for the purpose of sexual intercourse or other lewdness."<sup>37</sup> These twin omissions suggest that the traditional concern for prostitution was peculiarly associated with female sexuality—more particularly, with attitudes toward promiscuous unchastity in women—apart from any commercial aspects.<sup>38</sup> Contemporary legal definitions attempt to modify the scope of prostitution.<sup>39</sup> On the one hand, they enlarge the class of persons who may be prostitutes to include men in order to square anti-prostitution laws with emerging moral and constitutional norms of gender-neutral fairness in distributing governmental burdens and benefits.<sup>40</sup> On the other hand,

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consists of any sexual acts, including those which do not actually involve copulation, habitually performed by individuals with other individuals of their own or the opposite sex, for a consideration which is non-sexual," 1 F. HENRIQUES, PROSTITUTION AND SOCIETY 17 (1962); "Prostitution . . . [is] promiscuity—even transient promiscuity,—of sex relationship [sic] for pay, or its equivalent," A. FLEXNER, PROSTITUTION IN EUROPE 16 (1914); "Prostitution . . . [is] promiscuous unchastity for gain," W. EAST, SOCIETY AND THE CRIMINAL 242 (1949); "Prostitution is the common lewdness of a woman for gain," R. PERKINS, CRIMINAL LAW 392 (2d ed. 1969); "[P]rostitution exists when a woman (or a man) engages in sexual relations for other than sexual or amative motives," Benjamin, *Prostitution*, in 2 THE ENCYCLOPEDIA OF SEXUAL BEHAVIOR 869, 871 (A. Ellis & A. Abaranel eds. 1961); "[I]t can generally be defined as the granting of nonmarital sexual access, established by mutual agreement of the woman, her client, and/or her employer, for remuneration which provides part or all of her livelihood," C. WINICK & P. KINSIE, THE LIVELY COMMERCE 3 (1971); "A prostitute is an individual, female or male, who for some kind of reward, monetary or otherwise, or for some form of personal satisfaction other than purely for the gratification of an awareness of love, and as a part-time or whole-time profession, engages in normal or abnormal sexual intercourse with a number of persons, who may be of the same sex as, or the opposite sex to, herself or himself," G. SCOTT, LADIES OF VICE 13 (1968).

<sup>37</sup> M. PLOSCOWE, SEX AND THE LAW 226 (rev. ed. 1962) (emphasis deleted). Compare this definition with those of A. FLEXNER and Benjamin, *supra* note 36.

<sup>38</sup> The *Model Penal Code* identifies sixteen states whose statutes define prostitution to include promiscuous intercourse without hire, MODEL PENAL CODE § 217.12, Comment at 175 n.24 (Tent. Draft No. 9, 1959). The tendency, reflected in such statutes, to assimilate the moral status of the lost virginity of the seduced and abandoned woman to that of the prostitute appears to have led, as a kind of self-fulfilling prophecy, to many of these women becoming prostitutes. See, e.g., K. CHESNEY, THE ANTI-SOCIETY 315 (1970); L. STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800, at 601-02 (1977).

<sup>39</sup> The influential definition of the *Model Penal Code* states:

A person who engages, or offers or agrees to engage in sexual activity for hire, or is an inmate of a house of prostitution, or enters this state or any political subdivision thereof to engage in prostitution, commits a petty misdemeanor. Such activity is hereinafter referred to as prostitution, and the actor is referred to as a prostitute.

MODEL PENAL CODE § 207.12(1) (Tent. Draft No. 9, 1959).

<sup>40</sup> On the constitutional infirmities of more restrictive definitions of prostitution, see Rosenbleet & Pariente, *supra* note 30, at 381-403.

the commercialism requirement narrows the class of prostitutional sexual activities to indiscriminate "sexual relations in return for money payments,"<sup>41</sup> thus excluding mere sexual promiscuity or unchastity per se.<sup>42</sup> Since enforcement patterns under even gender-neutral anti-prostitution statutes indicate that the continuing concern is largely with female sexuality,<sup>43</sup> the total effect of the modern definitions has been to narrow the class of female sexual activities to which prostitution laws apply. A crucial concern has obviously been to exclude from the concept of prostitution forms of sexual relations which are not conventionally condemned today.<sup>44</sup> There

<sup>41</sup> See note 36 *supra*.

<sup>42</sup> The *Model Penal Code* commentary emphasizes that "only sexual activity 'for hire' is included" in the definition. MODEL PENAL CODE § 207.12(1), Comment at 174 (Tent. Draft No. 9, 1959). See also note 44 *infra*.

<sup>43</sup> The *Uniform Crime Reports* issued by the Federal Bureau of Investigation indicate that 74% of the persons arrested for "prostitution and commercialized vice" in 1972 were women. See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES—1972: UNIFORM CRIME REPORTS 130 (1973). As one author stated, "[p]rostitutes in the aggregate are primarily a one-sex, female group." Lemert, *Prostitution, in PROBLEMS OF SEX BEHAVIOR* 68, 69 (E. Sagarin & D. MacNamara eds. 1968). Indeed, prostitution appears to be the only sexual offense for which women are prosecuted to any significant extent. See H. KATCHADOURIAN & D. LUNDE, FUNDAMENTALS OF HUMAN SEXUALITY 517 (2d ed. 1975). Yet female prostitutes have male customers, who are equally legally culpable, and homosexual male prostitution exists. For discussions of homosexual prostitution, see H. BENJAMIN & R. MASTERS, PROSTITUTION AND MORALITY 286-337 (1964); D. DREW & J. DRAKE, BOYS FOR SALE: A SOCIOLOGICAL STUDY OF BOY PROSTITUTION (1969); R. LLOYD, FOR LOVE OR MONEY (1976); C. WINICK & P. KINSIE, *supra* note 36, at 89-96; Deisher, *Homosexual Prostitution*, MED. ASPECTS HUMAN SEXUALITY, Aug., 1975, at 85; Gandy & Deisher, *Young Male Prostitutes: The Physician's Role in Social Rehabilitation*, 212 J.A.M.A. 1661, 1662 (1970). Male prostitutes are very seldom apprehended by the law because of a general lack of societal concern. See C. WINICK & P. KINSIE, *supra* note 36, at 89. For example, out of 3,475 boys in a Philadelphia cohort who became recorded delinquents sometime by their seventeenth birthday, only one had been apprehended for prostitution. M. WOLFGANG, R. FIGLIO, & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 68-69 (1972). Failure to prosecute male patrons has been rationalized by the *Model Penal Code* as follows: "Imposition of severe penalties is out of the question, since prosecutors, judges and juries would be likely to regard extramarital intercourse for males as a necessary evil or even as socially beneficial." MODEL PENAL CODE § 207.12(1), Comment at 180 (Tent. Draft No. 9, 1959). Failure to prosecute homosexual prostitution has been explained "because it is fairly concentrated and offends relatively few people," C. WINICK & P. KINSIE, *supra* note 36, at 89. If we ask ourselves why prostitution involving men is not regarded as culpable, we face issues of special concern for female sexuality. As one judge argued in justifying punishing the prostitute but not the customer, "a study of the history of prostitution from ancient times down to the present day leaves one with this underlying thought: Wherever suppressive or punitive measures were employed, they were directed against the female, not the male." *People v. Anonymous*, 161 Misc. 379, 383, 292 N.Y.S. 282, 286 (1936). For recent constitutional attacks on such enforcement patterns under anti-prostitution laws, see L. KANOWITZ, *supra* note 34, at 15-18; Rosenbleet & Pariente, *supra* note 30, at 403-11.

<sup>44</sup> The *Model Penal Code* explains its "for hire" requirement as follows: "It should be noted also that a law punishing promiscuous, but non-commercial, sex activity would reach all males who seek sexual gratification indiscriminately,

may be a commercial element to some marital sexual relations, for example;<sup>45</sup> and there is not always a sharp line, perhaps, between the dinners and entertainment expenses in now conventional pre-marital sexual relations and the more formalized business transactions of the prostitute.<sup>46</sup> In consequence, in order to draw the desired distinctions between the conventional and the impermissible, contemporary definitions place great weight on money payments for indiscriminate sex. The mark of the contemporary prostitute is indiscriminate availability for sexual relations with any willing buyer, in contrast to other forms of now widespread pre- and extramarital sexual relations.<sup>47</sup>

The emergence of prostitution, within the terms of the modern definition, is generally associated with the development of urban civilization.<sup>48</sup> It is misleading to interpret the anthropological cross-cultural data of patterns of promiscuity among primitive peoples as forms of prostitution,<sup>49</sup> for such peoples often attached little value to virginity; furthermore, there is little evidence in this data of the existence of a class of women indiscriminately available to men for money.<sup>50</sup> Rather, the patterns of sexual promiscuity in question represent highly selective choices, often spontaneous and mutually pleasurable with no commercial elements other than gift giving.<sup>51</sup> The conditions of life in primitive society, with closely

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whether with professional prostitutes or amateur partners. This would involve contradiction of our policies on illicit extramarital relations generally." MODEL PENAL CODE § 207.12(1), Comment at 175 (Tent. Draft No. 9, 1959).

<sup>45</sup> The continuity of the motives of conventional women in marrying with those of a prostitute is one of Mrs. Warren's main points in her defense of her profession to her daughter. See G.B. SHAW, *Mrs. Warren's Profession*, in *PLAYS UNPLEASANT* 249-50 (Penguin 1975). Of her defense, Shaw observes: "Mrs. Warren's defence of herself is not only bold and specious, but valid and unanswerable," *id.* 201.

<sup>46</sup> On these problems of line-drawing, see H. BENJAMIN & R. MASTERS, *supra* note 43, at 21-32.

<sup>47</sup> For evidence on the historical growth of pre-marital sexuality, see E. SHORTER, *THE MAKING OF THE MODERN FAMILY* 79-119 (1975). On contemporary extramarital patterns, see J. SMITH & L. SMITH, *BEYOND MONOGAMY* (1974).

<sup>48</sup> See generally 4 H. ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX* 218-54 (1910).

<sup>49</sup> See, e.g., V. BULLOUGH, *THE HISTORY OF PROSTITUTION* 9-15 (1964).

<sup>50</sup> See H. ELLIS, *supra* note 48, at 226-28; G. SCOTT, *A HISTORY OF PROSTITUTION FROM ANTIQUITY TO THE PRESENT DAY* 53-58 (1936). Scott does, however, interpret many pre-urban sexual practices as almost equivalent to prostitution. *Id.*

<sup>51</sup> This conclusion is reflected in the findings of a leading student of cross-cultural sexual practices, reviewing the cross-cultural data:

Prostitution is not a problem in these societies. Nothing comparable to prostitution as it appears in civilized western societies today . . . is to be found in the societies of our sample. There are widespread customs of gift-giving as a prelude to or aftermath of sexual favors, oftentimes an exchange of gifts between the sex partners. But these customs can

knit family and kin networks that regulate the behavior of the young in detail, do not lend themselves to the emergence of a rootless class of women who are available for anonymous indiscriminate sexual encounters for money. This phenomenon is historically associated with the emergence of large cities and the possibility of anonymity associated therewith.<sup>52</sup>

The emergence of commercial prostitution in the modern sense appears to have been a development from the institution of temple prostitution that was a feature of religious life in the first high civilizations.<sup>53</sup> Herodotus, for example, notes that women of ancient Babylonia, prior to marriage, were required to engage once in sexual intercourse as temple prostitutes with the first man who presented himself.<sup>54</sup> The religious significance of temple prostitution is remote from us, but it probably was an institutionalized expression of primitive orgiastic communion<sup>55</sup> with the divine forces of fertility, both sexual and agricultural. We know the appeasement and worship of these forces to have been at the core of the ancient Babylonian and Egyptian cosmological conceptions of the universal order.<sup>56</sup>

Forms of temple prostitution continued to exist in ancient Greece,<sup>57</sup> but commercial prostitution emerged as an independent empirical phenomenon, associated, for example, with the commercial life of Athens as a metropolitan seaport.<sup>58</sup> Both the ancient

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scarcely be thought of in the same light as prostitution, in which sexual favors are traded for a price. They are much more akin to the small favors a suitor in our society may bestow upon the girl of his choice in the form of candy or flowers.

Ford, *Sex Offenses: An Anthropological Perspective*, 25 LAW & CONTEMP. PROB. 225, 227 (1960). See also, C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR 98-99 (1951).

<sup>52</sup> See H. ELLIS, *supra* note 48, at 228.

<sup>53</sup> V. BULLOUGH, *supra* note 49, at 17-30; H. ELLIS, *supra* note 48, at 228-38; W. SANGER, THE HISTORY OF PROSTITUTION 35-42 (1897); G.R. SCOTT, *supra* note 50, at 59-66.

<sup>54</sup> HERODOTUS, HISTORIES Book 1, Ch. cxcix. The accuracy of this account, however, is questionable.

<sup>55</sup> See H. ELLIS, *supra* note 48, at 218-23.

<sup>56</sup> See generally H. FRANKFORT, BEFORE PHILOSOPHY (1961); H. FRANKFORT, KINGSHIP AND THE GODS (1948).

<sup>57</sup> See V. BULLOUGH, *supra* note 49, at 36-37; H. ELLIS, *supra* note 48, at 229-34; H. LICHT (pseudonym for P. Brandt), SEXUAL LIFE IN ANCIENT GREECE 388-95 (J. Freese trans. 1932).

<sup>58</sup> See V. BULLOUGH, *supra* note 49, at 31-44; H. ELLIS, *supra* note 48, at 234; H. LICHT, *supra* note 57, at 329-63; S. POMEROY, GODDESSES, WHORES, WIVES, AND SLAVES 88-92 (1975); W. SANGER, *supra* note 53, at 43-63; G. SCOTT, *supra* note 50, at 78-79.

Greeks<sup>59</sup> and Romans<sup>60</sup> regulated prostitution, not merely permitting it, but in some cases<sup>61</sup> establishing state brothels. Prostitutes appear to have been divided into distinct classes, not unlike the still-familiar distinctions among streetwalkers, brothel prostitutes, and call girls.<sup>62</sup> In ancient Greece<sup>63</sup> and China,<sup>64</sup> the highest classes of prostitutes appear to have enjoyed extraordinary intellectual and artistic advantages that women of their periods were, in general, not permitted. Nonetheless, it is probably a mistake to romanticize the life of the typical prostitute of these periods.<sup>65</sup> Prostitutes were often slaves.<sup>66</sup> While their conduct was not crim-

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<sup>59</sup> Solon was reported to have established brothels as a state monopoly. The prostitutes in these brothels, called *dicteriades*, were typically foreigners, and were subject to a number of regulations, including strict segregation from reputable women, a special costume, forfeiture of any natal citizenship rights, and various legal disabilities for their children. See W. SANGER, *supra* note 53, at 43-44; G. SCOTT, *supra* note 50, at 78-79.

<sup>60</sup> In Rome, prostitutes were required to register with the state and were subject to various regulations, including requirement of a special costume, certain prohibitions on marriage, and exclusion from certain temples. See V. BULLOUGH, *supra* note 49, at 45-53; O. KIEFFER, *SEXUAL LIFE IN ANCIENT ROME* 55-63 (1934); W. SANGER, *supra* note 53, at 64-68; G. SCOTT, *supra* note 50, at 80-83.

<sup>61</sup> See note 59 *supra*. Solon's Athenian brothels, a state monopoly, charged patrons a small set fee.

<sup>62</sup> See V. BULLOUGH, *supra* note 49, at 31-53; H. LICHT, *supra* note 57, at 332-63; W. SANGER, *supra* note 53, at 47-63, 68-70; G. SCOTT, *supra* note 50, at 76-80. On the contemporary distinctions, see H. BENJAMIN & R. MASTERS, *supra* note 43, at 119-91; C. WINICK & P. KINSIE, *supra* note 36, at 131-84.

<sup>63</sup> There was a remarkable class of women, the *hetairae*, who, unlike most Greek women, were permitted deep contact with masculine artistic and political culture. See V. BULLOUGH, *supra* note 49, at 31-44; H. LICHT, *supra* note 57, at 339-63.

<sup>64</sup> See V. BULLOUGH, *supra* note 49, at 91-103.

<sup>65</sup> Sarah B. Pomeroy notes that "[t]he *hetaira* had access to the intellectual life of Athens, which we nowadays treasure, and a popular courtesan who was not a slave had the freedom to be with whoever pleased her," S. POMEROY, *supra* note 58, at 92, but then carefully concludes that "the fact that we know of some courtesans who attempted to live as respectable wives, while we know of no citizen wives who wished to be courtesans, should make us reconsider the question of which was the preferable role in Classical Athens—companion or wife." *Id.* The entire classical Greek society regarded spending money on commercial sex as discreditable. See K. DOVER, *GREEK POPULAR MORALITY IN THE TIME OF PLATO AND ARISTOTLE* 210 (1974). Thus, male homosexual relations, which were conventional and praised in ancient Athens, were discredited when done for money, the male prostitute losing his citizenship rights in perpetuity; apparently the male prostitute was viewed as degraded by his identification with the category of female prostitutes, who were non-citizens, largely of slave status. See *id.* 215-16.

The Romans appear to have had an even less romantic view of prostitution than the Greeks. See V. BULLOUGH, *supra* note 49, at 45-53. Brothels were encouraged, but Cicero, for example, entered them "with covered head and face concealed in his cloak," H. ELLIS, *supra* note 48, at 239.

<sup>66</sup> See V. BULLOUGH, *supra* note 49, at 48-49; S. POMEROY, *supra* note 58, at 88-89. Comparable phenomena existed in China, V. BULLOUGH, *supra* note 49, at 100-01, and in seventeenth century England, L. STONE, *supra* note 38, at 616-17.

inal, their activities were highly regulated, and their status as prostitutes deprived them of rights that other women enjoyed.<sup>67</sup> Prostitutes were regarded as useful to the state in the context of two factors that appear empirically to be part of the standard causal background for the existence of prostitution: (1) toleration of male sexual experimentation but insistence on female virginity before marriage and fidelity in marriage, often combined with late marriage for men or lifelong bachelorhood,<sup>68</sup> and (2) a class of women freed from traditional familial and clan restraints.<sup>69</sup> The usefulness of prostitutes as an outlet for male sexual experimentation in such circumstances does not, of course, mean that they were esteemed<sup>70</sup> or, with certain narrow exceptions,<sup>71</sup> admired. On the contrary, we know that the ancient Greeks thought of women as of inferior moral worth intrinsically, their moral value deriving in large part from their role in nurturing the development of men, who were considered to have intrinsic moral worth.<sup>72</sup> Prostitutes were regarded as of worth instrumentally in satisfying certain male needs much as Aristotle regarded slaves as valuable instruments and tools for their masters' uses.<sup>73</sup> For the Romans, with their higher esteem for respectable women as such, prostitutes were held in general contempt although, again, they were thought to be instrumentally useful.<sup>74</sup>

The history of prostitution under Christianity falls into two strikingly different periods: pre- and post-Reformation. In the

<sup>67</sup> See notes 59-60 *supra*.

<sup>68</sup> In ancient Athens, for example, men did not usually marry until the age of 30, and respectable women were not available for pre-marital intercourse. See S. POMEROY, *supra* note 58, at 91. In England, during the period when prostitution flourished, the age of marriage rose to 26 or older, and the younger sons often were not permitted to marry at all; respectable women were not available for pre-marital or extra-marital intercourse. See L. STONE, *supra* note 38, at 615-20. In Italy, during the comparable period, promiscuity was more common among married women; consequently, prostitution was kept at a fairly low level. *Id.* 619.

In contemporary Sweden, there is reported to be little prostitution. See N. ELLIOTT, *SENSUALITY IN SCANDINAVIA* 255 (1970); D. JENKINS, *SWEDEN AND THE PRICE OF PROGRESS* 203 (1968); B. LINNÉR, *SEX AND SOCIETY IN SWEDEN* 90 (1967). This is generally attributed to liberal attitudes toward extra-marital sex in Sweden. See N. ELLIOTT, *supra*, at 255. In Sweden, 90% of the boys and 75% of the girls have had sexual intercourse by the age of seventeen. *Id.* 9.

<sup>69</sup> See generally, H. ELLIS, *supra* note 48, at 226-28. For an example of the form that this rising class of urban poor woman historically took, see L. STONE, *supra* note 38, at 616-19. See also K. CHESNEY, *supra* note 38, at 314-15.

<sup>70</sup> See note 65 *supra*.

<sup>71</sup> See note 63 *supra*.

<sup>72</sup> See, e.g., K. DOVER, *supra* note 65, at 95-102; S. POMEROY, *supra* note 58, at 85.

<sup>73</sup> See generally ARISTOTLE, *POLITICS* \*1253b-1256a.

<sup>74</sup> See V. BULLOUGH, *supra* note 49, at 45-53; O. KIEFER, *supra* note 60, at 63.

pre-Reformation period, prostitution was perceived in the context of St. Augustine's classic conception that the only proper "genital commotion"<sup>75</sup> is that consciously aimed at the reproduction of the species in marriage.<sup>76</sup> Augustine argues that the only plausible explanation for the privacy associated with sexual experience is that humans experience sex as intrinsically degrading because it involves the radical loss of control over mental functions, experiences, sensations, and behavior. This perception of shame, in turn, is alleged to rest on the fact that the only proper form of sex is accompanied by the controlled marital intention to procreate. Augustine concludes that sexuality is intrinsically degrading because we tend to experience it without or independent of those intentions which alone can validate it.<sup>77</sup> It follows from this view not only that certain rigidly defined kinds of intercourse in conventional marriage are alone moral,<sup>78</sup> but that sexuality even within marriage is a natural object of continuing shame, for sexual drives generally operate quite independently of the will, let alone of the will to reproduce.<sup>79</sup> In the Augustinian view, prostitution, as a form of extramarital sex, is, of course, immoral. For Augustine, however, sexuality in general is problematic: asexuality is obviously the preferred state, and sex even in marriage is validated only by its procreational intentions. This unsentimental view of marriage and the

<sup>75</sup> This phrase appears in Catholic theological commentaries on the obscene and unnatural. See, e.g., Gardiner, *Moral Principles Towards a Definition of the Obscene*, 20 LAW & CONTEMP. PROB. 560, 567 (1955).

<sup>76</sup> See AUGUSTINE, *THE CITY OF GOD* 577-94 (H. Bettenson trans. 1972) (1st ed. 413-426 A.D.). St. Thomas is in accord with Augustine's view. Of the emission of semen apart from procreation in marriage, he wrote: "[A]fter the sin of homicide whereby a human nature already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is precluded." 3 T. AQUINAS, *ON THE TRUTH OF THE CATHOLIC FAITH: SUMMA CONTRA GENTILES* pt. 2, ch. 122(9), at 146 (V. Bourke trans. 1946).

<sup>77</sup> See the fuller discussion of Augustine's position at text accompanying notes 222-38 *infra*.

<sup>78</sup> One prominent account of the Catholic view notes that Catholic canon law holds, as a basic and cardinal fact, that complete sexual activity and pleasure is licit and moral only in a naturally completed act in valid marriage. All acts which, of their psychological and physical nature, are designed to be preparatory to the complete act, take their licitness and their morality from the complete act. If, therefore, they are entirely divorced from the complete act, they are distorted, warped, meaningless, and hence immoral.

Gardiner, *supra* note 75, at 564. See also T. BOUSCAREN, A. ELLIS & F. KORTH, *CANON LAW* 936 (1963); H. GARDINER, *CATHOLIC VIEWPOINT ON CENSORSHIP* 62-67 (1958). But see R. HANEY, *COMSTOCKERY IN AMERICA* (1960).

<sup>79</sup> Thus, Augustine notes that not only is sexual impulse "totally opposed to the mind's control, it is quite often divided against itself," AUGUSTINE, *supra* note 76, at 577: that is, when we want to experience such feelings, we often cannot; and when we don't want to experience them, we do.



desire to protect it realistically led both St. Augustine<sup>80</sup> and St. Thomas<sup>81</sup> to argue for the toleration of prostitution on the ground that it best protected the marital procreational unit. Unmarried men, incapable of celibacy, would be tempted to seduce neither married women nor the virgins destined to be married, and married men, incapable of fidelity, would be tempted to seduce neither of the above nor to form more permanent liaisons that would threaten their dedication to the procreational unit. In the pre-Reformation period, as a consequence, prostitution, with a few notable exceptions, was tolerated.<sup>82</sup>

Reformation thinkers, such as Luther, perceived prostitution in the context of attacks on the Catholic idealization of celibacy as the religiously preferable state<sup>83</sup> and the corresponding greater emphasis on the status of companionate marriage in which all one's sexual and emotional needs were to be satisfied.<sup>84</sup> Ideas of romantic love, which in the Middle Ages had been celebrated in secular literature in extramarital, often adulterous terms,<sup>85</sup> were

<sup>80</sup> St. Augustine, commenting on prostitution, asked:

What can be called more sordid, more void of modesty, more full of shame than prostitutes, brothels, and every evil of this kind? Yet remove prostitutes from human affairs, and you will pollute all things with lust; set them among honest matrons, and you will dishonour all things with disgrace and turpitude.

AUGUSTINE, DE ORDINE, II.4 (12).

<sup>81</sup> St. Thomas observed that prostitution is "like the filth in the sea, or a sewer in a palace. Take away the sewer, and you will fill the palace with pollution; and likewise with the filth (in the sea). Take away prostitutes from the world, and you will fill it with sodomy." T. AQUINAS, OPUSCULA XVI (IV in 1875 Paris ed.).

<sup>82</sup> The most notable attempt during this period to extirpate prostitution was made by King and Saint Louis IX of France. For a general description of the medieval approach and of Louis' deviation from it, see V. BULLOUGH, *supra* note 49, at 57-68, 107-26; H. ELLIS, *supra* note 48, at 239-41; W. SANGER, *supra* note 53, at 86-131; G. SCOTT, *supra* note 50, at 89-94.

<sup>83</sup> Luther attacked the hypocrisy of the Catholic religious who, although licentious themselves, demanded purity of women:

In order to attain the very summit of sanctity, a man is prohibited access to the priesthood if he has married a girl who was not a virgin, though he may have done so in ignorance, and by unfortunate mischance. But he may have had vile commerce with six hundred prostitutes, and seduced countless matrons and virgins, and kept many mistresses, yet nothing of this would be an impediment, and prevent his becoming a bishop, or a cardinal, or a pope.

M. LUTHER, SELECTIONS FROM HIS WRITINGS 347 (J. Dillenberger ed. 1961).

<sup>84</sup> See generally Luther, *The Natural Place of Women*, in SEXUAL LOVE AND WESTERN MORALITY 134-43 (D. Verene ed. 1972).

<sup>85</sup> The literature on the romantic love tradition is enormous. See, e.g., H. KELLY, LOVE AND MARRIAGE IN THE AGE OF CHAUCER (1975); C.S. LEWIS, THE ALLEGORY OF LOVE (1953); C. MORRIS, THE DISCOVERY OF THE INDIVIDUAL 1050-1200 (1972); D. ROBERTSON, JR., A PREFACE TO CHAUCER 391-503 (1962); J. STEVENS, MEDIEVAL ROMANCE (1973); M. VALENCY, IN PRAISE OF LOVE (1958). For a critique of the tradition, see D. DE ROUGEMONT, LOVE IN THE WESTERN

here explicitly absorbed into religious thought and vested by Luther and other Reformation thinkers in the marital unit alone.<sup>86</sup> In consequence, Lutheran and Calvinist thought not only regarded prostitution as immoral, but, unlike the Catholic thinkers, urged its absolute legal prohibition, because prostitution violated the moral norm that all one's emotional needs were to be satisfied in marriage alone.<sup>87</sup>

Calvinist thought, in the form of Puritanism, powerfully influenced popular attitudes toward and the legal treatment of prostitution in England and the United States. In England, Puritanism acted as a political force effectively prohibiting brothels for a short time.<sup>88</sup> As an empirical phenomenon, prostitution flourished in England due to the concurrence of the two standard background causal factors noted earlier.<sup>89</sup> During the Victorian period, a combination of religious forces and the first wave of British feminists, led by the redoubtable Josephine Butler,<sup>90</sup> frontally attacked the toleration of prostitution and the double standard of sexual morality that they perceived to underlie it; men, like women, should be compelled to observe the same standards, which the reformers assumed to be chastity or sex in marriage alone.<sup>91</sup> Among other things, these reformers secured the end of the brief British attempt at government licensing of prostitution,<sup>92</sup> which was then common in Europe.<sup>93</sup> Following the recommendations of the *Wolfenden*

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WORLD (M. Belgion trans. 1956). For later developments, see M. PRAZ, *THE ROMANTIC AGONY* (A. Davidson trans. 1933). For the relation of the tradition to the rise of the courtesan, see V. BULLOUGH, *supra* note 49, at 117-26.

<sup>86</sup> See note 84 *supra*; V. BULLOUGH, *supra* note 49, at 128-31. Calvin's view of marriage, if anything, is more romantic than Luther's. *Id.* 129-30.

<sup>87</sup> For Luther's violent attack on prostitution, see Luther, *supra* note 84, at 141-42. Correspondingly, Luther condemns homosexuality as "inhuman, satanic," *id.* 142-43. For the radical change this led to in attacking prostitution, see V. BULLOUGH, *supra* note 49, at 130-31.

<sup>88</sup> See W. SANGER, *supra* note 53, at 298.

<sup>89</sup> See text accompanying notes 68-69 *supra*; L. STONE, *supra* note 38, at 615-20.

<sup>90</sup> See generally E. BRISTOW, *VICE AND VIGILANCE* (1977); M. PEARSON, *THE AGE OF CONSENT* (1972).

<sup>91</sup> See Butler's attack on the double standard before a parliamentary commission, excerpted in M. PEARSON, *supra* note 90, at 70. The moral justifiability of the double standard had been questioned by the Roman jurist Ulpian: "It seems to be very unjust that a man demands chastity of his wife while he himself shows no example of it." ULPIAN, *DIGEST XLVIII*, 13, 5. Contemporary feminists note with regret that those aligned with Josephine Butler "did not take their understanding of every woman's fellowship with whores that bit further and investigate the potential of sexual expression for women rather than continence for men," Warner, *The Chastity Lobby*, *TIMES LITERARY SUPPLEMENT*, July 14, 1978, at 793.

<sup>92</sup> See note 90 *supra*; G. SCOTT, *supra* note 50, at 97-103.

<sup>93</sup> See generally A. FLEXNER, *supra* note 36.

*Report*,<sup>94</sup> prostitution is not itself a crime in England today, although public solicitation on the streets is prohibited.<sup>95</sup> In consequence, commerce in sexual services in England is largely negotiated through discreet advertisements in certain familiar locations and publications.<sup>96</sup>

In the United States, Puritan ideas have had much deeper impact on the legal treatment of prostitution than in England.<sup>97</sup> Calvinist ideas of companionate marriage, secularized by the combined influence of Calvinist preachers and female popular novelists,<sup>98</sup> developed into a reigning theory of sentimental marriage in which the asexual and more intensely spiritual wife would purify and elevate the husband's coarser worldly nature.<sup>99</sup> Drawing on these ideas, the first wave of American feminists, including Susan B. Anthony,<sup>100</sup> viewed attaining the vote as a means to secure expression in American politics of the higher spiritual vision that was uniquely feminine. This vision took the form of "purity leagues" that frontally attacked first slavery, and then alcoholism and prostitution.<sup>101</sup> The consequence of the latter attack was not merely the end of brief American experiments with licensing prostitution<sup>102</sup> and the decisive rejection of the sometimes eloquent arguments of American proponents of licensing,<sup>103</sup> but the criminalization throughout the nation of prostitution per se.<sup>104</sup> Today, of the American states, only Nevada permits local communities to allow prostitution.<sup>105</sup>

In continental Europe, the pattern of broad state toleration of prostitution was set in the early 1800's by the Napoleonic li-

<sup>94</sup> WOLFENDEN REPORT, *supra* note 1. See note 31 *supra*.

<sup>95</sup> See generally A. SION, *supra* note 34, at 52.

<sup>96</sup> *Id.* 64-72. Other forms of solicitation do occur in certain quasi-public places. *Id.* 54-64.

<sup>97</sup> See V. BULLOUGH, *supra* note 49, at 187-89.

<sup>98</sup> See A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1977).

<sup>99</sup> The underlying ideal appears to have been based on "stereotypes of ideal feminine virtue," *id.* 157, which ahistorically celebrated "the romance of domestic management," *id.* 185. In medical literature current in Victorian America, these ideas were expressed by the evolutionary purification of sexual feeling into asexual sentiment that women allegedly epitomized. See J. HALLER & R. HALLER, *THE PHYSICIAN AND SEXUALITY IN VICTORIAN AMERICA* 126-27 (1974).

<sup>100</sup> For Anthony's involvement with the aims of the purity leagues, see D. PIVAR, *PURITY CRUSADE* 51-52 (1973).

<sup>101</sup> See generally *id.*

<sup>102</sup> See G. SCOTT, *supra* note 50, at 103-07.

<sup>103</sup> See generally W. SANGER, *supra* note 53.

<sup>104</sup> For the history of this movement in the twentieth century, see C. WINICK & P. KINSIE, *supra* note 36, at 211-43. For previous history, see V. BULLOUGH, *supra* note 49, at 187-98.

<sup>105</sup> See note 31 *supra*; C. WINICK & P. KINSIE, *supra* note 36, at 221-23.

censing of brothels.<sup>106</sup> Licensing of prostitution continued throughout Europe into this century.<sup>107</sup> Growing concern for the alleged "white slave trade" in women and girls<sup>108</sup> led the League of Nations<sup>109</sup> and later the United Nations<sup>110</sup> to call for the abolition of licensed brothels, which were claimed to be the main sources of regular demand for the international commerce in women and girls. These international conventions, in conjunction with feminist arguments against the degree to which licensing unjustly regulated and stigmatized the lives of prostitutes,<sup>111</sup> led to the abolition of state licensing in Europe.<sup>112</sup> Although prostitution itself is not criminal in Europe, forms of solicitation and place of business are subject to various kinds of regulations.<sup>113</sup>

<sup>106</sup> See W. SANGER, *supra* note 53, at 139-54; G. SCOTT, *supra* note 50, at 96-97

<sup>107</sup> See note 93 *supra*.

<sup>108</sup> See V. BULLOUGH, *supra* note 49, at 173-85.

<sup>109</sup> See International Agreement for the Suppression of the "White Slave Traffic," March 18, 1904, 35 Stat. 1979, T.S. No. 496, 1 L.N.T.S. 83; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 116 B.F.S.P. 547, 9 L.N.T.S. 415.

<sup>110</sup> See Protocol Amending the International Agreements and Conventions on the White Slave Traffic, May 4, 1949, 2 U.S.T. 1997, T.I.A.S. No. 2332, 30 U.N.T.S. 23; Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children of Sept. 30, 1921, Nov. 12, 1947, 14 B.F.S.P. 871, 53 U.N.T.S. 13; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, March 21, 1950, 157 B.F.S.P. 482, 96 U.N.T.S. 271.

<sup>111</sup> See M. PEARSON, *supra* note 90, at 58-83.

<sup>112</sup> See H. BENJAMIN & R. MASTERS, *supra* note 43, at 415-27; C. WINICK & P. KINSIE, *supra* note 36, at 269-80.

<sup>113</sup> Consider, for example, France, Netherlands, and West Germany. The French Penal Code contains provisions prohibiting procuring, pandering, and pimping, THE FRENCH PENAL CODE art. 334 (G. MUELLER ed. 1960), as well as keeping, or assisting one in keeping, a house of prostitution, *id.* art. 335; but the act of prostitution itself is not illegal. Solicitation is a simple misdemeanor punishable by no more than a small fine and a jail term of several days. J. MANCINI, *supra* note 36, at 64-65. It is interesting to note that when the French Interior Minister ordered a nationwide crackdown on vice in 1975, which was followed by a brief crackdown on prostitutes in that country, the prostitutes went on strike and also commenced sit-in protests in various churches. TIME, June 16, 1975, at 33. The prostitutes were demanding decriminalization of solicitation as well as social security and old age benefits. NEWSWEEK, June 23, 1975, at 42. Interestingly, councilperson Marthe Richard, who sponsored the abolition of France's licensing of brothels, is now at the center of the movement to reinstitute houses of prostitution. See International Herald Tribune, Aug. 25-26, 1973, at 5; N.Y. Times, Aug. 16, 1970, at 13; TIME, Nov. 9, 1970, at 30.

In Holland, any promotion of a brothel or habitual procurement of a person into prostitution is illegal, WETBOEK VAN STRAFRECHT (Code of Criminal Law of Holland) art. 250 (1973); and pimping is illegal, *id.* art. 432. Although the Code of Criminal Law of Holland contains no prohibition of prostitution per se, local government regulations do so. While most outlaw all prostitution, the large cities permit it in certain districts of the city; even in such areas, regulations are imposed. For example, an article of the *Regulations of Amsterdam* prohibits prostitution in certain enumerated areas of the city and solicitation for purposes of prostitution in all sections of the city, including the districts where prostitution is allowed. REGULATIONS OF AMSTERDAM art. 223 (1973). For a detailed description of the red-light

## II. THE ARGUMENTS FOR THE CRIMINALIZATION OF PROSTITUTION

In order to understand the uniquely American practice of the criminal prohibition of prostitution per se, we must take seriously the four arguments familiarly offered in its defense: (1) criminogenesis; (2) the control of venereal disease; (3) the intrinsically immoral and degrading nature of commercial sex; and (4), cognate to (3), the self-destructive or debilitating nature of prostitution. Of these arguments, (1) and (2) do not justify absolute criminal prohibitions; therefore, the gravamen of the argument for criminalization turns, as we shall see, on the proper weight to be given to (3) and (4).

### A. *Criminogenesis*

The argument has been made that the criminal prohibition of prostitution is justified because of the number of crimes, such as theft and assault of patrons, trafficking in heroin, and the enlarged scope of organized crime operations,<sup>114</sup> which are said to occur incident to prostitution and of which prostitution is alleged to be the

district known as Zeedijk, located in one of the oldest centers of Amsterdam, see A. MANKOFF, *MANKOFF'S LUSTY EUROPE* 119-21 (1974). The effects of the national and local legislation are elimination, as in England, of the obtrusive solicitation aspects of prostitution by disallowing solicitation everywhere and prostitution in many areas, and protection of the prostitute from exploitation by pimps or the madams of traditional brothels.

In West Germany, there are controls on procuring and pandering, GERMAN PENAL CODE OF 1871, ch. 13, §§ 180-181 (G. Mueller ed. 1961), and on pimping, *id.* ch. 13, § 181a, but prostitution itself is not illegal. Those involved in the commission of prostitution are subject to various strictures, which include prohibitions of blatant annoyance to the public at large, *id.* ch. 13, § 183, and of various forms of obtrusive solicitation and acts of prostitution carried out near churches, schools, or children. They also include ordinances passed by municipalities aimed at repressing all prostitution within their boundaries. *Id.* ch. 29, § 361(6). The federal restrictions on houses of prostitution are complemented by state and local proscriptions which are more particular in nature. Houses of prostitution are allowed if they concentrate the prostitutes in such fashion as to make them controllable and if the community allows the houses to exist. The state governments of the federal republic have some degree of veto power over the existence of houses in its various communities, the extent of the veto power varying with the size of the community (in smaller communities prostitution may be prohibited entirely; in larger communities, in parts of the community only). Art. 3 Zehntes, Strafrechtsänderungsgesetz, April 7, 1970, BGBl I 313. The local governmental unit generally imposes ordinances of its own on the prostitutes and the brothel, including regular visits by prostitutes to a venereal disease inspection center and provisions as to hours and days open for business. Accordingly, the modus operandi of the West German prostitute is dependent on the combination of laws in effect in the particular political subdivision in which the prostitute operates. In several areas of West Germany, notably Hamburg and West Berlin, various forms of sexual service are readily available. For a description of the Hamburg forms of regulated prostitution, see A. SION, *supra* note 34, at 37-41.

<sup>114</sup> See M. PLOSCOWE, *supra* note 37, at 247; G. SHEEHY, *HUSTLING* 16 (1973).

genesis.<sup>115</sup> None of these considerations in fact justifies the criminalization of prostitution; indeed, to the contrary, criminalization itself fosters these evils by forcing prostitutional activities into the clandestine criminal underground, the covertness of which breeds incidental crime.<sup>116</sup> If prostitution were tolerated by the law in certain areas of the community, as, for example, it is in West Germany and the Netherlands,<sup>117</sup> the public visibility of prostitution would enable the police to cope more effectively with whatever violence or fraud exists. Patrons would be more likely to complain candidly to the police, and, conversely, prostitutes themselves would be more likely to bring to police attention the violence or fraud sometimes directed against them by patrons or pimps.<sup>118</sup> Similarly, the connections between prostitution and heroin traffic<sup>119</sup> are probably fostered, not combatted, by criminalization of the former. The effects of the criminal stigma and enforced covertness probably encourage or at least reinforce dependencies on narcotics<sup>120</sup> and certainly make more difficult the detection and possible control of addiction among prostitutes.<sup>121</sup> The better detection of ancillary crimes that would result from decriminalization would also promote more rational handling of the heroin traffic. Finally, the association of prostitution with organized crime is clearly fostered, not combatted, by criminalization. Prostitutes naturally seek protection from the criminal law by whatever means they can. Certainly, with the American prohibition of brothels, prostitutes have been practically driven for self-protection into alternative arrangements, including those with pimps.<sup>122</sup> In fact,

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<sup>115</sup> See, e.g., B. KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 609 (1954).

<sup>116</sup> See Esselstyn, *Prostitution in the United States*, in *SEX AND SOCIETY* 115 (J. Edwards ed. 1972).

<sup>117</sup> See note 113 *supra*.

<sup>118</sup> See Burstin & James, *Prostitution in Seattle*, 6 WASH. ST. B. NEWS Aug./Sept., 1971, at 5, 28. To the extent that arguments for criminalization of prostitution are based on deterrence of violence, they are overinclusive in light of increasing evidence of violence within the marriage relationship. Clearly we would not consider a prohibition on marriage to combat this violence; similarly with prostitution, alternatives to criminalization could adequately protect both prostitute and client.

<sup>119</sup> "Of the nondrug crimes, shoplifting, burglary, and prostitution account for the largest proportion of addict income used for drug purchases—perhaps 40 to 50 per cent," J. WILSON, *THINKING ABOUT CRIME* 139 (1975) (footnote omitted).

<sup>120</sup> See C. WINICK & P. KINSIE, *supra* note 36, at 67-69. See also E. SCHUR, *LAW AND SOCIETY* 134 (1968).

<sup>121</sup> See C. WINICK & P. KINSIE, *supra* note 36, at 216.

<sup>122</sup> "To the extent that decriminalization of prostitution would reduce the functional necessity of the pimp in the prostitute's livelihood, this causal association would be eliminated." Jennings, *supra* note 30, at 1244 (footnote omitted).

authoritative recent studies indicate that organized crime has little current role in prostitution.<sup>123</sup>

Arguments of criminogenesis are generally circular and question-begging: they argue for criminalization of prostitution on the basis of evils that criminalization, not prostitution, fosters. If there are crimes associated with prostitution, they are more rationally attacked by decriminalization and by criminal statutes directed at the evils themselves, not by overbroad statutes which actually encourage what they claim to combat.

### B. Venereal Disease

Venereal disease is a significant contemporary health problem. In the 1970's, gonorrhea was first and syphilis third among reported communicable diseases in America.<sup>124</sup> The appearance of penicillin-resistant gonococcus presents new obstacles to the control of venereal disease.<sup>125</sup> Such control is rendered even more difficult by the absence of any simple, effective antibiotic prophylaxis for venereal disease<sup>126</sup> and by the fact that sufferers of this disease, unlike those of other diseases, do not develop an immunity from it for the future.<sup>127</sup>

Nevertheless, it is a mistake to infer from the extent of this problem that there is more pressing need now than ever before for criminal prohibitions of prostitution. Recent data show that prostitutes are responsible for no more than five percent of all venereal disease;<sup>128</sup> the great majority of prostitutes do not suffer from the disease, and most tend to take more precautionary measures than does the promiscuous amateur.<sup>129</sup> Those age groups in which the

<sup>123</sup> The President's Commission on Law Enforcement and Administration of Justice declared in 1967: "Prostitution . . . play[s] a small and declining role in organized crime's operations," PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 4 (1967).

<sup>124</sup> See AMERICAN SOCIAL HEALTH ASSOCIATION, TODAY'S VD CONTROL PROBLEM 54 (1974). There are an estimated three to four million cases of gonorrheal infection per year in the United States. Williams, *Diagnosing Disseminated Gonorrhea*, MED. ASPECTS HUMAN SEXUALITY, May, 1977, at 57.

<sup>125</sup> Siegel & Wiesner, *Penicillin-Resistant Gonococcus*, MED. ASPECTS HUMAN SEXUALITY, May, 1977, at 105.

<sup>126</sup> Felman, *VD Prophylaxis via Drugs*, MED. ASPECTS HUMAN SEXUALITY, May, 1977, at 100.

<sup>127</sup> See, e.g., Vance, *Immunological Factors in Gonorrhea*, MED. ASPECTS HUMAN SEXUALITY, May, 1977, at 106-07.

<sup>128</sup> C. WINICK & P. KINSIE, *supra* note 36, at 64; Note, *supra* note 30, at 254-55.

<sup>129</sup> P. WILSON, THE SEXUAL DILEMMA 91 (1971). Most prostitutes examine their clients for signs of venereal disease and use prophylactics, safeguards rarely used by non-commercial sex partners. James, *Answers to the 20 Questions Most Frequently Asked About Prostitution*, in THE POLITICS OF PROSTITUTION 50 (J. James,

venereal disease rate is the highest are those in which patronage of prostitutes is the lowest.<sup>130</sup> The increase in venereal disease appears to be due to the increase in sexual activity among the young,<sup>131</sup> who are unaware of the causes of such infections and who fail to secure prompt treatment or to inform their sex partner about having contracted the disease.<sup>132</sup>

Arguments have been made in the past justifying criminalization on the ground that declines in venereal disease levels are causally associated with prohibitions of prostitution.<sup>133</sup> The cases adduced in support of the claim of causality are probably better explained by the general availability and widespread use of penicillin in its treatment.<sup>134</sup> In any event, the disappearance of prostitution today would still leave about ninety-five percent of the cases of venereal disease intact. In Sweden, for example, where there is virtually no prostitution,<sup>135</sup> venereal disease remains a serious problem.<sup>136</sup> Thus, in order to treat this problem, regulations or prohibitions would have to be directed against all sexual activity,<sup>137</sup> but absolute prohibitions in this area would clearly be rejected as unjustly overbroad. A regulatory program of compulsory examination of all sexually active people would be both impractical and unacceptable. The preferred course would appear to be massive public education concerning appropriate precautionary measures and safe-

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J. Withers, M. Haft & S. Theiss eds. 1975). In addition, many streetwalkers, and virtually all "call girl" and brothel types, wash their customers' and their own genitals incident to their check for sores or discharge. M. STEIN, *LOVERS, FRIENDS, SLAVES . . . THE NINE MALE SEXUAL TYPES* 18 (1974).

<sup>130</sup> While the 15 to 30-year old age group was found to be responsible for 84% of the reported cases of gonorrhea in the state of Washington, prostitutes interviewed in Seattle revealed that 70% of their customers are between 30 and 60 years of age. See Burstin & James, *supra* note 118, at 8 n.22.

<sup>131</sup> See L. SAXTON, *THE INDIVIDUAL, MARRIAGE, AND THE FAMILY* 86 n.30 (1972); Chang, *Quiz: Gonorrhea and Sexual Behavior*, *MED. ASPECTS HUMAN SEXUALITY*, April, 1977, at 48, 50; Fouser, *Introduction to EDUCATIONAL BROADCASTING CORPORATION, VD BLUES* 12 (1972).

<sup>132</sup> See Jennings, *supra* note 30, at 1243. Reticence when VD is contracted from a party outside the central relationship is a complicating factor. See *Viewpoints: How Do You Extend Treatment to the Spouse of a Patient with VDP?*, *MED. ASPECTS HUMAN SEXUALITY*, June, 1977, at 89.

<sup>133</sup> See, e.g., Turner, *The Suppression of Prostitution in Relation to Venereal Disease Control in the Army*, 7 *FED. PROB.*, April-June, 1943, at 8; Quisenberry, *Eight Years After the Houses Closed: Was "Controlled" Prostitution Good for Hawaii?*, 39 *J. SOC. HYGIENE* 312, 313-15 (1953); Williams, *The Suppression of Commercialized Prostitution in the City of Vancouver*, 27 *J. SOC. HYGIENE* 364, 369-71 (1941).

<sup>134</sup> See A. SMITH & H. POLLACK, *SOME SINS ARE NOT CRIMES* 30 (1975).

<sup>135</sup> See note 68 *supra*.

<sup>136</sup> L. BULTENA, *DEVIANT BEHAVIOR IN SWEDEN* 154-55 (1966).

<sup>137</sup> Clapp, *Social Treatment of Prostitutes and Promiscuous Women*, 7 *FED. PROB.*, April-June, 1943, at 23.



guards to combat the incidence of the disease.<sup>138</sup> In any event, there is no defensible reason, premised on venereal disease prophylaxis alone, justifying the absolute prohibition of commercial sex.

We have seen that it is disingenuous to suppose that the basis for the American criminal prohibition of prostitution rests on secular concerns for criminogenesis and venereal disease control. Neither argument can justify such prohibitions; indeed, serious concern with the evils adduced by one of the arguments would require the opposite conclusion. These arguments are, at best, post hoc empirical makeweights for justifications of a quite different order, namely, moralistic and paternalistic arguments of a peculiarly American provenance. In order to deal reasonably with the justifications for such criminal prohibitions, it is these arguments that we must critically examine.

### C. Moral Arguments

The moral argument for the criminal prohibition of prostitution was well summarized by the Supreme Court in 1908:

[Prostitution] refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."<sup>139</sup>

It is noteworthy that, consistent with the traditional definition of prostitution as female promiscuity,<sup>140</sup> the Supreme Court did not place weight on the element of commercialism per se; the gravamen of the moral evil, rather, is that a *woman* should engage in sex not only unchastely but *indiscriminately*, in complete isolation from sentimental attachments of a kind perfected in monogamous mar-

<sup>138</sup> See Jennings, *supra* note 30, at 1243.

<sup>139</sup> United States v. Bitty, 208 U.S. 393, 401 (1908) (construing an act of Congress prohibiting the importation of any woman or girl for the purposes of prostitution) (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)), *cited with approval* in Caminetti v. United States, 242 U.S. 470, 486-87 (1917) (power of Congress under the commerce clause enables it to forbid interstate transportation of women for immoral purposes, even if unaccompanied by pecuniary gain).

<sup>140</sup> See notes 36-38 *supra* & accompanying text.

riage. Prostitution is a moral evil because, in the Court's words, the "lives and example of such persons are in hostility" to a certain enormously powerful vision of women, their sexuality, and the role of marriage. We have sketched the origins of this vision already,<sup>141</sup> and will have cause to return to it in more detail below.<sup>142</sup>

In contemporary circumstances, however, the force of this moral vision has been somewhat reinterpreted in line with the growing acceptability of non-commercial sex outside marriage.<sup>143</sup> For many, the objection to prostitution would today be based not on female promiscuity, but on the transformation of sex into an impersonal encounter with no emotional significance by means of commercialization.<sup>144</sup> This objection is sometimes put in Marx's terms, such that prostitution is said to be the *reductio ad nauseam* of capitalist commercialization of all personal relationships.<sup>145</sup> Some contemporary feminists generally reject the Victorian model of female asexuality, but still perceive prostitution as the ultimate degradation of women into sexual objects or commodities.<sup>146</sup> Finally, the contemporary form of the moral objection has been put in terms of Kantian ethics: commercial sex is allegedly morally wrong per se because it involves the alienation of the body to the will of another, and thus undermines the ultimate roots of the integrity of moral personality.<sup>147</sup> Whatever the precise form of the argument, the sense of it rests on a vision of the necessary moral unity of sex and romantic love. This fact explains why many suppose that consensual adult non-commercial sex can no longer be regarded as immoral per se, but still condemn comparable forms of commercial sex.<sup>148</sup>

Even if no other moral judgment may appropriately be made about the probity of certain conduct, we may still believe that

<sup>141</sup> See notes 83-104 *supra* & accompanying text.

<sup>142</sup> See notes 254-61 & 299-304 *infra* & accompanying text.

<sup>143</sup> See note 47 *supra*.

<sup>144</sup> See note 33 *supra*.

<sup>145</sup> See K. MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, at 133 (M. Mulligan trans. 1964), where he describes prostitution as "only a *specific* expression of the *general* prostitution of the *labourer*." Engels argues that only the abolition of private property will allow the development of romantic love. See F. ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE 75-89 (1972).

<sup>146</sup> See S. BROWNMILLER, AGAINST OUR WILL 390-92 (1975).

<sup>147</sup> See C. FRIED, RIGHT AND WRONG 142-43 (1978); I. KANT, LECTURES ON ETHICS 162-71 (L. Infield trans. 1963) (first delivered 1780).

<sup>148</sup> See note 33 *supra*. Troubling intermediate cases do exist, such as non-commercial acts of "pure" lust, but the extremes are generally the objects of settled moral judgment.

undertaking such conduct is sufficiently irrational that we have moral title to interfere on paternalistic grounds. Paternalistic arguments against prostitution have taken two forms: the first depicts prostitution as intrinsically degrading and is often a restatement of the moral arguments just discussed;<sup>149</sup> the second emphasizes various respects in which choosing to be or to patronize a prostitute is harmful in empirically ascertainable ways. With respect to the prostitute, various kinds of harms have been adduced, including a much-shortened life,<sup>150</sup> venereal disease,<sup>151</sup> mental deficiency or neurotic impairment,<sup>152</sup> incapacity for orgasm,<sup>153</sup> and vulnerability to exploitation by pimps.<sup>154</sup> With respect to patrons, alleged harms include venereal disease,<sup>155</sup> neurotic impairment,<sup>156</sup> and sexual dysfunction.<sup>157</sup> The criminal prohibition of prostitution has thus been justified on the basis of protecting people from these kinds of self-inflicted harms.

Obviously, the critical assessment of this argument, as well as the moral argument for the criminalization of prostitution, depends upon an assessment of many claimed matters of fact. But it is equally important to articulate the proper form of moral or paternalistic reasoning to which these arguments appeal, for only such a critical assessment will enable us to understand how facts are relevant at all. Accordingly, we must turn to moral and normative theory to explicate the logical structure that reasoning in each case must take; then, we will be able critically to assess these arguments and the matters of fact to which they appeal. Such an assessment is crucial to the question of the justifiability of the criminalization of prostitution, for criminal prohibitions in this area rest on the normative arguments sketched above.

<sup>149</sup> See A. FLEXNER, *supra* note 36, at 12-13. Cf. M. Ploscowe's invocation of the argument made in *United States v. Bitty*, 208 U.S. 393, 401 (1908) (quoted at text accompanying note 139 *supra*): "Men who frequent prostitutes can hardly obtain any elevated ideas as to the position of women in our culture from such contacts." M. PLOSCOWE, *supra* note 37, at 247.

<sup>150</sup> Sanger claims that, on the average, prostitutes have a four-year life from the time they begin their careers. W. SANGER, *supra* note 53, at 455-56.

<sup>151</sup> M. PLOSCOWE, *supra* note 37, at 245-46.

<sup>152</sup> George, *Legal, Medical and Psychiatric Considerations in the Control of Prostitution*, 60 MICH. L. REV. 717, 746-52 (1962).

<sup>153</sup> *Id.* 748.

<sup>154</sup> M. PLOSCOWE, *supra* note 37, at 247.

<sup>155</sup> A. FLEXNER, *supra* note 36, at 12.

<sup>156</sup> George, *supra* note 152, at 758-60.

<sup>157</sup> H. GREENWALD, *THE ELEGANT PROSTITUTE* 221-37 (1970).

### III. THE CONCEPTS OF HUMAN RIGHTS AND THE PUBLIC MORALITY UNDER CONSTITUTIONAL DEMOCRACY

In order to articulate the proper form of moral analysis necessary to evaluate these arguments for criminalization, we shall present an argument in the following stages: (1) a description of the rights thesis institutionalized in American constitutional democracy; (2) an explication of the basic moral values underlying the rights thesis; (3) the role of contractarian theory in the determinate specification of these values; and (4) an analysis of the "public morality" required by these values.

#### A. *The Rights Thesis*

American constitutional democracy, resting on the power of judicial review of constitutionality, is marked by two salient structural features. First, such review is intrinsically countermajoritarian. The Constitution clearly was intended to put legal constraints on the exercise of majority power, whether through legislators or through executives. Second, the basis of this countermajoritarian appeal appears to be an idea of human rights which, by definition, government has no moral title to transgress. Under the constitutional order, certain human rights of persons are elevated into legally enforceable rights, so that if a law infringes on certain of these moral rights, the law is not valid.<sup>158</sup>

Ronald Dworkin has recently explained these central structural features of constitutional adjudication in terms of his rights thesis,<sup>159</sup> which rests on an analytical claim regarding the deliberative force of rights as trump cards over other kinds of considerations. He argues that the notion of a person having the right to "x" against the state is equivalent to the notion that there is a reason for the state to accord "x" to that person which trumps other countervailing considerations. Thus, it is right for the state to accord "x" despite independent utilitarian reasons for not doing so. For example, to say that black persons have a right to unsegregated public education is to say that it is wrong for the state not to accord blacks such education notwithstanding the fact that, given public antipathy and resistance to desegregation, utilitarian considerations might dictate that the greatest happiness of the greatest number is advanced by not desegregating.

In order to understand the form of the rights thesis in American constitutional law, we must take seriously the radical vision

<sup>158</sup> See D.A.J. RICHARDS, *MORAL CRITICISM*, *supra* note 18, at 39-56.

<sup>159</sup> See R. DWORKIN, *supra* note 18, at 82-90.

of human rights which the Constitution was intended to express and in terms of which the text of the Constitution must be interpreted.<sup>160</sup> The idea of human rights was a major departure in civilized moral thought. When Locke, Rousseau, and Kant progressively gave the idea its most articulate and profound theoretical statement, they defined a way of thinking about the moral implications of human personality that was radically new. The practical political implications of this way of thinking are a matter of history. The idea of human rights was one among the central moral concepts in terms of which a number of great political revolutions conceived and justified their demands.<sup>161</sup>

Once introduced, the idea of human rights could not be contained. Its institutionalization in American constitutional law is evidenced (1) by the countermajoritarian character of constitutional rights, (2) by the ways in which such rights are weighed, and (3) by the force of such rights in justifying disobedience to law. First, although the will of the majority, expressed in political bargaining and pressure-group influence on legislatures and executives, approximates the course of governmental conduct which maximizes the greatest happiness of the greatest number, considerations of human rights are, by definition, trump cards over such utilitarian considerations. Accordingly, judicial review, premised on the enforcement of a charter of human rights denied by majoritarian institutions, institutionalizes the rights thesis.<sup>162</sup> Second, commitment to the rights thesis is further shown by the fact that courts, when they vindicate claims of human rights, often do not permit such rights to be weighed against utilitarian or quasi-utilitarian considerations, but only against other rights. The weighing of *rights* cannot be a sham appeal to vague and speculative consequences of a kind that the rights thesis repudiates.<sup>163</sup> Finally, the force of the

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<sup>160</sup> I call this vision the unwritten constitution. See Richards, *Sexual Autonomy*, *supra* note 12. See also Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

<sup>161</sup> The political revolutions of the seventeenth and eighteenth centuries witnessed such landmarks as the English Petition of Rights (1627), the Habeas Corpus Act (1679), the American Declaration of Independence (1776), the United States Constitution (1787), the American Bill of Rights (1791), and the French Declaration of the Rights of Man and Citizen (1789).

<sup>162</sup> See R. DWORKIN, *supra* note 18, at 131-49 (ch. 5, "Constitutional Cases"). Although the idea of judicial review is American in origin, it did have European antecedents. See Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966). For comparative law contrasts of different approaches, see M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

<sup>163</sup> See R. DWORKIN, *supra* note 18, at 184-205 (ch. 7, "Taking Rights Seriously").

rights thesis in American constitutional law is shown by the fact that violation of constitutional rights establishes not merely a permission but an affirmative right,<sup>164</sup> and arguably even a duty, to disobey laws challenged on constitutional grounds. The legal notion of an affirmative right and even duty to disobey laws violating constitutional rights derives from the force of the case or controversy requirement for federal litigation, which typically accords standing to make constitutional arguments about violations of human rights only to those who have disobeyed the law in question and are being, or are about to be, prosecuted for violations thereof.<sup>165</sup> Accordingly, the vindication and elaboration of constitutional rights requires willingness to disobey the law on a suitable occasion.

In our own time, the concept of human rights has been extended beyond the original civil and political rights to include a number of economic and social rights<sup>166</sup> and has, in the international sphere, been the central idea in terms of which colonial independence and post-colonial interdependence have been conceived and discussed.<sup>167</sup> Obviously, the philosophical analysis of human rights is of central normative importance.

### B. *Autonomy and Equality as the Values Underlying the Rights Thesis*

To think of persons as possessing human rights is to commit oneself to two crucial normative assumptions: first, that persons have the capacity to be autonomous, and second, that persons are entitled, as persons, to equal concern and respect in exercising that capacity. When we accept these assumptions, we accept also the

<sup>164</sup> See *id.* 206-22 (ch. 8, "Civil Disobedience").

<sup>165</sup> See *id.* 212-13, 219-20. Dworkin fails to develop this point. For an elaboration, see M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 147-70 (1973).

<sup>166</sup> See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. Doc. A/810 (1948), art. 22 (right to social security); art. 23 (rights to work); art. 24 (right to leisure); art. 25 (rights to adequate standard of living and child care); art. 26 (rights to education); art. 27 (rights to participate in cultural life), reprinted in *BASIC DOCUMENTS IN INTERNATIONAL LAW* 145-49 (2d ed. I. Brownlie ed. 1972). For a further elaboration of rights of these kinds, see *International Covenant on Economic, Social and Cultural Rights*, 21 U.N. GOAR, 2 Annexes (Agenda Item 62), U.N. Doc. A/6546, para. 627 (1966), reprinted in *id.* 151-61. For a critique of viewing these kinds of claims as human rights, see M. CRANSTON, *WHAT ARE HUMAN RIGHTS?* (1962). Cf. C. FRANKEL, *HUMAN RIGHTS AND FOREIGN POLICY* (1978).

<sup>167</sup> For a useful discussion of the force and currency of the idea of national self-determination in international law, see Franck & Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT'L L. & POL. 331 (1976); Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694 (1976).

rights thesis. After a brief explication<sup>168</sup> of these concepts, we will be able to clarify how they underlie and justify the rights thesis.

Autonomy, in the sense fundamental to the theory of human rights, is an empirical assumption about the capacities, developed or undeveloped, of persons. Persons have a range of capacities that enables them to develop, to want to act on, and in fact to act on higher-order plans of action that take as their object the individual's life and the way it is lived.<sup>169</sup> For example, persons establish various kinds of priorities and schedules for the satisfaction of first-order desires. The satisfaction of certain wants (for example, hunger) is regularized; the satisfaction of others is sometimes postponed (for example, sexual gratification may be delayed in order to develop and educate certain competences). Indeed, persons sometimes gradually eliminate certain self-criticized desires (smoking) or over time encourage the development of others (cultivating one's still-undeveloped capacities for love and tender mutual response).<sup>170</sup> Sometimes the exercise of such capacities of autonomy is rational or morally desirable; at other times it is irrational or morally wrong. Nevertheless, autonomy gives to persons the capacity to call their lives their own. The development of these capacities for separation and individuation is, from the earliest life of the infant, the central developmental task of becoming a person.<sup>171</sup>

The concept of equality is based upon this capacity for autonomy. Because autonomy is so fundamental to the concept of what it is to be a person and because all are equal in their possession of it, all persons are entitled to equal concern and respect, as persons.

It is these two concepts of autonomy and equality, then, that constitute the notion of human rights. To attribute human rights to persons is to assess and criticize human institutions and relationships in terms of whether those institutions and relationships conform to principles of obligation and duty<sup>172</sup> that guarantee to each person equal concern and respect in exercising autonomy, the effective capacity for final responsibility in establishing the integrity of their lives. The vision, ultimately, is one of persons who, because of the effective exercise of their autonomy, are able to iden-

<sup>168</sup> For expanded versions of the argument of this section, see Richards, *Prolegomenon*, *supra* note 24; Richards, *Sexual Autonomy*, *supra* note 12, at 709-16.

<sup>169</sup> See D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 65-68.

<sup>170</sup> On the relation of the person to rational choice, including choices of these kinds, see D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 27.

<sup>171</sup> See M. MAHLER, F. PINE, & A. BERGMAN, *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT* (1975). See also L. KAPLAN, *ONENESS AND SEPARATENESS* (1978).

<sup>172</sup> For an account of principles of obligation and duty, see D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 92-106.

tify their lives as their own, having thus realized the inestimable moral and human good of having chosen one's life as a free and rational being.<sup>173</sup> Effective autonomy in this sense may, of course, be perversely abused; it is surely compatible with shaping personality and character structures that are undesirable in myriad ways. Still, autonomy is the sine qua non for exercising the human capacity for rational choice regarding one's life, in terms of which we define our notions of the good.<sup>174</sup>

Accordingly, the revolution in human thought represented by the idea of human rights derives from the fact that such rights recognize and foster equal concern and respect for the exercise of the autonomous capacities of persons.<sup>175</sup> It is no accident that the progressive enlargement of the rights thesis, since Rousseau and Kant, has rested on an enlarged conception of the class of humans believed to have autonomous capacities (for example, blacks and women) as well as of the kinds of capacities that can be autonomously exercised (for example, sexual autonomy). In fact, of course, people differ widely in their effective autonomy—the actual exercise of autonomous capacities. The rights thesis, however, does not rest on actual autonomy, but only on the capacity for it.<sup>176</sup> When John Stuart Mill eloquently argued against the subjection of women, he accepted *arguendo* that the women of his period were not actually autonomous.<sup>177</sup> His arguments for their rights rested not on their actual condition, which he conceded to be in large part slavishly dependent and emotionally vicarious on men, but on their

<sup>173</sup> A similar idea underlies John Stuart Mill's *On Liberty*, especially chapter three. J.S. MILL, *ON LIBERTY* (1859). For the idea of moral title to one's self, see Reiman, *Privacy, Intimacy, and Personhood*, 6 *PHILOSOPHY & PUB. AFF.* 26 (1976).

<sup>174</sup> For a statement of the classic position of the good as the object of rational choice, with supporting references to the classical literature, see D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 286-90.

<sup>175</sup> Autonomy has often been confused with a number of theses from which it is distinguishable, such as causal indeterminism, wilfulness, egoism, and Enlightenment psychology. I have tried to explore these distinctions in Richards, *Prolegomenon*, *supra* note 24.

<sup>176</sup> In addition, the concept of capacity, relevant to autonomy and personhood, should be demarcated from the quite different idea of potentiality. Persons, with the capacity for autonomy, have rights; other creatures or things, who may be potential persons, do not have rights, although they may have moral relevance on other grounds. Both capacities and potentialities justify *can*-statements, but they do so in logically incommensurable ways. See generally G. RYLE, *THE CONCEPT OF MIND* 116-53 (1949). It is an ontological and category mistake to extend the idea of personhood into potentialities (in particular, human fetuses in the early stages of pregnancy). For amplification of this view, see Engelhardt, *The Ontology of Abortion*, in *MORAL PROBLEMS IN MEDICINE* 318 (S. Gorovitz ed. 1976); Tooley, *A Defense of Abortion and Infanticide*, in *THE PROBLEM OF ABORTION* 51 (J. Feinberg ed. 1973).

<sup>177</sup> See generally J.S. MILL, *THE SUBJECTION OF WOMEN* (1869).



capacities for autonomy, however blunted and disfigured by traditional prejudices and conventions. Correspondingly, when people cogently vindicate the rights of putatively primitive people, their arguments do not rest on the idea that such people are effectively autonomous, but on the assumption that these people have the capacity for autonomy.<sup>178</sup> Even in so-called developed countries, mature people differ widely in their effective autonomy. Thus, the rights thesis does not rest on effective autonomy, nor can it ensure its existence. Perhaps nothing can ensure effective autonomy. The process of achieving it is often painful, and the process of maintaining it never completely secure. But the rights thesis rests on the idea that seeing people in this way and regulating our conduct and institutions accordingly can facilitate the moving vision of persons as equal and autonomous, with servility and non-consensual dependence reduced to a tolerable minimum.

The moral values of autonomy and equal concern and respect explain and justify the features of the rights thesis: the character of rights as trumps over utilitarian considerations, the weighing of rights only against other rights, and the special force of rights in justifying ultimate resistance. To see people as having the capacity for autonomy and entitled to equal concern and respect in exercising that autonomy is to deny the propriety of allowing utilitarian calculations of the greatest happiness of the greatest number to override the range of significant life choices facilitated by the rights thesis and to require that considerations of rights only be weighed against considerations of rights of comparable weight. Utilitarianism, by definition, requires that the pattern of individual life choices be overridden if others are thus made better off in a way that maximizes utility over all. But this is precisely to assimilate human life choices into the judgments of one person, the sympathetic spectator whose pleasure is maximized if and only if the utilitarian principle is observed.<sup>179</sup> To treat persons in the manner required by utilitarianism is to focus obsessively on the aggregation of pleasure as the only ethically significant fact. Pleasure is treated as impersonal, and no weight is given to the separateness of the creatures who experience it. But this treatment flatly ignores the ethically crucial facts that persons experience pleasure and that pleasure has moral significance only in the context of the life a person chooses to lead. In contrast, the rights thesis rests on re-

<sup>178</sup> I take it to be an analytically distinct question whether the content of human rights varies as applied to the conditions of a primitive society. In my view, it clearly does.

<sup>179</sup> See D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 86-91.

spect for autonomy—on the integrity of the person in leading his or her life.<sup>180</sup> Accordingly, the fundamental goal of morality must be, not the impersonal aggregation of pleasure, but the assurance that persons have been guaranteed conditions requisite for the developed capacity self-critically to choose how they will live their lives; ethical principles of obligation and duty rest upon and ensure that this is so, and correlatively define human rights.

### C. Contractarian Theory and Human Rights

The task of interpreting human rights in terms of the focal values of autonomy and equal concern and respect has been substantially furthered by the recent revival of contractarian theory in the work of John Rawls.<sup>181</sup> His seminal writings explicate such rights and their institutionalization in American constitutional law in a way that the existing moral theories of constitutional theorists—utilitarianism<sup>182</sup> and value skepticism—<sup>183</sup> cannot imitate. The great early theorists of human rights—Locke, Rousseau, and Kant—whose ideas clearly influenced American constitutionalism, all invoked, explicitly or implicitly,<sup>184</sup> contractarian metaphors in explaining the concrete implications of autonomy and equal concern

<sup>180</sup> See J. SMART & B. WILLIAMS, *supra* note 20, at 77.

<sup>181</sup> J. RAWLS, *supra* note 19.

<sup>182</sup> The majoritarian appeal in Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), is implicitly utilitarian, as are Bickel's later works, A. BICKEL, *THE MORALITY OF CONSENT* (1975); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

<sup>183</sup> See generally L. HAND, *THE BILL OF RIGHTS* (1958). Cf. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970), in which a value skepticism similar to Hand's leads to a critique of moral reform through constitutional adjudication. Moral reflection and reform in the light of principles are to be replaced by unconscious moral historicism. See *id.* 174-75. These ideas represent a significant retreat from Bickel's earlier work. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Value skepticism and utilitarianism are often inextricably intertwined in the work of these theorists. The idea, invoked seminally by Holmes, appears to be that one is skeptical of any non-utilitarian ideas but that utilitarian ideas are to be invoked in any proper policy analysis of the law. For the latter, see O.W. HOLMES, *supra* note 14. For a good statement of Holmes' value skepticism as a theory of the first amendment, see his dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919). See also his famous dissenting observation: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>184</sup> Kant did not expressly invoke a contractarian model in the way Locke and Rousseau did, but he clearly suggested it. See Kant, *Concerning the Common Saying: This May Be True in Theory, But Does Not Apply in Practice* (1st ed. 1793), excerpted in *SOCIETY, LAW AND MORALITY* 159-72 (F. Olafson ed. 1961). For Locke, see his *Second Treatise* in J. LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* (1st ed. London 1689). For Rousseau, see J. ROUSSEAU, *The Social Contract or Principles of Political Right* (1st ed. Amsterdam 1762), in *THE SOCIAL CONTRACT AND DISCOURSES* (G. Cole trans. 1950).

and respect. The basic moral vision of these theorists was that human institutions and relationships should be based on equal concern and respect for personal autonomy. The requirements of this moral point of view were expressed by the idea of a just society as one governed by an agreement or social contract arrived at by the consent of all persons, starting from a position of basic equality. Rawls' contractarian model has the great virtue of showing the continuing intellectual and moral vitality of this kind of metaphor.

The basic analytic model is this: <sup>185</sup> moral principles are those that perfectly rational persons, in a hypothetical "original position" of equal liberty, would agree to as the ultimate standards of conduct that are applicable at large.<sup>186</sup> Persons in the original position are thought of as ignorant of any knowledge of their specific situations, values, or identities, but as possessing all knowledge of general empirical facts, capable of interpersonal validation, and as holding all reasonable beliefs. Since Rawls' concern is to apply this definition of moral principles to develop a theory of justice, he introduces into the original position the existence of conflicting claims to a limited supply of general goods and considers a specific set of principles to regulate these claims.<sup>187</sup>

The original position presents a problem of rational choice under uncertainty. Rational people in the original position have no way of predicting the probability that they will end up in any given situation in life. If a person agrees to principles of justice that permit deprivations of liberty and property rights and later discovers that he occupies a disadvantaged position, he will, by definition, have no just claim against deprivations that may render his life prospects meager and bitterly servile. To avoid such consequences, the rational strategy in choosing the basic principles of justice would be the conservative "maximin" strategy: <sup>188</sup> one would seek to maximize the minimum condition, so that if a person were born into the worst possible situation of life allowed by the adopted

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<sup>185</sup> J. RAWLS, *supra* note 19. See also D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 75-91.

<sup>186</sup> See J. RAWLS, *supra* note 19, at 11-22.

<sup>187</sup> If there were goods in abundant superfluity or if people were more willing to sacrifice their interests for the good of others, the need for a moral system might be significantly different or even nonexistent. For David Hume's remarkable discussion of the conditions of moderate scarcity, see D. HUME, *A TREATISE OF HUMAN NATURE* Bk. III, pt. II, § II (1st ed. 1739), reprinted in *Society, Law and Morality* 307-19 (F. Olafson ed. 1961). See also J. RAWLS, *supra* note 19, at 128.

<sup>188</sup> See J. RAWLS, *supra* note 19, at 150-61.

moral principles, he would still be better off than he would be in the worst situation allowed by other principles.

The choice of which fundamental principles of justice to adopt requires consideration of the weight assigned to general goods by those in the original position. "General goods"<sup>189</sup> are those things or conditions that all people desire as the generalized means to fulfillment of their individual life plans.<sup>190</sup> Liberty, understood as the absence of constraint, is usually considered to be one of these general goods. Similarly classifiable are powers, opportunities, and wealth.<sup>191</sup>

Among these general goods, self-respect or self-esteem, a concept intimately related to the idea of autonomy developed previously, occupies a place of special prominence.<sup>192</sup> Autonomy, seen now in the light of contractarian theory, is the capacity of persons to plan and shape their lives in accordance with changing desires and aspirations. As such, it involves such essentially human capacities as thought and deliberation, speech, and craftsmanship. The competent exercise of such abilities in the pursuit of one's life plan forms the basis of self-respect,<sup>193</sup> without which one is liable to suffer from despair, apathy, and cynicism. Thus, persons in the original position, each concerned to create favorable conditions for the successful pursuit of his life plan, but ignorant of the particulars of his position in the resulting social order, would agree to regulate access to general goods so as to maximize the possibility that every member of society will be able to achieve self-respect. Accordingly, self-respect might be thought of as the primary human good.<sup>194</sup>

Thus, Rawls' contractarian reconstruction provides an interpretation of the moral weight of autonomy (autonomy as a feature

<sup>189</sup> Rawls describes these general goods as "things which it is supposed a rational man wants whatever else he wants," J. RAWLS, *supra* note 19, at 92. The notion of rationality considered here is developed in D.A.J. RICHARDS, REASONS, *supra* note 19, at 27-48, and in J. RAWLS, *supra* note 19, at 407-16. The general view of the good is discussed in *id.* 395-452, and in D.A.J. RICHARDS, REASONS, *supra* note 19, at 286-91.

<sup>190</sup> For the notion of a life plan, see C. FRIED, AN ANATOMY OF VALUES 97-101, 155-82 (1970); J. RAWLS, *supra* note 19, at 407-16; D.A.J. RICHARDS, REASONS, *supra* note 19, at 27-48, 63-74.

<sup>191</sup> J. RAWLS, *supra* note 19, at 92. See also Richards, *Equal Opportunity*, *supra* note 24, at 41-49.

<sup>192</sup> See J. RAWLS, *supra* note 19, at 433, 440-46.

<sup>193</sup> See D.A.J. RICHARDS, REASONS, *supra* note 19, at 257, 265-68; R. WHITE, EGO AND REALITY IN PSYCHOANALYTIC THEORY (1963).

<sup>194</sup> What are here called "general goods" Rawls denominates "primary goods." In his terminology, self-respect is "the most important primary good." J. RAWLS, *supra* note 19, at 440. See also *id.* 178-80.

of the primary human good) and equality (the original position of equal liberty), and affords a decisionmaking procedure (the maxim strategy) which provides a determinate substantive account for the content of human rights as minimum conditions of human decency.

An important feature of the contractarian interpretation of autonomy is the assumption of ignorance of specific identity and the consequent requirement that a decision be reached on the basis of empirical facts capable of interpersonal validation. This assumption assures that the principles decided on in the original position will be neutral as between divergent visions of the good life, for the ignorance of specific identity deprives people of any basis for illegitimately distorting their decisions in favor of their own vision. Such neutrality, a fundamental feature of the idea of political right, ensures to people the right to choose their own lives autonomously.<sup>195</sup>

#### D. *The Concept of the Public Morality and the Criminal Law*

Our discussion of the analysis of the institutionalization of human rights in constitutional democracy has been a necessary preliminary to the explication of the proper scope of the morality that underlies the criminal law. It is an uncontroversial truth that the criminal law rests on the enforcement of "public morality" in some sense. Criminal penalties identify and stigmatize certain moral wrongs that society at large justifiably condemns as violations of the minimum boundary conditions of civilized social life.<sup>196</sup> However, little critical attention has yet been given to the proper explication of the "public morality" in the light of the human rights to which constitutional democracy is committed. Rather, legal theory has tended to acquiesce in a questionable identification of the "public morality" with social convention. Let us briefly consider<sup>197</sup> the form of this identification, the conclusive objections to it, and the alternatives.

<sup>195</sup> In later defenses of his theory, Rawls has laid great stress on the primacy of the argument for religious toleration as the paradigm for his argument. See Rawls, *Fairness to Goodness*, 84 *PHILOSOPHY REV.* 536, 539-40, 542-43 (1975); Rawls, *Reply to Alexander and Musgrave*, 88 *Q.J. ECON.* 633, 636-37 (1974). The self-conscious primacy of religious toleration in Rawls' theory is a striking correlate to the place of the free exercise and anti-establishment clauses of the first amendment.

<sup>196</sup> See, e.g., J. BUTLER, *Upon Resentment* (Sermon VIII), in 2 *THE WORKS OF JOSEPH BUTLER, D.C.L.* 136 (W. Gladstone ed. 1897) (1st ed. 1726); J. FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING* 95-118 (1970); 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 80-87, 90-93 (1883); H.M. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401, 401-06 (1958).

<sup>197</sup> For a fuller discussion of the identification thesis, see Richards, *Free Speech*, *supra* note 24, at 1336-40.

The classic modern statement of the identification thesis was made by Devlin<sup>198</sup> in the context of his criticism of the *Wolfenden Report*,<sup>199</sup> which recommended the abolition of criminal penalties for homosexual acts between consenting adults and for prostitution per se. Devlin's criticism of the Report focused on the proposition that certain private immoral acts are not the law's business. The criminal law, Devlin argued, is completely unintelligible without reference to morality, from which it arises. Morality, furthermore, is the necessary condition for the existence of society. Thus, to change the law in such a way as to violate that morality is to threaten the stability of the social order. Morality, in this connection, is to be understood in terms of the ordinary man's intuitive sense of right and wrong. Just as we determine the standards of negligence for purposes of civil or criminal liability by appealing to the judgment of ordinary men acting as jurors, so the applicable standards of morality can be proved in the same way. If ordinary men morally loathe homosexuality and condemn prostitution, homosexuality and prostitution are immoral and may be legally forbidden.

Superficially, Devlin's approach appears to have the general form of an acceptable moral argument. There should be no moral objection to prohibiting clearly immoral acts that threaten the existence of society. Furthermore, it is surely plausible to say that law and morals have a deep and systematic connection of the kind that Devlin suggests.<sup>200</sup> However, these propositions will not support the specific argument that Devlin propounds. Devlin argues, probably correctly, that the criminal law arises from and enforces morality. But he then falsely identifies morality with conventional social views in a way that renders unthinkable, if not unintelligible, the whole idea of moral criticism and reform of social convention. Adoption of this view would effectively confine the number of legally enforceable moral ideas to those that happen to have triumphed over their rivals in the battle for social acceptance.<sup>201</sup> But there is no good reason to make this identification of morality with social convention, since it is based on an indefensible and naive

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<sup>198</sup> P. DEVLIN, *supra* note 28, at 1-25. For an earlier statement of the same position, see J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (1874). Devlin's thesis has been criticized by Hart, H.L.A. HART, *supra* note 3. Stephen's statement was made in criticism of Mill. J.S. MILL, *supra* note 173.

<sup>199</sup> See note 1 *supra*.

<sup>200</sup> See D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 92-196.

<sup>201</sup> See Gussfield, *On Legislating Morals: The Symbolic Process of Designating Deviancy*, 56 CALIF. L. REV. 54, 58-59 (1968).

moral philosophy as well as on an unexamined and unsound sociology.<sup>202</sup>

Recent moral philosophy has been increasingly occupied with clarifying the conceptual structure of ordinary moral reasoning.<sup>203</sup> The concept of morality or ethics is not a completely flexible one: there are certain determinate constraints on the kind of beliefs that can be counted as ethical in nature.<sup>204</sup> Some examples of these constraints are the principles of mutual respect—treating others as one would like to be treated in comparable circumstances;<sup>205</sup> universalization—judging the morality of principles by the consequences of their universal application;<sup>206</sup> and minimization of differential treatment based on fortuitous human differences such as clan, caste, ethnicity, gender, and color.<sup>207</sup> Given these constraints, a view is not a moral one merely because it is passionately and sincerely held, because it has a certain emotional depth,<sup>208</sup> because it is the view of one's father or mother or clan, or because it is conventional. On the contrary, the moral point of view affords an impartial way of assessing whether any of these beliefs, which often press one to action, are in fact worthy of ethical commitment.<sup>209</sup>

<sup>202</sup> See H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHL. L. REV. 1 (1967).

<sup>203</sup> See, e.g., K. BAIER, *THE MORAL POINT OF VIEW* 187-213 (1958); A. DONAGAN, *THE THEORY OF MORALITY* 210-43 (1977); C. FRIED, *supra* note 147, at 7-29; D. GAUTHIER, *PRACTICAL REASONING* (1963); A. GEWIRTH, *supra* note 19, at 129-98; G. GRICE, *THE GROUNDS OF MORAL JUDGMENT* 1-35 (1967); R. HARE, *FREEDOM AND REASON* 86-185 (1963); R. HARE, *THE LANGUAGE OF MORALS* (1952); J. MACKIE, *ETHICS* 83-102 (1977); J. RAWLS, *supra* note 19; D.A.J. RICHARDS, *REASONS*, *supra* note 19.

<sup>204</sup> See G. WARNOCK, *CONTEMPORARY MORAL PHILOSOPHY* 55-61 (1967); G. WARNOCK, *THE OBJECT OF MORALITY* 35-70 (1971); Foot, *Moral Arguments*, 67 MIND 502-13 (1958); Foot, *Moral Beliefs*, 59 PROC. ARISTOTELIAN SOC'Y 83-104 (1958-1959); Foot & Harrison, *When Is a Principle a Moral Principle?*, 28 PROC. ARISTOTELIAN SOC'Y 95-110 (Supp. 1954).

<sup>205</sup> See K. BAIER, *supra* note 203, at 187-213; D. GAUTHIER, *supra* note 203, at 81-94; G. GRICE, *supra* note 203, at 1-35; J. MACKIE, *supra* note 203, at 83-102; J. RAWLS, *supra* note 19, at 130-32; D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 75-91.

<sup>206</sup> See R. HARE, *FREEDOM AND REASON* 91-94 (1963); D.A.J. RICHARDS, *REASON*, *supra* note 19, at 83-85, 216.

<sup>207</sup> This idea is the basis of Kant's theory of autonomy. See I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 65-71 (L. Beck trans. 1959) (1st ed. 1784). Also note J.S. Mill's remark that the true idea of distributive justice consists in "redressing the inequalities and wrongs of nature." J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* 805 (Ashley ed. 1909) (1st ed. London 1848). Mill thus concludes that primogeniture is unjust in that distinctions are grounded on accident. *Id.* 894. Note also Sidgwick's claim that justice rewards voluntary effort, not natural ability alone. H. SIDGWICK, *THE PRINCIPLES OF POLITICAL ECONOMY* 505-29 (3d ed. 1924).

<sup>208</sup> Devlin remarks that "[w]hat is important is not the quality of the creed but the strength of the belief in it." P. DEVLIN, *supra* note 28, at 114.

<sup>209</sup> See sources cited in note 203 *supra*.

Thus, moral views of the kind that the law ought to enforce cannot rest on mere social convention. Truly moral beliefs are marked by a special structure of mutual respect, universalization, and minimization of fortuity. Devlin's moral theory takes none of these features seriously; it accepts at face value instincts, social tastes, and accepted conventions that may or may not be moral. It is a mark of the unhappy separation of legal theory from serious moral theory that Devlin's superficial analysis can have been taken seriously when its moral basis is so transparently inadequate.

Devlin does not, it must be conceded, merely assume that any prejudice of the ordinary man can, without more, justify criminal sanctions. He freely acknowledges the traditional values of liberty and privacy as brakes on public sentiment.<sup>210</sup> Ultimately, however, these safeguards furnish little protection, for according to Devlin, tolerance has its limits, and if the social prejudice is strong enough, the state may justifiably stamp it into law.<sup>211</sup> Rather than subject societal passions to critical scrutiny, the identification thesis, in the final analysis, allows blind and possibly vicious prejudice to pose as the moral foundations of the criminal law.<sup>212</sup>

Devlin's theory is for such reasons theoretically unacceptable. However, even if it could be defended on such grounds, it must be rejected as incompatible with the moral theory of human rights implicit in constitutional democracy. The Constitution, we have suggested, institutionalizes the rights thesis and guarantees that moral rights of individuals cannot be violated, notwithstanding majoritarian sentiment to the contrary. Accordingly, the Supreme Court has rightly and consistently disallowed restrictions on constitutional rights based on popular prejudices, whether racial or sexual.<sup>213</sup>

In a constitutional democracy, the rights thesis compels particular scrutiny of criminal laws claimed to be justified by the "public morality." Recognizing the criminal law as a focal area

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<sup>210</sup> P. DEVLIN, *supra* note 28, at 16-19.

<sup>211</sup> See Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966), reprinted in R. DWORIN, *supra* note 18, at 240-65.

<sup>212</sup> The attraction of Devlin's method is its seemingly objectivity; it affords an easy and definite criterion of legally enforceable morality, without an appeal to difficult moral inquiry. For the classic statement of this view by an American judge, see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 105-13, 133-41 (1921). But the "objective" identification of widely shared subjective moral beliefs cannot escape subjectivity. Ethical beliefs are truly objective only when supported by sound moral reasoning.

<sup>213</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception for unmarried persons); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (segregated education).



for governmental abuse of human rights, the founders surrounded the criminal legal process with a number of procedural and substantive constitutional guarantees.<sup>214</sup> Fundamental among those guarantees is the idea of due process reasonableness—the insistence that government give reasons for its actions, particularly for deprivations of life, liberty, or property.<sup>215</sup> Because the moral reasonableness of the criminal law rests crucially on the soundness of the “public morality,” constitutional values require critical examination of that morality in order to ensure that its claims are morally valid.<sup>216</sup>

Such criticism of the “public morality” on the basis of its due process reasonableness fully accords with the moral point of view. The values of equal concern and respect for personal autonomy that we have unearthed as the foundations of American constitutionalism are the same values that recent moral theory, following Kant,<sup>217</sup> has identified as fundamental to the moral point of view. In particular, contractarian theory, recognizing these values, affords a method for determining which beliefs can correctly be included in the “public morality” that may be enforced by law. Where public attitudes about morality are, in fact, demonstrably not justified by underlying moral principles, laws expressing such attitudes are morally arbitrary and should be found to violate minimal standards of constitutional due process.

It is important, however, not to be misunderstood as to the institutional significance of the foregoing argument. Although the moral constraints on the criminal law are of constitutional magnitude, their institutional relevance is not confined to constitutional interpretation and adjudication. Indeed, it is doubtful whether any court today would entertain to its full extent a theory of constitutional due process such as has been described.<sup>218</sup> But even if the courts fail to recognize the full constitutional import of the requirement that its laws be morally justifiable, the requirement is

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<sup>214</sup> See, e.g., D.A.J. RICHARDS, *MORAL CRITICISM*, *supra* note 18, at 192-262.

<sup>215</sup> Cf. Scanlon, *Due Process*, in *DUE PROCESS: NOMOS XVIII* 93-125 (J. Pennock & J. Chapman eds. 1977) (due process is grounded in principles of political right and the design of social institutions).

<sup>216</sup> See generally Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, note 24 *supra*. Cf. H.M. Hart, *supra* note 196 (exploring the moral perspective of “constitution makers”).

<sup>217</sup> See J. RAWLS, *supra* note 19; D.A.J. RICHARDS, *REASONS*, *supra* note 19. See also A. GEWIRTEH, *supra* note 19.

<sup>218</sup> Such doubt seems justified by the judicial treatment of sodomy. See generally Richards, *Unnatural Acts*, *supra* note 24, at 1319-33.

nevertheless capable of implementation at the legislative level.<sup>219</sup> There being no defensible moral principle to sustain a given state interference, legislators should refrain from enacting laws that interfere in that way.<sup>220</sup>

Of course, in order to demonstrate an abuse of the "public morality" in a certain area, one must be prepared to offer a moral analysis of wherein the abuse consists: what kind of moral fallacy underlies the traditional arguments? Are the facts wrong? Has improper weight been given to certain kinds of personal ideals? Are there question-begging underlying assumptions about moral personality?

With respect to prostitution, which is our analytic concern here, the tradition of moral condemnation is ancient and surely entitled to a respectful hearing. I wish to take it very seriously, and yet show with care how contractarian theory, of the kind here suggested, may enable us to understand why it is mistaken. In order to do this, we will appeal to moral theory and also to moral archeology. Ancient moral beliefs, like those surrounding prostitution, often rest on a residuum of quite primitive beliefs which we self-consciously reject elsewhere in our social life but which, in certain circumscribed areas, unconsciously retain their force.<sup>221</sup> In order rationally to scrutinize these matters, we must exercise some historical and moral imagination in articulating and bringing to light these assumptions and in subjecting them to moral criticism. Let us begin with the grounds for the moral condemnation of prostitution per se, and then turn to the paternalistic grounds.

#### IV. THE MORALITY OF PROSTITUTION AND THE RIGHTS OF THE PERSON

The moral condemnation of prostitution rests on a number of disparate grounds. Let us consider them *seriatim*.

##### A. Prostitution as Non-Procreational Sex

The model of procreational sexual love was given its classic formulation, as we have seen, in St. Augustine's conception that the

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<sup>219</sup> On the concept of judicially underenforced constitutional norms, see Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

<sup>220</sup> See H.M. HART, *supra* note 196.

<sup>221</sup> My methodological procedure here is in line with that of O.W. Holmes, who believed that ancient residues in the law control behavior long after their rationale has ceased to exist. See O.W. HOLMES, *supra* note 14, at 8-33.

only proper "genital commotion"<sup>222</sup> is that consciously aimed at the reproduction of the species in marriage.<sup>223</sup> Contraception, whether within or outside marriage, and extramarital (including prostitution) and homosexual intercourse are all forbidden as deviations from the only proper canonical form of legitimate sexuality—the intent to procreate within marriage. This marital procreational focus led Augustine<sup>224</sup> and St. Thomas<sup>225</sup> on the one hand to condemn prostitution morally and, on the other, to urge its toleration so as to keep wayward sexual appetites within bounds in a way least detrimental to the central procreational unit.

Essentially, Augustine's procreational model<sup>226</sup> rests on a mistaken view of sexual passion as a form of loss of control,<sup>227</sup> as though humans cannot with self-esteem indulge emotional spontaneity. Such a conception both underestimates the distinctively human capacity for self-control over sexual desire and overestimates the force of sexuality as a kind of dark, unreasoning, Bacchic possession whose demands inexorably undermine the rational will. As sexologists have emphasized,<sup>228</sup> human sexuality, unlike all other comparable biological appetities, is malleable and subject to conscious control. Humans can and do postpone engaging in sexual activity indefinitely, and sometimes for a lifetime. They use sexuality for diverse purposes—to express love, for recreation, or for procreation. No one purpose necessarily dominates; rather, people choose among

<sup>222</sup> See note 75 *supra*.

<sup>223</sup> See note 76 *supra*.

<sup>224</sup> See note 80 *supra*.

<sup>225</sup> See note 81 *supra*.

<sup>226</sup> For an expanded explication of Augustine's view of sexuality, see Richards, *Sexual Autonomy*, *supra* note 12, at 722-25.

<sup>227</sup> This conception that sexuality is a proper object of the will appears to have disastrous effects on natural sexual function. Masters and Johnson, for example, report that a principal feature of certain kinds of inadequate sexual function is the very attempt to will it. W. MASTERS & V. JOHNSON, *HUMAN SEXUAL INADEQUACY* 198-99, 202-03 (1970). The conception, common to certain religious traditions, that "proper" sexual experience must be accompanied by certain kinds of wills and intentions may account for the association of defective sexual function with rigid religious sexual conceptions. *Id.* 117-20, 133, 135, 139, 144, 175-79, 253-56.

<sup>228</sup> See W. MASTERS & V. JOHNSON, *supra* note 227, at 10:

Seemingly, many cultures and certainly many religions have risen and fallen on their interpretation or misinterpretation of one basic physiological fact. Sexual functioning is a natural physiological process, yet it has a unique facility that no other natural physiological process, such as respiratory, bladder, or bowel function, can imitate. *Sexual responsivity can be delayed indefinitely or functionally denied for a lifetime.* No other basic physiological process can claim such malleability of physical expression.

these purposes depending on the context and the person. Human sexuality is distinguished from animal sexuality by its control by higher cortical functions and its concomitant involvement with the human symbolic imagination, so that human sexual propensities and experiences are largely independent of the reproductive cycle.<sup>229</sup> As a consequence, humans have extraordinary capacities to experience and cultivate sexual experience as part of their imaginative lives.<sup>230</sup> Thus freed of its bonds to the reproductive cycle, sexual experience for humans is a continually available resource, upon which are built longstanding and intense personal relationships resting on reciprocal sensual delight and the associated imaginative deepening of these experiences through the spiritual and aesthetic dimension that human sexual love alone involves.<sup>231</sup>

Augustine and the tradition he fostered saw neither the distinctive ways in which humans experience self-respect in regulating their sexual lives nor the versatility of sensual passion. For many, it is not a fear-ridden anarchy incompatible with rational will, but an inestimable good, distinctively available to human creatures, which has a natural place in the design of a fulfilled life. Augustine would blindly condemn as unnatural the use of sexuality as a way in which two people express mutual love as an end in itself, without procreational motives. At best, the procreational model is a plausible description of the animal, not the human, world.<sup>232</sup> For animals, sexual activity is rigidly bound to the period of female receptive fertility; natural human sexuality distinctively differs in that sexual propensities and readiness are not tied to the period of possible procreation. A more appropriate use of the "unnatural-natural" distinction would, therefore, be to call the exclusive use of sex for procreation unnatural for humans, though natural for animals.

Nor can the procreational model of human sexuality be sustained as intrinsic to the concept of love. Love is conceptually defined by its peculiar aims, beliefs, and experiences—for example, by the intensity of the experience, the desire to promote the good

<sup>229</sup> See generally C. FORD & F. BEACH, *supra* note 51, at 199-267.

<sup>230</sup> Consider the role of imaginative idealization in human affectional relationships as the basis of the remarkable aesthetic elaboration of ideas of romantic love. See I. SINGER, *THE NATURE OF LOVE: PLATO TO LUTHER* 3-45 (1966); sources cited at note 85 *supra*. See also 6 H. ELLIS, *supra* note 48, at 130-31, 139.

<sup>231</sup> See I. EIBL-EIBESFELDT, *LOVE AND HATE* 155-69 (G. Strachan trans. 1972); W. MASTERS & V. JOHNSON, *THE PLEASURE BOND* (1975). On the variety and complexity of friendship and love relations in human societies cross-culturally, see R. BRAIN, *FRIENDS AND LOVERS* (1977). See also note 230 *supra*.

<sup>232</sup> See note 229 *supra*.

of the other, the identification of another's interests as one's own, and the desire for physical and psychological closeness.<sup>233</sup> The concept of love says nothing about the forms its physical expression must take. As a result, there is no ideal, exclusive, or proper physical expression of sexual love, for a large and indeterminate class of forms of sexual intercourse is compatible with the aims of love.<sup>234</sup>

Consider an analogy of another great human appetite, hunger. Some people eat to live, but many others live to eat, elaborating food preparation into a highly sensual art and eating into an exquisite social ritual of friendship and even love. The class of utilitarian eaters, the Augustinians of gastronomy, might argue that eating must be regarded in bleakly utilitarian terms, and that all other forms of eating should be morally condemned and made criminal offenses. Certainly, they would have at hand some good arguments for adopting this attitude: keeping slim, maintaining dietary health, and conserving time and money for more socially significant enterprises. But such arguments are at best relevant to issues of personal prudence or personal ideals; they do not constitute a moral argument of the kind that justifies criminal enforcement of moral standards. There is an indeterminately large class of attitudes toward eating compatible with the neutrality toward visions of the good life that underlies equal concern and respect for autonomy. Food is, of course, a general good, and should be distributed equitably. But to compel by law any one style of eating would evince contempt for the dignity of individual self-determination. Legal enforcement of a particular sexual ideal fails equally to accord due respect to individual autonomy.

Because the procreational model of sexuality can no longer be sustained by any good empirical or conceptual argument for the reasons just given, neither can it validly be legally enforced on the ground of public morality, for it fails to satisfy the ethical and constitutional requirement that legally enforceable moral ideas be grounded in equal concern and respect for autonomy and facts capable of interpersonal empirical validation. Recognition of this inadequacy of the procreational model underlies the decriminalization by constitutional decision of contraception,<sup>235</sup> abortion,<sup>236</sup> and

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<sup>233</sup> See D.A.J. RICHARDS, REASONS, *supra* note 19, at 250-59. See also ARISTOTLE, NICOMACHEAN ETHICS \*1157b.

<sup>234</sup> See Richards, *Unnatural Acts*, *supra* note 24, at 1308.

<sup>235</sup> Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraceptives and the unmarried); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives and the married).

<sup>236</sup> Roe v. Wade, 410 U.S. 113 (1973).

pornography in the home,<sup>237</sup> and the gradual decriminalization of consensual non-commercial sexual relations between consenting adults.<sup>238</sup> In the same way, the procreational model cannot justify the criminalization of prostitution. Prostitution, that is, cannot appropriately be made criminal on the ground that it does not look towards procreation.

This does not mean, of course, that prostitution is necessarily superior to the procreational model as a personal moral ideal.<sup>239</sup> Indeed, a number of the reasons adduced for rejecting the procreational model as a foundation for law would seem to apply equally to commercial sex. We spoke, for example, of sexual experience as the basis for longstanding and intense personal relationships, and as a way in which two people express mutual love.<sup>240</sup> These descriptions do not apply in any obvious way to commercial sex. This fact in no way impairs the strength of our argument against using the procreational model as a ground for the criminalization of commercial sex, however. The model remains morally inadequate. But the apparent incompatibility of prostitution with love may be the basis for an independent argument for its criminalization. To this argument, then, we must turn.

### B. *Prostitution and Romantic Love*

No argument supporting the moral condemnation of prostitution has a stronger hold on the American popular imagination than the argument for protecting romantic love. Even those who do not identify romantic love with the conventional family—indeed, who argue for freer extramarital expression of capacities for romantic love—sharply condemn prostitution.<sup>241</sup> In order to understand these claims, we must examine with care the idea and force of romantic love as a personal ideal and its peculiar associations in American intellectual and social history.

The history of the romantic love tradition in European thought is complex and much disputed.<sup>242</sup> Plato articulated the idea in the context of extramarital, male homosexual relationships.<sup>243</sup> The

<sup>237</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>238</sup> See note 11 *supra*. See also Richards, *Sexual Autonomy*, *supra* note 12; Richards, *Unnatural Acts*, *supra* note 24.

<sup>239</sup> See text accompanying notes 409-14 *infra*.

<sup>240</sup> Text accompanying notes 230-32 *supra*.

<sup>241</sup> See note 33 *supra*.

<sup>242</sup> See note 85 *supra*.

<sup>243</sup> See PLATO, *Phaedrus*, in COLLECTED DIALOGUES OF PLATO 476 (E. Hamilton & H. Cairns eds. 1961); PLATO, SYMPOSIUM, in *id.* 527. Plato appears to have had

seminal works in medieval literature understandably did not identify romantic love with marriage<sup>244</sup> because medieval marriages were commonly arranged by family and clan networks to serve larger economic, social, and procreational purposes.<sup>245</sup> According to some, the romantic love tradition is the offshoot of Christian heresy,<sup>246</sup> for it celebrates a form of intense human feeling outside of and indeed antagonistic to the then conventional marriage relationship. Certainly these ideas of romantic extramarital feeling are sharply opposed to the then current sorrowing Augustinian dismissal of sexuality as an unfortunate and spiritually empty concomitant of propagation.<sup>247</sup> The form of romantic love celebrated in the middle

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a highly developed, idealized concept of romantic homosexual love which required that it rarely, if ever, be consummated. Plato, himself homosexual and a celebrant of aim-inhibited romantic homosexual love, appears to have condemned actual homosexual relations, introducing, for the first time anywhere, a philosophical argument for its unnaturalness. PLATO, *LAWS* (Book VIII) \*835d-42a, in *id.* 1226, 1401-06. For discussion of Plato's insistence that romantic love be aim-inhibited and of the question whether Plato believed consummated homosexual acts themselves to be unnatural, see G. VLASTOS, *The Individual as an Object of Love in Plato*, in *PLATONIC STUDIES* 3, 22-28 (1973). For a critique of Plato's arguments on the unnaturalness of homosexuality, see Richards, *Unnatural Acts*, *supra* note 24.

<sup>244</sup> See C.S. LEWIS, *supra* note 85, at 1-43; C. MORRIS, *supra* note 85, at 112-13; J. STEVENS, *supra* note 85, at 37-38. Andreas Capellanus, for example, in his important treatise *De Arte Honeste Amandi*, defines love as extramarital by nature:

We declare and we hold as firmly established that love cannot exert its powers between two people who are married to each other. For lovers give each other something freely, under no compulsion of necessity, but married people are in duty bound to give in to each other's desires and deny themselves to each other in nothing.

A. CAPELLANUS, *THE ART OF COURTLY LOVE* 106-07 (J. Parry trans. 1941). See also *id.* 100:

[E]verybody knows that love can have no place between husband and wife. They may be bound to each other by a great and immoderate affection, but their feeling cannot take the place of love, because it cannot fit under the true definition of love. For what is love but an inordinate desire to receive passionately a furtive and hidden embrace? But what embrace between husband and wife can be furtive, I ask you, since they may be said to belong to each other and may satisfy all of each other's desires without fear that anybody will object? Besides, that most excellent doctrine of princes shows that nobody can make furtive use of what belongs to him.

For commentary, see D. ROBERTSON, JR., *supra* note 85, at 391-448. For an argument that the tradition is not completely extramarital, see H. KELLY, *LOVE AND MARRIAGE IN THE AGE OF CHAUCER* 31-48 (1975).

<sup>245</sup> See C.S. LEWIS, *supra* note 85, at 13; C. MORRIS, *supra* note 85, at 107-08; M. VALENCY, *supra* note 85, at 63-64.

<sup>246</sup> The most famous statement of this critical viewpoint is that of D. DE ROUGEMONT, *supra* note 85, at 44-45, 283-87.

<sup>247</sup> Indeed, a number of medieval theologians had condemned even sex in marriage if not for procreation. See D. ROBERTSON, JR., *supra* note 85, at 429-30. One commentator concluded, "Although the upholders of the dominant ascetical tradition carefully guarded themselves from the condemnation of marriage as such, they regarded passionate love as essentially sinful, and were apt to quote the

ages has left permanent marks on all later conceptions.<sup>248</sup> The emotional relationship between the lovers is intensely heightened by various frustrations, including a highly exacting code of chivalrous conduct,<sup>249</sup> continual tests of one's love,<sup>250</sup> and sometimes the impossibility of sexual consummation.<sup>251</sup> In consequence, the beloved is often highly idealized in terms of inaccessible remoteness<sup>252</sup> and consummation is often associated with death,<sup>253</sup> the implicit just condemnation for indulging in spontaneous and natural feeling undisciplined by convention.

Reformation thinkers, however, gave the theretofore secular and possibly heretical romantic love tradition religious respectability in the form of the Lutheran-Calvinist idea of companionate mar-

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ungenerous tag: 'every ardent lover is an adulterer with his own wife.'" C. MORRIS, *supra* note 85, at 107-08. The words quoted were those of St. Jerome, who was warning husbands that "nothing is more foul than to love a wife as though she were an adulteress." AUGUSTINE, *ENCHIRIDION* 70.19, *quoted in* D. ROBERTSON, JR., *supra* note 85, at 429.

<sup>248</sup> What, then, was the experience which is usually called "courtly love," and how can we know about it? We know about it in one sense, because, as romantic love, it still exists—the perennial theme of European literature, life, art, and our entertainment. From *Lancelot* to *Anna Karenina*, from *Les Deux Amants* to *Les Enfants du Paradis*, it is often quite literally the same story. In its domesticated, neo-Victorian form romantic love is the substance of the women's magazines and the radio serial. In its now equally admired but undomesticated form it is part of the "resistance movement" of youth—a spontaneous private unregulatable protest against the mediocrities of a middle-aged materialistic society. In George Orwell's *Nineteen Eighty-Four* it takes an overtly political twist.

J. STEVENS, *supra* note 85, at 33.

<sup>249</sup> The Capellanus text, *supra* note 244, describes the complex forms that aristocratic courting took.

<sup>250</sup> See note 249 *supra*.

<sup>251</sup> The presence of such barriers created

a heightening of sensuality, since it brought about the concentration of enormous libidinous energy upon such casual contacts as ordinarily have no special erotic significance. In this manner, a glance, a touch of the hand, a word of greeting could be transformed into an event of crucial character, so that the relations of lovers whose contacts were purely visual could be more deeply sensual than the physical coupling of husband and wife.

M. VALENCY, *supra* note 85, at 28.

<sup>252</sup> An extreme example is Dante's religious idealization of Beatrice. Dante first met Beatrice when he was about nine and she eight; they met and spoke briefly only once again nine years later. DANTE, *VITA NUOVA* 3, 5 (M. Musa trans. 1973). Thereafter, Dante, by his own description, met with contempt from the lady, *id.* 17-18, and himself avoided her presence, *id.* 24-25. After her death, Beatrice appeared to Dante in a vision as a remote religious figure, demanding that he "be capable of writing about her in a noble way . . . ." *Id.* 68. She is, of course, the inspiring figure of *The Divine Comedy*. See also C.S. LEWIS, *supra* note 85, at 21.

<sup>253</sup> See D. DE ROUGEMONT, *supra* note 85, at 42-46. The connections between frustrated love, heightened sensuality, and death are central themes of later romanticism. See generally M. PRAZ, *supra* note 85.



riage.<sup>254</sup> The choice of marriage partner became increasingly invested with romantic feeling, and marriage took on a new psychological dimension as an expression of such feelings.<sup>255</sup> Accordingly, the choice of marriage partner was interpreted in the way of the medieval romantic lover; there was courting, testing, frustration, and idealization, but with the crucial difference that the process was ultimately consummated within marriage.<sup>256</sup> The subsequent history of the family is the history of the growing dominance of the psychological-romantic aspects of marriage over the economic aspect;<sup>257</sup> with contraception, even the procreational focus has receded.<sup>258</sup>

The Reformation absorption of the romantic love tradition into marriage had an especially telling impact on American intellectual and social history. The Calvinist-Puritan view of companionate marriage established romantic marital love not as one ideal among others, but as the exclusive form in which sexual and affectional feeling could legitimately be experienced.<sup>259</sup> This new orthodoxy was secularized during the Victorian period by a confluence of supposed "[s]cience . . . with aesthetic and literary fashion to support the ideal of the delicate and frigid female"<sup>260</sup> in a powerful vision of sentimental marriage as the core of spiritual values. Such marriage was thought to protect the asexual and highly idealized woman from the pressures of a coarse, competitive, masculine world. In consequence, prostitution is morally condemned not so much because it is extramarital, but because it directly contravenes the model of romantic love,<sup>261</sup> including the model of the allegedly proper role of women.

The gravamen of this moral objection is not the empirical claim that the toleration of prostitution makes marriage less stable. As the continental European and English experience shows,<sup>262</sup> there is no evidence whatsoever for this view; indeed, prostitution may have beneficial effects on the stability of marriage, as St. Au-

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<sup>254</sup> See notes 83-87 *supra* & accompanying text.

<sup>255</sup> See E. SHORTER, *supra* note 47, at 79-107, 148-61; L. STONE, *supra* note 38, at 644-45.

<sup>256</sup> See E. SHORTER, *supra* note 47, at 148-61.

<sup>257</sup> See *id.* 205-44.

<sup>258</sup> See 245-54; L. STONE, *supra* note 38, at 680-81.

<sup>259</sup> See notes 97-105 *supra* & accompanying text.

<sup>260</sup> L. STONE, *supra* note 38, at 675-76. For extended treatment of this point, see notes 299-303 *infra* & accompanying text.

<sup>261</sup> See notes 289-304 *infra* & accompanying text.

<sup>262</sup> There is no evidence that these countries, which do not criminalize prostitution, see note 113 *supra*, have less stable marriage relationships.

gustine,<sup>263</sup> St. Thomas,<sup>264</sup> and many others<sup>265</sup> have shrewdly observed. The objection, rather, is a form of moral argument to the effect that prostitution blatantly violates the ideal of romantic love. The patron of the prostitute engages in sexual activity and experiences sexual release impersonally without the processes of courting, testing, frustration, and personal idealization of the beloved<sup>266</sup> that characterize romantic love. Many Americans today would no longer limit the scope of romantic love to marital relationships. Romantic love occurs maritally and extramaritally, homosexually and heterosexually. If there is a moral and human right to love, all of these relationships, within limits, invoke it.<sup>267</sup> But prostitution does not. Accordingly, the former loving relationships should be decriminalized, but not prostitution.

<sup>263</sup> See note 80 *supra*.

<sup>264</sup> See note 81 *supra*.

<sup>265</sup> Lecky described the social functions of prostitution in protecting monogamous marriage as follows:

[T]he supreme type of vice, she is ultimately the most efficient guardian of virtue. But for her, the unchallenged purity of countless happy homes would be polluted, and not a few who, in the pride of their untempted chastity, think of her with an indignant shudder, would have known the agony of remorse and despair. On that one degraded and ignoble form are concentrated the passions that might have filled the world with shame. She remains, while creeds and civilisations rise and fall, the eternal priestess of humanity, blasted for the sins of the people.

2 W. LECKY, *HISTORY OF EUROPEAN MORALS* 283 (1921). Compare Schopenhauer's remark: "There are 80,000 prostitutes in London alone: and what are they if not sacrifices on the altar of monogamy?" A. SCHOPENHAUER, *On Women*, in *ESSAYS AND APHORISMS* 80, 88 (B. Hollingdale trans. 1970). Mandeville's view was similar:

If Courtezans and Strumpets were to be prosecuted with as much Rigour as some silly People would have it, what Locks or Bars would be sufficient to preserve the Honour of our Wives and Daughters? . . . [I]t is manifest, that there is a Necessity of sacrificing one part of Womankind to preserve the other, and prevent a Filthyness of a more heinous Nature. From whence I think I may justly conclude . . . that Chastity may be supported by Incontinence, and the best of Virtues want the Assistance of the worst of Vices.

B. MANDEVILLE, *Remarks to THE FABLE OF THE BEES* 127, 130 (P. Harth ed. 1970) (1st ed. 1714).

<sup>266</sup> Of course, patrons of prostitutes often engage in elaborate fantasies during sex with prostitutes.

As far as his psychologic responses are concerned, the male in many instances may not be having coitus with the immediate sexual partner, but with all of the other girls with whom he has ever had coitus, and with the entire genus Female with which he would like to have coitus.

A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 684 (1953) [hereinafter cited as *KINSEY REPORT*]. But the *personal* idealization of the beloved that marks romantic love is not present. *But see* note 281 *infra*.

<sup>267</sup> See Richards, *Unnatural Acts*, *supra* note 24, at 1306-13, 1325-28, 1331-33, 1343-46.

This argument represents a legitimate expression of personal ideals that one may urge upon others as desirable, but it is fallaciously misconceived as a valid moral argument to justify the application of criminal sanctions, as is made manifest by consideration of moral theory and the underlying values of equal concern and respect for autonomy. In order to preserve these values, the contractarian model deprives the contractors of knowledge of specific identity and requires that decisions on basic moral principles be based on empirical facts capable of interpersonal validation.<sup>268</sup> The neutrality ensured by these constraints is incompatible with the invocation of the model of romantic love as the morally compulsory norm of sexual expression enforceable on society at large. First, the contractors, not knowing whether or not they have personal ideals of romantic love, would be reluctant to make it compulsory. Second, it is not justified to introduce the model of romantic love, under the guise of an empirical fact, as the only fulfilling form of sexual expression. This latter point raises the general question as to the appropriate form in which these questions would be raised in the original position. When we reject the procreational model of sexuality as the measure of legally enforceable sexual morality,<sup>269</sup> we are able to understand the humane and fulfilling force of sexuality per se in human life, the scope of human autonomous self-control in regulating its expression, and the implications of these facts for the widening application of the concept of human rights to the sexual area.

Contemporary understanding of sexuality, building on Freud's insights,<sup>270</sup> has permanently transformed our view of the role of sexuality in human development and in the definition of the person. At the core of these insights lies Freud's perception that human sexuality serves complex imaginative and symbolic purposes that have important ramifications in a person's general orientation to the basic tasks of human life.<sup>271</sup> Freud thus introduced into sci-

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<sup>268</sup> See notes 181-94 *supra* & accompanying text.

<sup>269</sup> See notes 222-39 *supra* & accompanying text.

<sup>270</sup> See generally S. FREUD, INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS, in 15 & 16 COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (Standard ed. 1958-1975) [hereinafter cited as STANDARD EDITION]. See also S. FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS, reprinted in 22 STANDARD EDITION 5-182. For a useful general review of the empirical confirmation of Freud's major hypotheses, see S. FISHER & R. GREENBERG, THE SCIENTIFIC CREDIBILITY OF FREUD'S THEORIES AND THERAPY (1977).

<sup>271</sup> The distinction between animal and human sexuality was a central postulate of Freud's emphasis on the distinctive role of sexuality in human personality:

The sexual instinct . . . is probably more strongly developed in man than in most of the higher animals; it is certainly more constant, since it has

entific psychology what philosophical artists have always known and expressed: <sup>272</sup> that for humans, sex is not, even in solitary masturbation, a purely physical act, but is endowed with complex evaluational interpretations of its real or fantasied object, often rooted in the history of the individual from early childhood.<sup>273</sup> In particular, Freud's theory of unconscious defenses clarifies some of the imaginative manipulations of sexual feelings as at times destructive and at times adaptive.<sup>274</sup> Understanding these unconscious processes was, for Freud, a step toward the understanding of human autonomy. Knowledge of the unconscious mind and its processes deepens the range and strength of the ego or self in controlling id and superego impulses: "[w]here id was, there shall ego be."<sup>275</sup> Knowledge of one's unconscious defenses enables one to assess consciously the work of the unconscious, deciding whether desires disowned by the unconscious should be reclaimed, or desires excessively developed by the unconscious cut back.<sup>276</sup> One is thereby able to see life as one's own, rather than as the result of the wishes of others.<sup>277</sup> In view of the capacities just discussed and the powerful role of sexuality as an independent force in the imaginative life and development of the person, sexual autonomy appears to be a central aspect

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almost entirely overcome the periodicity to which it is tied in animals. It places extraordinarily large amounts of force at the disposal of civilized activity, and it does this in virtue of its especially marked characteristic of being able to displace its aim without materially diminishing its intensity. This capacity to exchange its originally sexual aim for another one, which is no longer sexual but which is psychically related to the first aim, is called the capacity for sublimation.

S. FREUD, "Civilized" Sexual Morality and Modern Nervous Illness, in 9 STANDARD EDITION, *supra* note 270, at 181, 187. For a comparison of the animal and human data, see C. FORD & F. BEACH, *supra* note 51, at 199-267. For a seminal development of Freud's ideas of the place of sexual defenses in understanding the personality or character structure of the person, see W. REICH, CHARACTER ANALYSIS (V. Carfagno trans. 1972). For confirming data, see S. FISHER & P. GREENBERG, *supra* note 270, at 80-169.

<sup>272</sup> See PLATO, *Symposium*, *supra* note 243.

<sup>273</sup> For a striking recent account, see A. OFFIT, THE SEXUAL SELF (1977).

<sup>274</sup> For the classical sources on the theory of the defenses, see S. FREUD, *Inhibition, Symptoms and Anxiety*, in 20 STANDARD EDITION, *supra* note 270, 87-172; A. FREUD, THE EGO AND THE MECHANISMS OF DEFENSE (1936); note 271 *supra*. For a recent discussion of the changing and adaptive pattern of the defenses in the context of the life cycle, see G. VAILLANT, ADAPTATION TO LIFE 73-192 (1977).

<sup>275</sup> See S. FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS, *reprinted* in 22 STANDARD EDITION, *supra* note 270, at 80.

<sup>276</sup> These are the familiar defensive mechanisms of repression, sublimation, and projection. See A. FREUD, THE EGO AND THE MECHANISMS OF DEFENCE 45-57 (1946).

<sup>277</sup> For an example of a potentially self-destructive identification, see the discussion of identification with the aggressor, *id.* 117-31.

of moral personality through which we define our ideas of a free person who has taken responsibility for her or his life.

In this regard, it is a common but serious mistake to draw sharp dichotomous lines between the different ways that persons use sexuality in their lives instead of recognizing the existence of a continuum. For example, people sometimes distinguish between sexual love and sexual lust, describing married couples as being "in love" or "falling in love," whereas others are, properly speaking, "in lust" with one another or have fallen "in lust."<sup>278</sup> Interestingly, however, we describe ourselves as "making love" to another person when we have sexual relations, even if we are clearly not "in love." Sexual attitudes are intrinsically evaluational: to desire to have sexual relations with a person is to perceive that person as desirable for certain reasons.<sup>279</sup> Thus, sexual attitudes can be enormously erratic when we discover that the other is not desirable in the way at first supposed. We discover that he or she is not gentle or sensitive or courageous in the way assumed and our eros drily goes up in smoke. Sexual relations between lovers and those not in love share these evaluational significances and are often equally self-expressive. The relationships do differ, of course, but often the nature of the sexual experience does not.<sup>280</sup> In neither

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<sup>278</sup> See Bertocci, *The Human Venture in Sex, Love and Marriage*, in TODAY'S MORAL PROBLEMS 218, 227 (R. Wasserstrom ed. 1975).

<sup>279</sup> See Diotima's speech, PLATO, SYMPOSIUM \*201d-212c, wherein the object of erotic attraction is described as forms of desirable beauty, and thus forms of the good.

<sup>280</sup> The distinction between commercial and non-commercial sex is clearly not as sharp a line as many conventionally have believed. There are commercial, indeed dominantly economic, features in many traditional marriages, see, e.g., descriptions of traditional, pre-modern marriage in E. SHORTER, *supra* note 47, at 22-78; and there are such features in sexual relationships not regarded as commercial, see H. BENJAMIN & R. MASTERS, *supra* note 43, at 21-32. Further, the forms of commercial and non-commercial sex are not intrinsically different. For example, many conventional married women appear to engage in sex with their husbands without experiencing orgasm, presumably in order to retain their traditional role. See S. FISHER, *THE FEMALE ORGASM* 113-15 (1973); KINSEY REPORT, *supra* note 266, at 373-76. Many traditional women experience prostitution fantasies. See I. H. DEUTSCH, *THE PSYCHOLOGY OF WOMEN* 265-69 (1944). And, Freud suggests that masculine fantasies of sex with prostitutes are a relatively permanent feature of the masculine sexual imagination and sexual experience in general. See S. FREUD, *A Special Type of Choice of Object Made by Men*, in 11 STANDARD EDITION, *supra* note 270, at 165-75; S. FREUD, *On the Universal Tendency To Debasement in the Sphere of Love*, in *id.* 178. Freud suggests a psychoanalytic explanation for the masculine tendency to divide affectionate feelings from sensual eroticism, expressed in asexual love for one's wife and sexual vigor with degraded prostitutes: the division between affection and sensuality derives from the Oedipal prohibition on sexual feelings with one's mother, so that in falling in love with a woman later in one's life, one idealizes her like one's asexual mother and thus experiences no sexual excitement, and one experiences eroticism with degraded women who least remind one of the idealized mother. For a recent striking investigation of the forms of sexual fantasy categorized by gender and sexual preference, see W.

case is it correct to regard the sexual relations as blind or instinctive or spiritually insignificant, as is animal sexuality. This is no less true in the case of commercial sex than in non-commercial sex.<sup>281</sup>

It was argued earlier that the Augustinian model should not be legally enforced precisely because it fails to take seriously this role of sexual self-determination as one focally important form of moral personality and thus deprives persons of autonomous choice regarding these fundamental experiences. Similarly, the invocation of romantic love as a compulsory moral standard must be criticized. Assume that the model of romantic love is the ideal of conducting personal sexual relationships in terms of a process of patient courting, including readiness to undergo frustrating testing of one's love in the interest of perfecting and cultivating sensitive response to the beloved, often aesthetically and sometimes religiously idealized. Assume also that this is an ideal of personal conduct to which many justly aspire,<sup>282</sup> perhaps on the grounds of erotic chastity suggested by Havelock Ellis,<sup>283</sup> such that only by self-imposed frustrating restraints of the kind that pursuit of romantic love calls for do we

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MASTERS & V. JOHNSON, *HOMOSEXUALITY IN PERSPECTIVE* 174-92 (1979). The study indicates that such fantasies usually include, for men and women, heterosexual and homosexual, fantasies of sex with persons not one's current sexual partner, of forcible sex, and of forms of sex with persons not of one's sexual preference.

<sup>281</sup> For example, an in-depth and extensive study of the patrons of prostitutes indicates that the experience has complex and diverse meanings for the patrons. Fifty-two percent of the patrons in the sample imposed a therapeutic role on the call girl that included ego support, crisis intervention, dealing with suppressed sexual material, and sexual counseling. M. STEIN, *supra* note 129, at 91-92.

Stein summarizes the complex nature of the meaning of commercial sex for patrons as follows:

Their behavior and needs in turn determined the call girl's role on call; to the Fraternizers—a party girl; to the Promoter—a businesswoman; to the Adventurer—a playmate. The Lover sought a romantic partner; the Friend, a confidante; the Slave, a dominatrix; the Guardian, a daughter-figure; the Juvenile, a mother-figure. The role playing became a kind of fantasy enactment for some of the Lovers, Friends, Slaves, Guardians, Juveniles. The part they assigned the call girl corresponded to an idealized image of woman which exerted great power over their erotic imagination, and the correspondence was a source of excitement and pleasure. The men's individual fantasies of the ideal partner can be seen as variations of female types idealized by our culture as a whole; the Sexual Superwoman; the Beloved; the Girlfriend; the Dominating Mistress; the Child-Woman; the Earth-Mother.

*Id.* 313-14. Other researchers studying patrons noted, "[e]motional, fantasy, cultural, or symbolic overtones of the situation may be more important to the clients than their desire for sex. The customer's relationship to a prostitute is far more complex than has traditionally been believed." C. WINICK & P. KINSIE, *supra* note 36, at 197.

<sup>282</sup> See text accompanying notes 406-14 *infra*.

<sup>283</sup> See H. ELLIS, *supra* note 48, at 143-77.

realize the more exquisite sensual fulfillment of which our human nature is capable. Nonetheless, there is no reason to believe that this ideal is any more entitled to moral enforcement as the only legitimate model of sexual expression than is the Augustinian model of sexuality or, for that matter, the Augustinian model of gastronomy suggested earlier.<sup>284</sup> It is simply dogmatic to say that romantic love can be the only means of human fulfillment. There are many other courses that may reasonably accommodate the diverse individuality of human competences, aspirations, and ends. What for one is a reasonable self-imposed ideal of deepened romantic sensuality may, for another, be a narrow and parochial narcissism, a waste of self in privatized obsession and broader social irresponsibility.<sup>285</sup> Consider, in this connection, the eloquent feminist literature that has urged self-criticism about the special force of the concept of love as used by and applied to women, which has allegedly blinded women to their real social and economic situation, sanctifying acquiescence in exploitative and masochistic personal relationships in the name of loving self-sacrifice.<sup>286</sup>

Surely, in matters of sexual choice, the range of reasonable personal ideals is wide, various, and acutely sensitive to personal context and individual idiosyncrasy.<sup>287</sup> The law has no proper role in prejudging how these choices are to be made in general, and whether romantic love is to be chosen in particular.

Finally, it is particularly inappropriate to use an ideal like romantic love to justify any form of compulsory moral norm.<sup>288</sup> This ideal, based on the cultivation of spontaneous romantic feeling, is the very antithesis to compulsory forms of sexual expression. Furthermore, loveless encounters are sometimes prerequisites for genuine love relationships; to forbid the former is, therefore, to inhibit the latter. Accordingly, the invocation of such ideals to justify such compulsory norms is a travesty of the spiritual meaning of these ideals.

<sup>284</sup> See text following note 234 *supra*.

<sup>285</sup> See, e.g., S. PEELE, *LOVE AND ADDICTION* 71-91 (1975). Cf. C. LASCH, *THE CULTURE OF NARCISSISM* (1979); R. SENNETT, *THE FALL OF PUBLIC MAN* (1974).

<sup>286</sup> See S. DE BEAUVOIR, *THE SECOND SEX* 712-43 (H. Parsley trans. 1952); S. FIRESTONE, *THE DIALECTIC OF SEX* 126-55 (1972).

<sup>287</sup> For a further development of this point, see text following note 386 *infra*.

<sup>288</sup> See G. GORER, *THE DANGER OF EQUALITY* 126-32 (1966). In some views, romantic love is peculiarly unsusceptible to generalization to people at large, for only a few "special souls" are authentically adequate to its demands. See *id.*

### C. Prostitution and Degradation

Another form of the moral argument for criminalization of prostitution focuses not on the character of the sexual relations, but on the alleged degradation of the prostitute. This argument takes at least three different forms: first, a moral argument based on female chastity; second, the immorality of treating a person as a commercial sex object; and third, alleged specific empirical harms to the prostitute or the patron. These arguments will be considered in the following three sections.

#### 1. Prostitution as Unchaste Sex

To think of behavior as degraded rests on the twin assumptions that one's self-esteem is invested in the competent exercise of certain capacities of the person and that certain behavior fails to be competent in the required way. The degraded, thus, is the natural object of shame or self-disgust at personal failure to live up to standards of conduct that are valued as essential to the integrity of the self.<sup>289</sup> Accordingly, the understanding of the application of the concept of the degraded to prostitution requires an account of the valued forms of behavior from which it is alleged to deviate.

For this purpose, moral archeology is needed to unearth the ancient conceptions of female sexuality that underlie the view that prostitution degrades. The core of this view appears to be the definition of a woman's basic self-esteem in terms of her chastity—her control of sexual impulses for the marital obligations which are her destiny in life.<sup>290</sup> The origin of these ideas is linked historically to the important function of women as means of exchange in the strengthening and widening of kinship networks and the consequent economic and social integration.<sup>291</sup> The virginity of one's daughter was a mark of her value for these exchange purposes, so that an unchaste woman was a waste of a family asset indispensable to social and economic well-being.<sup>292</sup> Primitive myths often ex-

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<sup>289</sup> For a defense of this view of the concept of shame, see D.A.J. RICHARDS, REASONS, *supra* note 19, at 250-67.

<sup>290</sup> See H. ELLIS, *supra* note 48, at 147-48.

<sup>291</sup> The function of women as a means of kinship exchange and integration has been a prominent feature of the anthropology of Claude Lévi-Strauss. For the seminal works, see C. LÉVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 83,309 (C. Jacobson & B. Schoepf trans. 1963); C. LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 63-68, 481-85 (1969). For a useful general commentary, see J. BARNES, THREE STYLES IN THE STUDY OF KINSHIP 139-55 (1973).

<sup>292</sup> See H. ELLIS, *supra* note 48, at 147-48; S. WEITZ, SEX ROLES 116-19 (1977).



plain these ideas in terms of female hypersexuality that must be controlled by rigidly enforced social and political sanctions, sometimes including quite barbaric physical disfigurements.<sup>293</sup> The idea of female vulnerability to concupiscent excesses is, in Western culture, associated with the seminal and pervasive Aristotelian vision of the morally inferior status of women,<sup>294</sup> the inferiority here taking the form of a lack of internal capacities for self-control.<sup>295</sup> In societies where these conceptions of rigid virginity prevail, female unchastity is conceived of as intrinsically degraded—as a disgusting failure to exercise self-control over appetites in the way required to perform one's mandated social role as wife and mother.<sup>296</sup> An important further presupposition of this way of thinking is that women are capable of only one kind of life, defined by procreation and child-rearing in the home.<sup>297</sup> Accordingly, in advanced urban societies with prostitution, occasional female unchastity was often regarded as morally equivalent to prostitution. This view, which seems to follow from the economic value placed upon a marriageable girl's chastity, was a self-fulfilling prophecy and tended so to stigmatize a girl who erred once "for love" that prostitution inexorably followed.<sup>298</sup>

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<sup>293</sup> In the Sudan, for example, Arab Moslem women undergo the genital mutilation of infibulation that is regarded as necessary in order to protect inherently oversexed women from unchastity. See S. WERTZ, *supra* note 292, at 185-86. Another mutilation ritual is clitoridectomy, which removes the seat of female sexual feelings. Other forms of special control of female sexuality include sexual segregation, an extreme form of which is the Moslem custom of *pardah* (seclusion), and the double standard. *Id.*

<sup>294</sup> See ARISTOTLE, *POLITICS* bk. I, pt. V, \*1259a40-1260b26.

<sup>295</sup> Andreas Capellanus takes this view of female sexuality:

Every woman in the world is likewise wanton, because no woman, no matter how famous and honored she is, will refuse her embraces to any man, even the most vile and abject, if she knows that he is good at the work of Venus; yet there is no man so good at the work that he can satisfy the desires of any woman . . . in any way at all.

A. CAPELLANUS, *supra* note 244, at 208. For other examples of this point of view, see T. AQUINAS, *SUMMA THEOLOGICA* pt. II-II, question 149; M. VALENCY, *supra* note 85, at 67-68.

<sup>296</sup> Havelock Ellis distinguishes the injustice of such "unnatural and empty forms of chastity," H. ELLIS, *supra* note 48, at 144, "imposed by one sex on the opposite sex," *id.*, from voluntary self-imposed chastity used to heighten one's romantic sensibilities. See generally *id.* 143-77.

<sup>297</sup> See Chodorow, *Family Structure and Feminine Personality*, in *WOMAN, CULTURE, AND SOCIETY* 43 (M. Rosaldo & L. Lamphere eds. 1974); Ortner, *Is Female to Male as Nature is to Culture?*, in *WOMAN, CULTURE, AND SOCIETY*, *supra*, at 67; Rosaldo, *Woman, Culture and Society: A Theoretical Overview*, in *WOMAN, CULTURE, AND SOCIETY*, *supra*, at 17. See also D.A.J. RICHARDS, *MORAL CRITICISM*, *supra* note 18, at 173-76.

<sup>298</sup> See note 73 *supra*. Cf. *THE MAIMIE PAPERS xxxi* (R. Rosen ed. 1977) (families stigmatize erring girls as "whores" and lock them out).

In Victorian America, female chastity remained the ideal, but the ancient idea of female hypersexuality was radically denied and replaced by that of female asexuality. Remarkably,

despite internal dissension within the medical profession, for the first time in Western history there was a strong body of opinion which actually denied the existence of the sexual drive in the majority of women, and regarded the minority who experienced it to any marked degree as morally, mentally or physically diseased.<sup>299</sup>

A remarkable confluence of medical-scientific theory<sup>300</sup> and religio-sentimental literature<sup>301</sup> described women as having superior capacities for spiritual and moral inwardness that were properly insulated in the home from coarsely sensual, masculine, competitive concerns derived from the business and political worlds. It is this identification of women in the home with higher moral and spiritual sensibility which explains the striking and not at all self-evident association of the protection of this role with the preservation of the sources of morality. As one expression of this social perception, the first wave of British and American feminism proclaimed that

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<sup>299</sup> L. STONE, *supra* note 38, at 676. Stone continues:

A marriage manual of 1839 stated as a fact that sterility was caused by any female who displayed "excessive ardour of desire," and advised that "tranquility, silence and secrecy are necessary for a prolific coition." It was very discouraging advice, almost as discouraging as that offered to married women by Mrs. Ellis in 1845: "suffer and be still."

*Id.* Related medical advice was to limit the incidence of sex in marriage to moderate amounts. *Id.* 677. Similarly,

the perils of masturbation developed into a major obsession not only of moralists but also of the medical profession . . . . Inspired by fears of physical debilitation and even of insanity, some surgeons in the third quarter of the century, especially in England and America, were performing clitoridectomy on masturbating girls and deliberately painful circumcision on boys, while agitated parents were attaching toothed rings to the penis and locking adolescents into chastity belts or even in strait-jackets for the night.

*Id.* See also note 293 *supra* & accompanying text. For a detailed description of American medical views during this period, see J. HALLER & R. HALLER, *supra* note 99. For a discussion of the Victorian medical literature supporting female sexuality, see Degler, *What Ought to Be and What Was: Women's Sexuality in the Nineteenth Century*, 79 AM. HIST. REV. 1469 (1974).

<sup>300</sup> One medical writer in Victorian America, for example, envisioned the evolutionary purification of mankind's sensuality, leading eventually to the removal of man's animal sensual pleasure entirely. See J. HALLER & R. HALLER, *supra* note 99, at 126-27. See generally *id.* 91-137.

<sup>301</sup> See generally, A. DOUGLAS, *supra* note 98. The sentimental literature of the period appears to have been based on "stereotypes of ideal feminine virtue," *id.* 157, flourishing in "the romance of domestic management," *id.* 185. For discussion of the comparable English phenomenon, see L. STONE, *supra* note 38, at 675-76.

women must carry this higher moral vision into the public world in the form of moral purification.<sup>302</sup> In particular, prostitution was the central focus of an attack by purity reformers,<sup>303</sup> who perceived it as a direct and outrageous offense to the Victorian higher moral "ideal of the delicate and frigid female,"<sup>304</sup> as prostitutes were sexual, aggressive, and commercial.

The idea that prostitution is morally degrading, resting on ideas of proper female chastity, can no longer be sustained either as an empirical thesis about female sexuality or as an implication of women's social and economic role. As an empirical matter, contemporary studies of female sexuality make clear the ample natural sexual appetities of women, including substantial orgasmic capacity.<sup>305</sup> Ideas of natural female asexuality, on the one hand, and of the incapacity for sexual self-control, on the other, appear today to be not descriptions, but ideologies<sup>306</sup> by which women have been denied a basic self-conception acknowledging their moral right to sexual fulfillment. Correlative ideas of women's social and economic role as a necessary means of kinship exchange are, in their traditional form, obsolete today. Furthermore, in the compulsory and exploitative forms that they historically took, these ideas are

<sup>302</sup> See notes 90, 91, & 100 *supra* & accompanying text. The focal attack by feminists on the double standard was well summarized by Dr. Elizabeth Blackwell during this period:

The great truth now to be recognized, is the fact, that male as well as female purity is a necessary foundation of progressive human society.

This important subject must no longer be ignored. The time has come for its acceptance by all experienced men and women. The necessity of upholding one moral standard as the aim to be striven for, must become a fundamental article of religious faith.

R. WALTERS, PRIMERS FOR PRUDERY 67-68 (1974).

It is a notable historical paradox that the preeminent concerns of these first feminists should have been dominated by a moral vision born in the insulation and isolation of their traditional role, which was, accordingly, in many ways designed to confirm traditional stereotyped feminine roles. See Warner, *supra* note 91.

<sup>303</sup> For the English experience, see note 90 *supra*. For the comparable American experience, influenced by British developments, see generally D. PIVAR, *supra* note 100.

<sup>304</sup> See L. STONE, *supra* note 38, at 676.

<sup>305</sup> For a comprehensive general study, see S. FISHER, *supra* note 280. Other important studies include the KINSEY REPORT, *supra* note 266, at 346-408; W. MASTERS & V. JOHNSON, *supra* note 227, at 214-315; W. MASTERS & V. JOHNSON, HUMAN SEXUAL RESPONSE 27-168 (1966). A striking but somewhat speculative recent study suggests, in fact, that women have much greater natural orgasmic and sensual capacity than do men. M. SHERFEY, THE NATURE AND EVOLUTION OF FEMALE SEXUALITY (1973).

<sup>306</sup> Of the Victorian medical literature regarding the sexuality of women, Lawrence Stone observes: "On both sides of the argument much of the writing is clearly normative and moralistic rather than merely descriptive of proven biological facts." L. STONE, *supra* note 38, at 676.

repugnant to the equal concern and respect to which women, as persons, are entitled. Marriage no longer serves such economic and social purposes;<sup>307</sup> contraception has mitigated many of the fears peculiar to female unchastity; and the general role of women, no longer limited to procreation and child rearing, has been and continues to be transformed by the growing access of women to the formerly exclusively masculine realm of the public, competitive work, and politics.<sup>308</sup> From this perspective, arguments, like those condemning prostitution, that allegedly protected the spiritual, female sanctuary of the home from incursions from the sensual, competitive masculine world, appear to be malign ways in which women have been caged by an ideology which distorted and unrecognizably disfigured basic self-conceptions of natural capacity and responsible autonomy.<sup>309</sup>

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<sup>307</sup> See notes 254-58 *supra* & accompanying text.

<sup>308</sup> See D.A.J. RICHARDS, *MORAL CRITICISM*, *supra* note 18, at 162-78.

<sup>309</sup> Freud observed of the effects of the Victorian constraints on female sexuality:

The harmful results which the strict demand for abstinence before marriage produces in women's natures are quite especially apparent. It is clear that education is far from underestimating the task of suppressing a girl's sensuality till her marriage, for it makes use of the most drastic measures. Not only does it forbid sexual intercourse and set a high premium on the preservation of female chastity, but it also protects the young woman from temptation as she grows up, by keeping her ignorant of all the facts of the part she is to play and by not tolerating any impulse of love in her which cannot lead to marriage. The result is that when the girl's parental authorities suddenly allow her to fall in love, she is unequal to this psychical achievement and enters marriage uncertain of her own feelings. In consequence of this artificial retardation in her function of love, she has nothing but disappointments to offer the man who has saved up all his desire for her. In her mental feelings she is still attached to her parents, whose authority has brought about the suppression of her sexuality; and in her physical behaviour she shows herself frigid, which deprives the man of any high degree of sexual enjoyment.

S. FREUD, *'Civilized' Sexual Morality and Modern Nervous Illness*, in 9 STANDARD EDITION, *supra* note 270, at 181, 197-98. Of the effects on women themselves, Freud notes:

Their upbringing forbids their concerning themselves intellectually with sexual problems though they nevertheless feel extremely curious about them, and frightens them by condemning such curiosity as unwomanly and a sign of a sinful disposition. In this way they are scared away from any form of thinking, and knowledge loses its value for them. The prohibition of thought extends beyond the sexual field, partly through unavoidable association, partly automatically, like the prohibition of thought about religion among men, or the prohibition of thought about loyalty among faithful subjects . . . . I think that the undoubted intellectual inferiority of so many women can . . . be traced back to the inhibition of thought necessitated by sexual suppression.

*Id.* 198-99.

Accordingly, the condemnation of prostitution as morally degraded appears not to rest on critically defensible moral arguments, but on an ideology that idealized female chastity and stigmatized as morally indecent any deviation from this ideal. The rejection of this ground for the criminalization of prostitution is, then, mandated by the deepest values of equal concern and respect for autonomy. Not only does it fail to respect female sexual autonomy, but, in addition, to permit this ideology to have the force of law today is inconsistently to accept a model of compulsory female chastity that we reject elsewhere in our social life.

Nevertheless, it may be objected that however sound the foregoing arguments against legal enforcement of a parochial view of female chastity may be, they do not really come to terms with the modern view that prostitution is degrading. Such an objection leads to what is perhaps, the most interesting form of moral argument for the criminalization of prostitution from the point of view of moral theory.

## 2. Commercial Sex and the Alienation of Moral Personality

At the root of this argument is the idea of intrinsic moral limitations on the range of human conduct that may be justly subjected to the economic laws of the marketplace. The argument, derived from the father of modern moral theory, Immanuel Kant,<sup>310</sup> is that commercial sex is immoral *per se* because it involves the sale of the body, which is the foundation of personal integrity, and thus the root of ethical relationships. Kant put the argument in Augustinian terms of objections to the intrinsically degraded nature of sexual appetite *per se*<sup>311</sup> as an appetite for another person's body. Kant's words are striking: "Sexual love makes of the loved person an Object of appetite; as soon as that appetite has been stilled, the person is cast aside as one casts away a lemon which has been sucked dry."<sup>312</sup> The only legitimate sexuality for Kant is in conventional marriage, where there is reciprocal equality, each party having full rights in the person and body of the other.<sup>313</sup> Commercial sex, in particular, is forbidden for the same reason that a per-

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<sup>310</sup> I. KANT, *supra* note 147, at 162-71.

<sup>311</sup> *Id.* 163-64. Kant's words are deeply Augustinian: "Sexual desire is at the root of [sexual love]; and that is why we are ashamed of it, and why all strict moralists, and those who had pretensions to be regarded as saints, sought to suppress and extirpate it." *Id.*

<sup>312</sup> *Id.* 163.

<sup>313</sup> *Id.* 166-67.

son "is not entitled to sell a limb, not even one of his teeth."<sup>314</sup> Indeed:

to allow one's person for profit to be used by another for the satisfaction of sexual desire, to make of oneself an Object of demand, is to dispose over oneself as over a thing and to make of oneself a thing on which another satisfies his appetite, just as he satisfies his hunger upon a steak. But since the inclination is directed towards one's sex and not towards one's humanity, it is clear that one thus partially sacrifices one's humanity and thereby runs a moral risk. Human beings are, therefore, not entitled to offer themselves, for profit, as things for the use of others in the satisfaction of their sexual propensities. . . . To let one's person out on hire and to surrender it to another for the satisfaction of his sexual desire in return for money is the depth of infamy. The underlying moral principle is that man is not his own property and cannot do with his body what he will. The body is part of the self; in its togetherness with the self it constitutes the person; a man cannot make of his person a thing, and this is exactly what happens in *vaga libido*. This manner of satisfying sexual desire is, therefore, not permitted by the rules of morality.<sup>315</sup>

The integrity of the person rests on the integrity of the body; accordingly, the sale of the body is the alienation of moral personality, a kind of moral slavery. Charles Fried's recent references to prostitution in a discussion of the sale of body parts suggests a reintroduction of this argument, although without Kant's Augustinian view of sexual appetite as intrinsically degraded, nor Kant's view that only marital sex is legitimate.<sup>316</sup> Fried does seem to follow Kant in arguing that, in a society where distributive shares are just, the commercial sale of sex is intrinsically immoral for the same reason that the sale of body parts is shameful.<sup>317</sup>

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<sup>314</sup> *Id.* 165.

<sup>315</sup> *Id.* 165-66.

<sup>316</sup> C. FRIED, *supra* note 147, at 140-43.

<sup>317</sup> *Id.* 142. Fried's argument is specifically concerned with the question of the proper mode of distribution and contribution of valuable body parts, for example, kidneys, and is only concerned with prostitution and commercial sex by analogy. Indeed, Fried suggests that the sale of body parts in a just society would violate no one's rights, though there is something called "shame of selling one's body." *Id.* 142. In a note, Fried states that the sale of body parts is "though not wrong, . . . somehow shameful," *id.* 143, though the compulsion of donation of body parts is wrong. Fried's remark that there "may, after all, also be an absolute prohibition against engaging in sex for pay," *id.* 31, seems to indicate

This moral argument is sometimes put in Marxist terms that prostitution represents the ultimate capitalist degradation of personal relationships.<sup>318</sup> Since personal sexual love is conceived by Marx as the model for non-alienated personal relationships,<sup>319</sup> prostitution, degrading love into commerce, cuts to the heart of morality. In similar ways, some contemporary feminists regard prostitution as the ultimate symbol of woman as a degraded sex object, making sexuality a capital asset exploited in impersonal business terms.<sup>320</sup> These arguments seem to depend on the underlying Kantian argument about the alienation of moral personality.

Initially, it is important to see and be puzzled by the fact that the argument proves too much. Commercial sex is condemned as a sale of body parts, but this is, of course, not actually true. Commercial sex is no more the sale of sexual organs than is the sale of a mover's muscles or a model's beauty or a lawyer's legal talent. It is a gross misdescription to call commercial sex, on the one hand,

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that the prohibition of commercial sex may in some sense be more wrongful than the sale of kidneys.

It is important to add that the criticism here made is only of a small part of Fried's larger scheme. Overall, that scheme is an admirable essay in moral and legal philosophy. See especially *id.* 81-163.

<sup>318</sup> See K. MARX, *supra* note 145, at 133, where, in a footnote, Marx notes: "Prostitution is only a *specific* expression of the *general* prostitution of the *laborer*, and since it is a relationship in which falls not the prostitute alone, but also the one who prostitutes—and the latter's abomination is still greater—the capitalist, etc., also comes under this head." Cf. F. ENGELS, *supra* note 145, at 75-90 (prostitution as a product of monogamy). See also note 145 *supra* & accompanying text.

<sup>319</sup> See K. MARX, *supra* note 145, at 134, where Marx expresses his model of the overcoming of alienation and the realization of species man in terms of the movement from "the infinite degradation" of sex with women as "the spoil and handmaid of communal lust" to romantic love.

From this relationship one can therefore judge man's whole level of development. From the character of this relationship follows how much *man* as a *species being*, as *man*, has come to be himself and to comprehend himself; the relation of man to woman is *the most natural* relation of human being to human being. . . . In this relationship is revealed . . . the extent to which man's *need* has become a *human need*; the extent to which, therefore, the *other* person as a person has become for him a need—the extent to which he in his individual existence is at the same time a social being.

*Id.* Following this view, Engels argues that romantic love will fully emerge only with the coming of communism. See F. ENGELS, *supra* note 145, at 92-101.

<sup>320</sup> See S. BROWNMILLER, *supra* note 146, at 438-54; Brownmiller, *Speaking Out on Prostitution*, in NOTES FROM THIRD YEAR 24-25 (1971); Kearon & Mehrhof, *Prostitution*, in NOTES FROM THIRD YEAR, *supra*, at 26-28. Even feminist authors who, unlike those just referred to, support decriminalization of prostitution often write of the woman's role in commercial sex in this way. See, e.g., S. DE BEAUVOIR, *supra* note 286, at 631 ("I use the word *hetaira* to designate all women who treat not only their bodies but their entire personalities as capital to be exploited."); K. MILLETT, THE PROSTITUTION PAPERS 93-96, 111 (1973).

a "sale," and, on the other, to denominate the latter as "services."<sup>321</sup> Both the one and the others are most accurately described as services. So construed, the condemnation of commercial sex as a service would surely require the condemnation of others as well. If it is argued, for example, that commercial sex in some way degrades the talents of the prostitute because the prostitute is emotionally alienated,<sup>322</sup> the same arguments could be made, perhaps more strongly, about other forms of service that our economy not merely tolerates but encourages.<sup>323</sup> Prostitutes clearly perform an important social service; many people find with them a kind of personal release and solace not otherwise available to them;<sup>324</sup> and many prostitutes perform complex supportive and even therapeutic roles for their patrons in addition to sexual services.<sup>325</sup> It is difficult to regard such services as intrinsically degraded: the work is no more emotionally detached than much other contemporary work, and may be less so.<sup>326</sup> It is often well and fairly paid,<sup>327</sup> and the needs served are deep and real. Many forms of factory work in the United States unnecessarily involve repetitive boring tasks that create an emotionally alienated work force and, in a plausible sense, degrade capacities for committed and engaged work.<sup>328</sup> Many people in highly remunerated service professions engage in boring, sometimes socially wasteful work that they know sacrifices their better talents and that leads to deep alienation and emotional detachment.<sup>329</sup> If prostitution is to be criminalized as degraded work, much other work in the United States, a fortiori, would have to be criminalized. We are not prepared to do so in the latter case because of considerations that apply to prostitution as well: in a society committed to

<sup>321</sup> See H. BENJAMIN & R. MASTERS, *supra* note 43, at 435-74; H. ELLIS, *supra* note 48, at 304-05.

<sup>322</sup> One woman, reflecting on her life as a streetwalker, described her attitudes during commercial sex as follows: "I used to lie there with my hands behind my head and do mathematics equations in my head or memorize the keyboard typewriter." S. TERKEL, *WORKING* 62 (1974).

<sup>323</sup> The streetwalker, note 322 *supra*, compared her detached state of mind as a streetwalker to that of a person in a typing pool who receives work anonymously, in contrast to the more engaged call girl who is more like the executive secretary with a personal relationship to her employer. *Id.*

<sup>324</sup> See H. BENJAMIN & R. MASTERS, *supra* note 43, at 435-74; note 380 *infra*.

<sup>325</sup> See note 359 *infra* for the behavior of patrons and notes 379-80 *infra* for the complexity of services that a prostitute may render, including perception required in deciphering the needs of patrons.

<sup>326</sup> See note 325 *supra* & accompanying text.

<sup>327</sup> See note 398 *infra*.

<sup>328</sup> See generally H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* (1974).

<sup>329</sup> For a description of this state of mind, see R. UNGER, *KNOWLEDGE AND POLITICS* 145-90 (1975).



equal concern and respect for autonomy people are entitled to make choices for themselves as to trade-offs between alienation, social service, and remuneration. We certainly can criticize these decisions, but we do not regard criminalization as an appropriate expression of our condemnation.

It is impossible to see how sexual services can be distinguished from other cases. The suggestion, for example, that highly remunerated professional services require effort and training, but that prostitution does not,<sup>330</sup> obviously will not do. Many forms of service other than commercial sex call for comparably little effort and training; yet, we do not criminalize them on that ground. In any event, why should years of training make any difference, if the work itself is empty, alienated, and socially unproductive?

However, let us assume *arguendo* that it is possible to distinguish commercial sex from other forms of service, and even to regard it as a kind of sale of the body like the sale of body parts. Kant's argument, nevertheless, rests on an indefensible interpretation of the relation of moral personality to the body. Kant identifies the person with the body, and then argues roughly as follows:

1. It is always wrong to alienate moral personality.
2. Prostitution is the sale of the body.
3. The person and the body are the same.
4. It is always wrong to engage in prostitution.

The crucial assumption is the third, on the basis of which Kant associates prostitution with a kind of moral slavery.

Kant's identification of moral personality with the body in his discussion of sexual morality is remarkably inconsistent with what he says elsewhere about autonomy as the basis of moral personality. In his central statements of ethical theory, moral personality is described in terms of autonomous independence—the capacity to order and choose one's ends as a free and rational being.<sup>331</sup> By comparison, in his sexual morality discussion, the body acts as an absolute and inexplicable limit on autonomous freedom. It is impossible to square these views. Indeed, the deeper theory of autonomy, Kant's central contribution to ethical theory,<sup>332</sup> requires the rejection of the

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<sup>330</sup> Fried attempts to use this distinction in order to distinguish the sale of the body from the sale of services. C. FRIED, *supra* note 147, at 142.

<sup>331</sup> See I. KANT, *supra* note 207, at 51-52. See generally text accompanying notes 168-80 *supra*.

<sup>332</sup> See *id.*

rather parochial and unimaginative views of moral personality applied in his consideration of sex. Autonomy, in the fullest sense, rests, as we have already seen,<sup>333</sup> on persons' self-critical capacities to assess their present wants and lives, to form and act on wants and projects, and to change them. Autonomy occurs in a certain body, occasioning a person self-critically to take into account that body and its capacities in deciding on the form of his or her life. The existence of certain capacities or physical traits, as opposed to others, will importantly shape basic decisions on work and love. But the embodiment of autonomy does not limit the exercise of autonomy in the way Kant supposes. Kant means to be making the quite valid point about autonomy-based ethics that it is immoral to abdicate one's autonomy, or one's capacity for self-critical choice about the form of one's life. All forms of slavery are thus forbidden because they involve such a surrender of basic autonomy and of the human rights that express and facilitate such autonomy. But Kant conflates this valid moral idea with the quite unrelated idea that one's body parts are not alienable. It is a flat non sequitur to assume that such alienations are alienations of moral personality. The self-critical capacities of autonomy may validly be exercised by the sale or donation of blood<sup>334</sup> or, within limits,<sup>335</sup> other body parts. The extension of the argument to commercial sex is equally mistaken. Voluntarily engaging in commercial sex cannot reasonably be supposed to be the same thing as the forbidden moral slavery of alienating moral personality. Indeed, there is something morally perverse in condemning commercial sex as intrinsic moral slavery when the very prohibition of it seems to be an arbitrary abridgement of sexual autonomy.

Kant's argument would be perceived as the non sequitur that it is if it were applied to other forms of commercial service. Certainly the form of Kant's argument renders dubious the whole idea of the marketplace and the role of personal services in it, as if there were some moral impediment to rendering services on equitable terms. There are moral limits on the range of activities to which the market properly applies; slavery and certain kinds of

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<sup>333</sup> *Id.*

<sup>334</sup> Of course, to say that the sale or donation of body parts is not morally forbidden is not to say that there may not be reasons to prefer donation over sale, other things being equal. For a suggestion of such reasons, see R. TITMUS, *THE GIFT RELATIONSHIP* (1971). See also ARROW, *Gifts and Exchanges*, 1 *PHILOSOPHY & PUB. AFF.* 343 (1972).

<sup>335</sup> I assume some form of moral limit to exist on the donation of vital parts that would result in the death or severe impairment of the person donating or selling them.

services are correctly forbidden.<sup>336</sup> But the market sensibly operates in making commercially available to willing buyers those willing to offer their services on terms equitable to both parties. Sexual services are not, in moral principle, any less worthy of being in the marketplace than are any other valued services. Rendering such services is no more harmful to the seller or buyer than many other personal services conventionally available and may, in some cases, be less so.<sup>337</sup>

In this connection, Kant, followed by Marxists<sup>338</sup> and recent feminists,<sup>339</sup> argues that in the sexual area there is a unique evil in treating another person as an object, and that commercial sex is the most degraded example of such objectification. Sexual relations of all kinds do, of course, involve making the sex partner the object of one's sexual interests, but it is a rather silly equivocation on the notion of sex object to conflate this uncontroversial truth with the moral claim that sex necessarily treats the partner as a non-person. In many human relationships, we take other persons as the "objects" of our endeavors, but this grammatical truth says nothing about the morality of our endeavors, which may be highly humane and morally sensitive. In having sex, our partner is the object of our sexual interests, but the moral character of the intercourse will depend on many background factors. Among lovers, the morality of the intercourse may depend on exquisite issues of awareness of and sensitivity to giving and receiving reciprocal pleasure. Among non-lovers, the moral issues may center on issues of the nature of mutual understanding. In commercial sex, presumably a subcase of non-lovers, a crucial issue will be the fairness of the bargain, determined by the nature of the service and the money paid. There is no reason why the morality of a sexual relationship may not, like any other commercial service, be judged in this way. Kant argues that the only just reciprocity for sex can be marriage,<sup>340</sup> and Marx similarly suggests that the only just equivalence can be mutual love.<sup>341</sup> Kant's arguments, as we have seen, are mistaken; and Marx appears to invoke the model of romantic

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<sup>336</sup> Such services independently violate basic moral principles expressing equal concern and respect for autonomy. See generally text accompanying notes 181-220 *supra*. See also D.A.J. RICHARDS, REASONS, *supra* note 19, at 75-211.

<sup>337</sup> See notes 321-29 *supra* & accompanying text.

<sup>338</sup> See notes 318-19 *supra*.

<sup>339</sup> See note 320 *supra*.

<sup>340</sup> See note 313 *supra*.

<sup>341</sup> See notes 318-19 *supra*.

love,<sup>342</sup> which we have seen to be an improper measure of legally enforceable morality. In general, commercial sex involves a valued service and may be given in a fair bargain. The buyer receives a kind of attention not secured elsewhere,<sup>343</sup> and the seller receives fair payment.<sup>344</sup> In neither case is there any evidence that the parties in question are disabled or rendered incapable of love elsewhere.<sup>345</sup> If one thinks of the prostitute as an unloved sex object, the alleged symbol of sexually exploited women carried to its immoral extreme, the crucial difference becomes clear: the prostitute demands and exacts a fair return, as an autonomous person should, for service rendered.

It is not difficult to understand how Kant, so powerful in his statement of abstract universalistic ethics, could be so time-bound in his casuistry of sex; he assumes, as the foundation of his discussion of sexual morality, the Augustinian model of sexuality. Thus, when Kant argues that we do not have a property right in our sexuality, he is not only making the confused argument about alienating moral personality just discussed, but he is echoing Augustine's quasi-theological argument that our sexuality is the property of God which we may employ only on His marital, procreational terms.<sup>346</sup> Accordingly, Kant isolates sex from autonomy in the way conventional for his period. But there is no reason to continue this mistake today. If the religious overtones of the subject caused Kant to miss the implications of his own ideas, there is no reason for us irrationally to isolate sex for ad hoc treatment. Such isolation blinds us to the reality of our sexual and social lives, encouraging us to see degradation in commercial sex when there may be better examples of the degradation of work elsewhere in our society, to see in prostitution loveless waste where, in fact, there may be fair service, and to support as national dogma romantic love which may be a sentimental mask for exploitative self-sacrifice.

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<sup>342</sup> See note 319 *supra*.

<sup>343</sup> See note 324 *supra*.

<sup>344</sup> If not, the concern of the law should be to secure payment on fair terms.

<sup>345</sup> For example, despite the widespread speculation that a prostitute must be a basically immature person lacking the normal ability to respond with sexual excitement, when W.B. Pomeroy systematically interviewed 175 prostitutes, he found that they experienced orgasm and multiple orgasm more frequently in their personal, "noncommercial" intercourse than did the normal woman (as defined by Kinsey norms). Over 20% of the prostitutes even reported frequently experiencing orgasms while having intercourse with clients. See Pomeroy, *Some Aspects of Prostitution*, 1 J. SEX RESEARCH 177-87 (1965).

<sup>346</sup> For a criticism of this argument, see notes 222-40 *supra* & accompanying text.

### 3. Paternalistic Arguments Against Prostitution

Even if no other moral argument on behalf of criminalization can be sustained, it may still be argued that undertaking particular conduct is sufficiently irrational for an agent that there is moral title to interfere on paternalistic grounds. Such forms of argument in defense of prohibitions of commercial sex, however, are radically inappropriate.

Let us begin with a consideration of the proper scope of paternalistic considerations in general, and then turn to the special problems raised by the application of these considerations to basic life choices. We have discussed the moral point of view in terms of a structure of reasons expressing mutual concern and respect, universalization, and minimization of natural fortuity, and have employed a contractarian model to articulate these ideas.<sup>347</sup> This model would clearly justify a principle of paternalism and explain its proper scope and limits. From the point of view of the original position, the contractors would know that human beings would be subject to certain kinds of irrationalities with severe consequences, including death and the permanent impairment of health. They would, accordingly, agree on an insurance principle against certain of these more serious irrationalities in the event they might occur to them.<sup>348</sup> There are two critical constraints on the scope of such a principle. First, the relevant idea of irrationality cannot itself violate the two constraints of morality imposed on moral contractors: ignorance of specific identity and reliance only on facts capable of empirical validation. In particular, possibly idiosyncratic personal values cannot be smuggled into the content of "irrationality" that defines the scope of the principle. Rather, the notion of irrationality must be defined in terms of a neutral theory that can accommodate the many visions of the good life compatible with moral constraints. For this purpose, the idea of rationality must be defined relative to the agent's system of ends, which are, in turn, determined by the agent's appetites, desires, capacities, and aspirations. Principles of rational choice require the most coherent and satisfying plan for accommodating the agent's ends over time.<sup>349</sup> Accordingly, only those acts are irrational that frustrate the agent's own system of ends, whatever those ends are. Paternalistic considerations, then, only come into play when irrationalities of this kind exist (for ex-

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<sup>347</sup> See text accompanying notes 168-95 *supra*.

<sup>348</sup> See D.A.J. RICHARDS, REASONS, *supra* note 19, at 192-95; Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107-26 (R. Wasserstrom ed. 1971).

<sup>349</sup> See D.A.J. RICHARDS, REASONS, *supra* note 19, at 27-48.

ample, the agent's jumping out the window will cause his death, which the agent does not want but which he falsely believes will not occur). Second, within the class of irrationalities so defined, paternalistic considerations would properly come into play only when the irrationality was severe and systematic (due to undeveloped or impaired capacities, or lack of opportunity to exercise such capacities) and a serious, permanent impairment of interests was in prospect. Interference in irrationalities outside the scope of this second constraint would be forbidden in large part because allowing people to make and learn from their own mistakes is a crucial part of the development of mature autonomy.<sup>350</sup>

When we consider the application of paternalistic considerations of these kinds to the choice of engaging in commercial sex, we face the question how to assess the rationality of this kind of choice. Again, the idea of rationality employed here takes as its fundamental datum the agent's ends. In this context, principles of rational choice call for the assessment of choices of occupation in terms of the degree to which each choice satisfies the agent's ends over time.<sup>351</sup> This is because choices of occupation determine a number of subchoices having effects throughout the agent's life, and indeed may determine the duration of that life.<sup>352</sup> Since the agent's ends over time are often complex and difficult to anticipate with exactitude, a number of such choices may be equally rational. Nonetheless, there is a coherent sense to the application of rationality criteria to such choices. Some such choices are clearly irrational if they frustrate every significant end which the agent has and available alternatives do not.<sup>353</sup> Such choices, if they satisfy the stringent constraints of the principle discussed above, may be the proper object of paternalistic interference.

One radically inappropriate form of paternalistic interference is that which is grounded in the substitution of the interferer's own personal ends for the ends of the agent. This fails to take seriously the fundamental datum of paternalism, that the agent's ends are given and that the agent acts irrationally only when his or her action frustrates them. This error is a frequent problem in the pa-

<sup>350</sup> *Id.* 193.

<sup>351</sup> Such a choice might involve a consideration of, for example, whether the exercise of competences that the agent can take pleasure in is called for, the degree to which human contacts satisfy one's desires for sociability, the level of remuneration in relation to other opportunities and trade-offs in the satisfaction of other wants, and the degree of leisure to pursue avocations.

<sup>352</sup> See C. FRIED, *supra* note 190, at 155-82.

<sup>353</sup> In terms of rational choice theory, one plan would dominate another. See D.A.J. RICHARDS, REASONS, *supra* note 19, at 28, 40-43.

ternalistic assessment of basic choices such as that of occupation, for in this context people find it all too natural facilely to substitute their own personal solutions for the kinds of imaginative understanding of the perspectives of others required properly to examine these matters. The temptations to such paternalistic distortions are particularly strong in cases in which conventional moral judgments mistakenly condemn certain conduct. The idea of human rights may, in part, be understood as a prophylaxis against such abuses.

The assertion of paternalistic arguments sometimes marks a period of transvaluation of values in matters of certain kinds of life choice.<sup>354</sup> Certain conduct traditionally believed to be morally wrong may no longer justifiably be so regarded. In such a context, the last stand of traditional moralists, after they are compelled to concede the lack of moral foundations for their views, is to retreat to paternalistic arguments that covertly mask the discredited traditional morality. This is quite natural. People attach deep significance to traditionally sanctioned life choices such as marrying and having children. For many, such decisions are of metaphysical import and invoke the person's deepest ideology and philosophy—the kind of choice associated with what many naturally think of as the “meaning of life.” Given the personal significance that they may have found in such traditional moral judgments, their imaginations systematically fail them when they try seriously to consider whether it could be a rational life choice to adopt a traditionally condemned occupation. Nevertheless, such views cannot be sustained in terms of rationality criteria and, indeed, can be seen to rest on deep moral confusions which contradict the ultimate values of human rights.

No good argument can be made that paternalistic considerations would justify the kind of interferences, either in choices to render sexual services commercially or to use such services, that are involved in the criminalization of prostitution. Indeed, in many cases such choices seem all *too* rational. It is important, first, to understand that people are not always full-time prostitutes<sup>355</sup> or are full-time prostitutes only for certain periods of their lives, after which they lead more conventional lives.<sup>356</sup> For many, prostitution

<sup>354</sup> For a further development of this idea, see Richards, *Sexual Autonomy*, *supra* note 12, at 719-42.

<sup>355</sup> About 10% of New York City prostitutes are estimated to be suburban housewives who engage in commercial sex part-time. See G. SHEEHY, *supra* note 114, at 36-37, 189, 200-01. For the comparable British phenomenon, see A. STON, *supra* note 34, at 67, 114-15.

<sup>356</sup> See C. WINICK & P. KINSIE, *supra* note 36, at 73-76; G. SHEEHY, *supra* note 114, at 221-54. Compare Acton's well-informed remark in his study of London

is engaged in for limited financial and social purposes and is abandoned when these purposes are achieved.<sup>357</sup> These purposes are not irrational. Prostitutes have been described as the highest paid professional women in America.<sup>358</sup> There is no evidence that prostitution itself is necessarily an unpleasant experience for the prostitutes,<sup>359</sup> or that, in general, it disables them from engaging in other loving relationships;<sup>360</sup> indeed, there is some evidence that prostitutes, as a class, are more sexually fulfilled than other American women.<sup>361</sup> Many women have traditionally found in prostitution a useful escape from limited, oppressive, and parochial family<sup>362</sup>

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prostitution written in the middle of the last century that prostitution is "a transitory stage, through which an untold number of British women are ever on their passage." W. ACTON, PROSTITUTION 49 (1870). Similarly, Parent-Duchâtelet, the leading authority during this period on French prostitution, stated that "prostitution is for the majority only a transitory stage; it is quitted usually during the first year; very few prostitutes continue until extinction," quoted in H. ELLIS, *supra* note 48, at 261-62.

<sup>357</sup> *Id.*

<sup>358</sup> See note 398 *infra*.

<sup>359</sup> Stein's study shows that 92% of her sample of 1,230 clients expressed positive post-orgasmic emotions and "behaved affectionately" toward the prostitutes. M. STEIN, *supra* note 129, at 99-100. Another study found that no less than 66% of a sample of customers were willing to admit they could fall in love with the prostitute they frequented. C. WINICK & P. KINSIE, *supra* note 36, at 197.

<sup>360</sup> Of the much maligned relationship of the prostitute to her pimp, the *Wolfenden Report* notes that

[s]uch evidence as we have been able to obtain on this matter suggests that the arrangement between the prostitute and the man she lives with is usually brought about at the instance of the woman, and it seems to stem from a need on the part of the prostitute for some element of stability in the background of her life,

WOLFENDEN REPORT, *supra* note 1, at 161-62, and then quotes approvingly the observation of one writer that the pimp is sometimes a coercive figure, but is often

"the only person in the world towards whom she feels affection and sense of possession; he is usually her champion in disputes and her protector in a skirmish. He is deeply despised by the police and by the public outside his trade; but he may be nevertheless the one humanizing element in the life of the woman on whom he lives."

*Id.* (quoting HALL, PROSTITUTION (1933)). See also J. MURTAGH & S. HARRIS, CAST THE FIRST STONE 147-68 (1957). There is some evidence that prostitutes are less likely to have children than other women. See C. WINICK & P. KINSIE, *supra* note 36, at 59-62. But, of course, this does not show that, if they do have children, they are not loving parents. If there were evidence that being a prostitute disabled one from being a minimally good parent, that would be a reason not to forbid prostitution but for some form of alternative parental care. But, in fact, there are many professions that one might regard as less than optimal in this regard, a fact hardly sufficient to warrant automatic deprivation of parental rights. That a person is a professional gambler may lead to a sad and socially wasteful life, but such an undesirable profession does not disentitle him or her per se from parenthood.

<sup>361</sup> See note 345 *supra*.

<sup>362</sup> See note 365 *infra*. Consider the remarkable collection of recently published letters of the Victorian ex-prostitute Maimie, which adds to the economic causes of prostitution the claim "that many of the young girls suffered from overly strict families who prevented them from enjoying a normal social life and who also



and career lives.<sup>363</sup> Prostitution, for them, is not adopted exclusively for economic reasons but because its urban life style affords a kind of social and cultural variety, color, glamor, and range of possibilities<sup>364</sup> that would not have been available to them otherwise.<sup>365</sup> In periods when women had no substantial access to social and economic mobility and the jobs available to them were underpaid and servile, the case for prostitution was rationally powerful.<sup>366</sup> With greater social and economic opportunities for women today, presumably the case for adopting this life is not as strong, but that is not to say that it is not still one of the number of ways in which people may rationally advance their ends. At the least, there is no good case for its irrationality, let alone the kind of irrationality required to bring paternalistic considerations into play.

It is important to see that the traditional arguments for the irrationality of rendering commercial services are typically based on mistaken distortions of the facts. It is as if the extant moralistic

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refused them a few cents to fulfill necessary adolescent vanities and fantasies." THE MAIMIE PAPERS, *supra* note 298, at xxxi.

<sup>363</sup> Jennifer James found that of the approximately 135 prostitutes that she studied, the occupations held by the 37 who were employed when they entered the profession were for the most part "low-paying, low-status, low-skilled service occupations." James, *Motivations for Entrance into Prostitution, in THE FEMALE OFFENDER* 177, 180, 201 (L. Crites ed. 1976). See also F. ADLER, *SISTERS IN CRIME* 76 (1975); C. WINICK & P. KINSIE, *supra* note 36, at 35-38.

<sup>364</sup> One older study of the causes of prostitution shrewdly observed:

A very large constituent in what has been called the irresistible demand of natural instinct is nothing but suggestion and stimulation associated with alcohol, late hours, and sensuous amusements . . . Amid conditions as they exist in Paris, Berlin, and Vienna, and the smaller towns like Geneva which aspire to be world cities by being licentious, growing youth is characterized not by a normal, healthy, and natural sexual development, but by an over-stimulated and premature sex activity—a purely artificial excitation of instinct.

A. FLEXNER, *supra* note 36, at 45-46.

<sup>365</sup> See H. ELLIS, *supra* note 48, at 287-302. See also P. ADLER, *A HOUSE IS NOT A HOME* 128-29 (1953), where a woman who ran a house of prostitution for 25 years described this phenomenon:

When a fifteen-year-old girl looks around her with the new awareness of adolescence and sees only poverty and ugliness, the groundwork is laid. She doesn't want to wind up like her mother, wornout from too much childbearing, slopping around in an old ragged dress, beaten up by a drunken stupid husband every Saturday night. She wants a chance at the kind of life she's seen in the movies, with becoming frocks to wear and handsome men to pay her court, a house on a pretty street, clean, smiling children. . . . And suddenly she sees that she might not get all this, nor even any part of it, that in fact she does not even know how to go about getting it.

*Id.* 128. See also A. FLEXNER, *supra* note 36, at 84, 89; THE MAIMIE PAPERS, *supra* note 298, at 156, 277. Cf. G. SHEEHY, *supra* note 114, at 221-54.

<sup>366</sup> See L. STONE, *supra* note 38, at 615-19, 645-47.

condemnation of prostitution inexorably shaped the reading of the facts so as to confirm that the putatively immoral conduct was personally irrational as well. Older accounts of prostitutes, for example, claim that they are mentally deficient<sup>367</sup> and have much shortened life spans because of the horrors of their work.<sup>368</sup> Psychiatrists have commonly supplied a psychiatric makeweight to the moral condemnations by claims that the prostitute is mentally ill or, at least, neurotic.<sup>369</sup> None of these claims has been sustained by careful empirical research observing sound scientific methods.<sup>370</sup> Typically the older claims rested on the limited sample of people whom the researcher mistakenly believed to be typical of the research population at large. For example, a psychiatrist might mistakenly infer from the class of prostitutes who seek therapeutic help that all prostitutes need therapeutic help.<sup>371</sup> In fact, some recent studies indicate that classes of prostitutes may be happier and healthier than other women.<sup>372</sup> In any event, the class of prostitutes whose life is most harsh, that of the streetwalker, is precisely the class affected most directly by criminalization.<sup>373</sup> There is reason to believe that much of the harshness of their lives would be ameliorated by decriminalization.<sup>374</sup>

I do not wish to romanticize the facts of the life of a prostitute. Many accounts forcefully show how difficult and costly an occupa-

<sup>367</sup> See C. KNEELAND, *COMMERCIALIZED PROSTITUTION IN NEW YORK CITY* 186-88. See also the review of the studies of Lombroso et al., H. ELLIS, *supra* note 48, at 275-80. For more recent findings, see H. GREENWALD, *supra* note 157, at 183; C. WINICK & P. KINSIE, *supra* note 36, at 35-36.

<sup>368</sup> See W. SANGER, *supra* note 53, at 455-56, who claims that the average prostitute lives only four years from the beginning of her career.

<sup>369</sup> See M. CHOISY, *PSYCHOANALYSIS OF A PROSTITUTE* 6, 62-63 (1961); O. FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSIS* (1945); H. GREENWALD, *supra* note 157; George, *supra* note 152, at 746-52.

<sup>370</sup> Indeed, of prostitution,

some research sponsored by the British Social Biology Council suggests that in the majority of cases this way of life is chosen because it offers greater ease, freedom, and profit than available alternatives. There is no evidence that the incidence of neurosis or psychological abnormality is greater among prostitutes than among housewives.

N. MORRIS & G. HAWKINS, *supra* note 1, at 21. On the existence of myths about the mental condition of prostitutes, as such, unconfirmed by any systematic empirical study, see James, *supra* note 363, at 188-92.

<sup>371</sup> For the comparable phenomenon vis-à-vis homosexuality, see Richards, *Sexual Autonomy*, *supra* note 12, at 1012 n.235; Richards, *Unnatural Acts*, *supra* note 24, at 1325-26.

<sup>372</sup> See *Happy and Healthy Harlots*, in *HUMAN BEHAVIOR*, August, 1978, at 66; note 345 *supra*.

<sup>373</sup> See note 399 *infra*.

<sup>374</sup> See notes 399-403 *infra* & accompanying text.

tion it can be,<sup>375</sup> but many recent accounts of women's traditional role show how difficult and costly that life can be as well.<sup>376</sup> It is as much a mistake to romanticize the life of the traditional woman as it is to romanticize the life of the prostitute. When we look at these lives unsentimentally, without the distorting myths that obscure American perception of these matters, we cannot regard either as necessarily rational or irrational. Rather, we must look with care and imagination at how people autonomously make such choices, often between lesser evils or lesser disadvantages. When we do so, we can see that there is no ground whatsoever to believe that prostitution is, for a mature adult, irrational in the way required to justify paternalistic interference.

In similar fashion, the conventional arguments about the intrinsic irrationality of using commercial sexual services are misplaced. Recent studies of patrons of prostitutes show that patrons rationally secure thereby forms of sexual release, comfort, and even therapeutic understanding.<sup>377</sup> In a period where the most advanced sex therapy often employs paid third parties to help a couple solve their sexual problems,<sup>378</sup> the role of a prostitute as a kind of therapist is a natural one.<sup>379</sup> Certainly, some patrons are able to achieve

<sup>375</sup> See A. FLEXNER, *supra* note 36; H. GREENWALD, *supra* note 157; J. MURTAGH & S. HARRIS, *supra* note 360; W. SANGER, *supra* note 53; G. SHEEHY, *supra* note 114; C. WINICK & P. KINSIE, *supra* note 36, at 23-96.

<sup>376</sup> See S. DE BEAUVOIR, *supra* note 286; S. FIRESTONE, *supra* note 286; E. JANEWAY, *MAN'S WORLD WOMAN'S PLACE* (1971); K. MILLETT, *SEXUAL POLITICS* (1970); J. MITCHELL, *WOMAN'S ESTATE* (1971). For older accounts, see J.S. MILL, *supra* note 177; M. WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* (1794); V. WOOLF, *A ROOM OF ONE'S OWN* (1957).

<sup>377</sup> See note 281 *supra*.

<sup>378</sup> See E. BRECHER, *THE SEX RESEARCHERS* 295-96 (1969).

<sup>379</sup> H. BENJAMIN & R. MASTERS, *supra* note 43, at 435-74; H. GREENWALD, *supra* note 157, at xviii-xix; K. MILLETT, *supra* note 320, at 69; C. WINICK & P. KINSIE, *supra* note 36, at 193-98. See note 281 *supra*. The therapeutic role of the call girl for ego support and for crisis intervention is operative in the frequent situations where the customer is relaxing from the tensions of work. M. STEIN, *supra* note 129. In describing roughly 15% of her study sample, the so-called "lovers," Stein observes that they

feel they must wear themselves out to maintain the upper-middle-class life style, just as they are beginning to question whether that life style has really brought the satisfactions they expected of it. At a time when they feel a great need for emotional support, many feel estranged from their wives and growing children; they no longer believe they are "communicating" in a rewarding way with the members of their family . . . They are aware that they are middle-aged in a society where youth is valued and they may believe the best moments of their lives have already passed. They are going through a middle-aged identity crisis and must find a way to deal with the feeling of being trapped by morality and circumstance, to overcome self-doubt and re-establish a sense of their own worth.

*Id.* 218. Many of the clients in Stein's sample spent as much time talking to the prostitutes as having sex, and for most this seemed as important as sex, if not more

with prostitutes the natural and fulfilling expression of sexual tastes and fantasies that they cannot indulge in their marriages or central personal relationships.<sup>380</sup> It is a species of dogmatism to assert that these people do not in this way more rationally advance their ends; to the contrary, the use of prostitutes is all *too* rational. Of course, in using prostitutes, a person does not cultivate the higher capacities of sensitivity, taste, and testing that the romantic love tradition celebrates. But such ideals are not without internal critical flaws and, in any event, are not a just basis for legal morality. Even the initiate of the mysteries of romantic love may, on occasion, need a recreational respite from the rigors of his or her path. Commercial sex may thus facilitate the pursuit of this ideal. Compared to the rigors of the frustrations and idealizations of romantic love, prostitution has virtues of its own: the understanding is unsentimentally clear, the reciprocal bargain fair, and the terms are met. Some would say that the best of romantic love does not quixotically repudiate

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so. *Id.* 226. While some patrons merely used the call girl as a listener while they relieved tensions, others "really worked through problems and gained insights about themselves." *Id.* 237. For many in Stein's psycho-sexual study, the prostitute seemed to increase the patrons' self-esteem—to help them reaffirm their battered self-worth. *Id.* 316-17. See also C. WINICK & P. KINSIE, *supra* note 36, at 197 (61% of sample indicated prostitute refurbished battered ego).

<sup>380</sup> The act most frequently requested of prostitutes is fellatio. H. GREENWALD, *supra* note 157, at 223 ("between 75 and 90 per cent of all clients did *not* want normal intercourse but preferred oral sex"); D. REUBEN, *EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX* 200 (1969) (75-85% of clients); M. STEIN, *supra* note 129, at 95, 98 (83% of clients received fellatio; climax occurred in association with coitus in only 51% of the cases and in association with fellatio in 29% of the cases); C. WINICK & P. KINSIE, *supra* note 36, at 207 ("Annual surveys conducted by the American Social Health Association suggest that as many as nine out of ten customers now want some form of oral satisfaction in contrast to the 10 per cent requesting it in the 1930's."). The fact that a large number of patrons take a "passive," rather than an "active," role in relationships with a prostitute, M. STEIN, *supra* note 129, at 92 (48%), and that the majority of customers who were previously impotent are brought to climax during their contact with a prostitute, *id.* 97 (122 out of 237 patrons), indicates that patrons are able in prostitution comfortably to adopt sex roles they cannot easily adopt elsewhere. Other unsatisfied yearnings that very few non-prostitutes will consider relate to those tendencies about which customers have conflicts, such as masochism, homosexuality, sadism, fetishism, and transvestitism. Prostitution affords an outlet for these as well. See H. BENJAMIN & R. MASTERS, *supra* note 43, at 194-95; M. STEIN, *supra* note 129, at 192, 243-65; C. WINICK & P. KINSIE, *supra* note 36, at 206-09. Stein observed 156 clients' transactions with call girls in which masochistic tendencies were being acted out, and indicated that the focus of the transaction appeared to be "power, not pain." M. STEIN, *supra* note 129, at 244. These transactions freed the clients to realize their desires without guilt or shame, and to act out impulses, normally expressed in more dangerous ways, "in a controlled context that channelled the impulses toward a pleasurable end." *Id.* 263. In general, prostitutes often evince great perception in deciphering the specialized needs of each client, *id.* 52-53. Stein observes: "I was continually surprised by the complexity of the transactions: each session involved an elaborated interplay of social, sexual, and psychological behavior. . . . [C]omplicated desires and needs were not being satisfied in the ordinary fabric of men's lives." *Id.* 52.

such virtues. Rather, the best in romantic love is realized when the relationship is most realistic, fair, and reciprocal, for then the idealization of the beloved is not a distorting fantastic myth<sup>381</sup> endowed with the egocentric expectations of one's childhood<sup>382</sup> but the celebration of realistic virtues more intensely felt because they meet unique, totally individual needs of a kind that mutual love comfortably discloses.<sup>383</sup> If so, romantic love and commercial sex may, at their best, express common moral virtues.

The radical vision of autonomy and mutual concern and respect is a vision of persons, *as such*, having human rights to create their own personal lives on terms fair to all. To see people in this way is to affirm basic intrinsic limits on the degree to which, even benevolently, one person may control the life of another. Within ethical constraints expressive of mutual concern and respect for autonomy, people are free to adopt a number of disparate and irreconcilable visions of the good life. Indeed, the adoption of different kinds of life plans, within these constraints, affords the moral good of different experiments in living by which people can more rationally assess such basic life choices.<sup>384</sup> The invocation of inadequate moral and paternalistic arguments of the kind we have discussed violates these considerations of human rights, confusing unreflective personal ideology with the moral reasoning that alone can justify the deprivations of liberty by criminal penalty. At the least, such arguments fail to take rights seriously, and thus fail to take seriously the separateness of other persons, their different situations, perspectives, interests, and ideals, and their right to build a life with integrity from such individual materials.

## V. COMMERCIAL SEX, HUMAN RIGHTS, AND MORAL IDEALS

So far, we have considered a number of negative arguments directed at showing why various moral arguments condemning commercial sex are mistaken. Let us now constructively consider the

<sup>381</sup> The most extreme example of this in the courtly love tradition is Dante. See note 252 *supra*. Such forms of extreme idealization, which positively avoid any realistic knowledge of the beloved, evince the origins of the medieval romantic love tradition in aristocratic chivalry, where the point is observance of an aristocratic code of conduct, not deepening sensitivity to the realistic needs of the beloved. For the complex forms of the romantic love tradition, of which Dante's religious idealization is one sub-variety, see notes 244-53 *supra* & accompanying text.

<sup>382</sup> For the psychoanalytic distinctions between narcissistic primary love (derived from early parental attachments) and the development of the capacity for the mutualities of reciprocal genital love, see M. BALINT, *PRIMARY LOVE AND PSYCHOANALYTIC TECHNIQUE* 90-140 (1965).

<sup>383</sup> See *id.* 109-20.

<sup>384</sup> See J.S. MILL, *supra* note 173, at ch. 3.

affirmative case for allowing commercial sex, that is, for the existence of rights of the person that include the right to engage in commercial sex. In this way, we can clarify the scope and limits of this right, and address in more systematic fashion the relation of this right to the personal ideals, frequently invoked previously, that the state allegedly has no right to enforce.

Let us reconsider the view of sexual autonomy that emerged in our discussion of romantic love and its relation to the contractarian analysis of human rights.<sup>385</sup> We argued that human sexuality is marked by its powerful role in the imaginative life and general development of the person, and that the neutral theory of the good, expressive of the values of equal concern and respect for autonomy, required toleration of a number of different visions of the role of sexuality in human life. In the contractarian model,<sup>386</sup> we express these ideas by saying that the choice in the original position is choice under uncertainty: rational people in the original position have no ways of predicting that they may end up in any given situation of life and they must decide only on the basis of facts capable of interpersonal empirical validation. By definition, none of the contractors knows his or her own age, sex, native talents, particular capacity for self-control, social or economic class or position, or the particular form of his or her personal desires. Each contractor will be concerned not to end up in a disadvantaged situation with no appeal to moral principles to denounce deprivations that may render life prospects bitter and mean. To avoid such consequences, the rational strategy in choosing the basic principles of justice would be the "maximin" strategy.

As we have suggested, the contractors in the original position would regard self-respect as the primary good. Accordingly, their aim would be to adopt principles that would ensure that people have the maximum chance of attaining self-respect. Sexual autonomy, the capacity to choose whether or how or with whom or on what terms one will have sexual relations, would be one crucial ingredient of this self-respect; it is one of the forms of personal competence in terms of which people self-critically decide, as free and rational agents, what kind of person they will be. Because contractors in the original position are assumed to be ignorant of specific identity and to take into account only those facts subject to general empirical validation, they may not appeal to special religious duties to procreate in order to override sexual liberty; nor

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<sup>385</sup> See notes 241-88 *supra* & accompanying text.

<sup>386</sup> See notes 181-95 *supra* & accompanying text.

may they appeal to any taste or distaste for certain forms of the physical expression of sexuality in order to override the interest in sexual autonomy; nor may they appeal to concepts of love that illegitimately smuggle in covert premises or prejudices incompatible with respect for the myriad paths to sexual fulfillment. As we have seen, self-respect in the fulfillment and expression of one's sexuality is compatible with a number of modes.<sup>387</sup> Sexual love is one of these modes; romantic love is one highly special form of it. But meaningful sexual fulfillment takes other forms as well. From the point of view of the original position and the values of equal concern and respect for autonomy that it expresses, there is no form of sexual expression that can be given preferred status, for a large and indeterminate class of forms of sexual intercourse is compatible with autonomous self-respect. Accordingly, subject to qualifying moral principles shortly to be discussed, the contractors would, in order to secure the values of sexual self-respect, agree to a principle of obligation and duty, defining correlative human rights, requiring that people be guaranteed the greatest equal liberty of autonomous sexual expression compatible with a like liberty for all.<sup>388</sup>

The contractarian model would, of course, also yield qualifying moral principles relevant to understanding the limits of this human right. Thus, on contractarian grounds, one may easily derive principles forbidding killing or the infliction of harm or gratuitous cruelty.<sup>389</sup> These principles would be accepted because they protect basic interests. Such moral principles are relevant to sexual expression; sexual partners should not inflict serious and irreparable bodily harm on one another, even if such harm is consensual. On the other hand, these principles would not justify prohibition of forms of consensual sexual conduct, including commercial sex, which are not harmful. Similarly, moral principles of fidelity can be derived from the original position,<sup>390</sup> requiring that mutual undertakings, voluntarily and maturely entered into, be observed faithfully. Such principles, again, do not justify general prohibition of forms of consensual sexual conduct, or commercial sex in particular;<sup>391</sup> they justify, at most, only specific constraints on breaches

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<sup>387</sup> See text accompanying notes 222-88 *supra*.

<sup>388</sup> See generally Richards, *Sexual Autonomy*, *supra* note 12; Richards, *Unnatural Acts*, *supra* note 24.

<sup>389</sup> See D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 176-85.

<sup>390</sup> *Id.* 148-75.

<sup>391</sup> Kinsey and his associates concluded that 69% of the total white male population has had some experience with prostitutes. They noted, however, that no more

of fidelity, such as breach of contract, or fraud and deception.<sup>392</sup> A principle of consideration can also be derived from the original position, requiring that persons not impose upon others unnecessary annoyance and disturbances.<sup>393</sup> This principle would justify time, place, and manner restrictions on prostitution and its solicitation, but certainly not a complete prohibition.

In addition, the contractarian model justifies, as we have seen,<sup>394</sup> a moral principle of paternalism in certain carefully delimited circumstances. This principle does not justify an absolute prohibition on consensual sexual conduct in general or commercial sex in particular. However, it is important to notice here that the imperative of sexual autonomy would not apply to persons presumably lacking rational capacities—young children, for example—since the value of autonomous sexual expression turns on the existence of developed capacities of rational choice. Accordingly, the sexual commerce of quite young children may be forbidden, just as sexual intercourse with and by them may be limited in various ways. One would need, of course, to determine the appropriate age of majority for those purposes based on available psychological data. The most that can

than 15 to 20% have contacts with prostitutes "more often than a few times a year." In terms of the total outlet derived from contacts with prostitutes, they estimated that prostitutes accounted for somewhere between 3.5 and 4% of the total sexual outlet of the total male population. A KINSEY, W. POMEROY & C. MARTIN, *supra* note 36, at 597. Among single males, this research team found that prostitutes provided 3.7% of the total outlet for those in their late teens, nearly 10% for those who have reached their thirtieth birthday, and over 15% for those who are forty years of age. *Id.* 250, 286. For married males, prostitutes were said to provide about 1% of the overall outlet. *Id.* 599.

The Kinsey data casts doubt on the assumption that commercial sex is necessarily linked to married men. They reported that single males of all ages had more contacts with prostitutes than married men; specifically, they concluded that the frequency of intercourse with prostitutes for singles between the ages of 16 and 25 was two to four times as high as for married men and that the frequency for singles between the ages of 46 and 50 was fifteen times greater than for married men. *Id.* 250.

<sup>392</sup> It might be thought that these principles of fidelity would justify criminalization of prostitution on the theory that prostitution undermines marital fidelity. There seems to be no evidence that prostitution does undermine marriage, and some theorize that it actually strengthens marriage. See notes 262-65 *supra* & accompanying text. Even assuming the doubtful proposition that commercial sex destabilizes marriage, the use of a prohibition on commercial sex as a means to preserve the institution of marriage is seriously underinclusive. Adulterous extra-marital conduct probably has a more detrimental effect on marriage than commercial sex, but adultery is neither prohibited in all states, nor, where it is criminalized, is it prosecuted. See N. MORRIS & C. HAWKINS, *supra* note 1, at 16. In addition, prohibitions of commercial sex are overinclusive, since patrons may not be married. See note 391 *supra*.

<sup>393</sup> See D.A.J. RICHARDS, REASONS, *supra* note 19, at 189-92.

<sup>394</sup> See text accompanying notes 347-84 *supra*.



be said here is that the principle of paternalism would not sustain an unrealistically old age at which sexual nonage is ended.<sup>395</sup>

Finally, principles of distributive justice would be agreed to in the original position that would require a certain form of the distribution of wealth, property, status, and opportunity.<sup>396</sup> Sometimes it is suggested that prostitution is appropriately criminalized in order to advance the more just distribution of the goods required by such principles of distributive justice, on the grounds that prostitution is mainly a temptation to the poor and a symptom of poverty.<sup>397</sup> Of course, on grounds of distributive justice, people should have more equal job opportunities than they currently have. Certainly better job opportunities should, for example, be available to racial minorities and women. But it does not follow that high-income job opportunities that currently exist for poor people<sup>398</sup> should, on grounds of justice, be ended. If one wishes responsibly to ameliorate the situation of racial minorities who are a disproportionate number of the women arrested for prostitution,<sup>399</sup> decriminalization, not criminalization, is the just course, for it would remove the moral stigma and the consequent unjustified self-contempt that they experience, the various ancillary evils that criminalization fosters,<sup>400</sup> and the uniquely degrading exposure to the American criminal justice system<sup>401</sup> that their more advantaged

<sup>395</sup> Cf. R. FARSON, BIRTHRIGHTS 129-53 (1974) (advocating sexual freedom for children).

<sup>396</sup> See generally J. RAWLS, *supra* note 19.

<sup>397</sup> This was a familiar argument during the period when American purity reformers urged the wholesale criminalization of prostitution. See, e.g., Seligman, *The Social Evil With Special Reference to Conditions Existing in the City of New York*, in PROSTITUTION IN AMERICA: THREE INVESTIGATIONS, 1902-1914, at 9-11 (1976).

<sup>398</sup> Most prostitutes command an income that is substantially higher than they could expect in another job for which they might qualify. For full-timers the scale varies dramatically. "Call girls," according to reliable sources, make anywhere from \$30,000, H. GREENWALD, *supra* note 57, at 10, to \$100,000 annually, J. MURTAGH & S. HARRIS, *supra* note 360, at 2. See also F. ADLER, *supra* note 363, at 65 (about \$50,000); C. WINICK & P. KINSIE, *supra* note 36, at 177 (\$40,000). At the other extreme, the streetwalker will accumulate much less, perhaps in the neighborhood of \$10,000. See F. ADLER, *supra* note 363, at 64. Some streetwalkers may net no more than \$5,000 per annum. G. SHEEHY, *supra* note 114, at 12-13. Sheehy nonetheless observes of prostitutes in general: "These are the highest-paid 'professional' women in America." *Id.* 104.

<sup>399</sup> Blacks represented 61.4% of the arrestees for prostitution and commercialized vice, while whites accounted for 37.2% of those arrests in 1972. UNIFORM CRIME REPORTS, *supra* note 43, at 131. Cf. C. WINICK & P. KINSIE, *supra* note 36, at 216-17. Arrested prostitutes are usually streetwalkers, who are more visible and easier to prosecute successfully than are brothel inmates or call girls. *Id.* 212-13.

<sup>400</sup> See notes 115-23 *supra* & accompanying text.

<sup>401</sup> For examples of police practices degrading to prostitutes, see J. SKOLNICK, *supra* note 5, at 106-08.

call-girl sisters<sup>402</sup> in large part avoid. In addition, responsible moral concern for whatever economic disadvantages streetwalkers suffer would take the form of regulations to ensure them economic fairness, including forms of union organization. Criminalization, in contrast, fosters the economic exploitation that it is fallaciously assumed to remedy.<sup>403</sup>

To summarize, the principle of sexual autonomy does not apply to persons presumably lacking rational capacities, such as young children, nor does it validate the infliction of serious bodily harm. In addition, the liberty of sexual expression comports with the liberty of others to choose to be sexual partners. It follows, therefore, that there should be no moral objection on grounds of sexual autonomy to the reasonable regulation of consensual adult sex as regards time, manner, and place. For example, there is no objection to the reasonable regulation of the obtrusive solicitation of sexual relations. But the moral principles qualifying the principle of sexual autonomy do not justify any absolute prohibition of sexual autonomy of the kind that the criminalization of prostitution involves. Such criminal prohibitions flatly violate the rights of the person. These rights may not be abridged by vague appeals to public distaste that, if given the force of law, would dilute their moral force and transform them from a powerful vindication of autonomy into the empty and vapid idea that people be allowed to do that which gives rise to no strong objection.<sup>404</sup> Majority attitudes by themselves, unsupported by defensible moral reasoning,<sup>405</sup> cannot justify the deprivations of liberty of the criminal law. They are merely intractable prejudices that the state should circumscribe where necessary to protect the system of human rights, rather than elevate into law.

It is important to see the scope and limits of an argument grounded in human rights of the kind here presented. To say that a person has a human right to do "x" is a claim of political and legal morality which justifies the claim that certain conduct must be protected by the state from forms of coercive prohibition.<sup>406</sup> But justifiably to assert the existence of such a right is not to conclude the question whether people should exercise these rights. This latter question is an issue of personal morality, the disposition

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<sup>402</sup> See note 399 *supra*.

<sup>403</sup> See notes 115-23 *supra* & accompanying text.

<sup>404</sup> See H.L.A. HART, *supra* note 3, at 46-47.

<sup>405</sup> See generally R. DWORKIN, *supra* note 18.

<sup>406</sup> See notes 158-221 *supra* & accompanying text.

of which may turn on considerations that have no proper place in questions of political and legal morality.

Consider, for example, the moral right to choose one's work. Often, we take highly critical attitudes to these choices, arguing, for example, that someone's choice is a waste of talent or a refusal to take risks with his or her life. Such arguments are often not simply prudential calculations of the best way rationally to realize the agent's ends, nor are they purely morally supererogatory,<sup>407</sup> for we do not merely praise appropriate choices, but assign a species of moral blame for failing to act on these ideals or for acting on the wrong ideals.<sup>408</sup> We may criticize, for example, ideals of competitive excellence on the grounds that they are elitist or in various ways inhumane, or we may challenge obsessive venality as crudely selfish. Such moral arguments are a central focus of civilized life, for they help us to cultivate our autonomy self-critically and to change our lives with reasonable integrity and sensitivity. However, while such arguments help us as individuals to decide how we should exercise our rights, they are often not relevant to discussions of whether we have these rights. We are frequently very clear that people unqualifiedly have rights that they should not exercise; when they do exercise these rights in ways we deem morally undesirable, we say or think they had the right to do the wrong thing. How are we to understand this important distinction, which we understand and apply throughout our everyday lives?

In order to explicate this distinction, we must note the fundamental difference between the kinds of questions addressed by questions of moral rights and issues of moral and human ideals. When we reflect on questions of human rights, we consider the general conditions that must be guaranteed to facilitate the exercise and development of human capacities for autonomy.<sup>409</sup> Such rights define minimum boundary conditions, assuring people personal integrity and independence compatible with a like integrity and independence for all. Within the constraints established by these rights, broad latitude is given to persons to decide on their own how they will choose to exercise the independence that rights guarantee. When we consider how people *should* make these choices, we invoke consideration of various kinds, prudential and moral. One form

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<sup>407</sup> See Urmson, *Saints and Heroes*, in *ESSAYS IN MORAL PHILOSOPHY* 198-216 (A. Melden ed. 1958).

<sup>408</sup> For the idea of supererogatory principles of blame, see D.A.J. RICHARDS, *REASONS*, *supra* note 19, at 197-205.

<sup>409</sup> See notes 158-221 *supra* & accompanying text.

of moral consideration is a moral ideal, which defines the particular form in which a person dedicates his or her self to lesser or greater service to others and on what terms. Such ideals often bear metaphorical analogies to the principles which define human rights, but they go well beyond them. Some of them are the supererogatory ideals of saints and heroes, which justify special praise when they are acted upon, but no blame when they are not.<sup>410</sup> Others, not requiring excessive sacrifice of personal self-interest, define various ways in which one may render humane service beyond the rights owed others. Often we criticize and blame people for not including such moral ideals among their narrow and parochial ends and aspirations.<sup>411</sup>

Criticism of the actions of others, based on such moral ideals, is importantly limited by two factors: first, mistakes are likely in the judgments of one person about the circumstances and ends of another; and second, the standards of value against which we judge issues of these kinds are vague and indeterminate.<sup>412</sup> Issues of this kind are uniquely sensitive to personal idiosyncrasy and individual context. Often, one person's critical judgments of another in this area betray failures of imagination to understand the other's special relation to his or her own life, to appreciate the sacrifices a certain choice would require, or to assess with sensitivity the trade-offs among humane values. Such factors explain why moral arguments of these kinds are both so important to our lives and justify forms of critical blame, but, on the other hand, debar us from more extensive interference into the lives of others. Nothing can be more important than constantly cultivating and challenging our critical imaginations about whether we are living our lives as humanely as we can, but our respect for personal separateness and individuality restrains us from coercive interference.

To say, therefore, that people have a human right to engage in commercial sex is not to conclude the question whether everyone should exercise this right. For example, we have discussed certain ideals of romantic love that a person might justifiably invoke in refusing to engage in commercial sex. Certainly such ideals cannot justifiably be invoked to qualify our general rights of sexual au-

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<sup>410</sup> See D.A.J. RICHARDS, REASONS, *supra* note 19, at 205-08.

<sup>411</sup> See note 408 *supra*.

<sup>412</sup> The discussion here profited from conversations with Ronald Dworkin. See Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113-43 (S. Hampshire ed. 1978). For a further exploration of the contrast between rights and ideals, see Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, *supra* note 24.

tonomy, for sexual self-respect and fulfillment do not require conformity to this ideal.<sup>413</sup> Even in the purely personal sphere, as a personal moral ideal, romantic love may be criticized as sentimental, unrealistic, and lacking reciprocity. Nonetheless, a person, after careful purification of the ideal by criticism, may justifiably espouse a form of it as a moral ideal, regulate his or her life accordingly, and criticize others for not observing it and thus not being as humane in their sexual lives as they could be. Certainly, moral ideals like romantic love are of incalculable cultural and human importance. Indeed, in some views, the ideal of romantic love has humanely and pervasively tempered personal relationships not only of sexual partners but also more widely.<sup>414</sup> On the other hand, legal enforcement of such an ideal imposes a personal ideal upon persons who may find it unfulfilling or even oppressive and exploitative.

## VI. BEYOND DECRIMINALIZATION

This Article has tried to establish that there are no good moral arguments for criminalizing consensual adult commercial sex, and that its punishment is a violation of the rights of the person. The criminalization of prostitution appears to be an illegitimate vindication of unjust social hatred and fear of autonomously sexual women and their rights to define and pursue their own vision of the good. Having given such reasons for decriminalizing prostitution, we are able to take a much less confining view of the legal treatment of prostitution. Let us briefly consider three alternatives: licensing; regulations of place, time, and methods; and no regulations at all. I assume throughout that per se criminal prohibitions of prostitution are repealed or otherwise invalidated.

### A. Licensing

The licensing of prostitutes is of ancient vintage,<sup>415</sup> and was widespread in Europe until this century.<sup>416</sup> The idea of licensing is that, in order to engage in commercial sex, one must secure a permit from the state that entails having one's name entered in a public record, various regulations of dress, price, and place of business and solicitation, and, in the widespread European practice,

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<sup>413</sup> See notes 241-88 *supra* & accompanying text.

<sup>414</sup> On the civilizing effects of courtly love on the development of the "gentil" man, see J. STEVENS, *supra* note 85, at 29-71.

<sup>415</sup> See notes 59-67 *supra* & accompanying text.

<sup>416</sup> See generally A. FLEXNER, *supra* note 36.

regular medical inspections for venereal disease.<sup>417</sup> The European justification for licensing focused on alleged venereal disease prophylaxis.<sup>418</sup> When these considerations were urged in Great Britain and the United States, they were successfully resisted by a constellation of powerful political forces, including purity reformers and feminists.<sup>419</sup> The arguments of the feminists were of two kinds, the second of which is still made by contemporary feminists who urge decriminalization but condemn licensing:<sup>420</sup> first, an attack on the double standard, urging that men be compelled to heed the same standards of chastity exacted from women;<sup>421</sup> and second, the degrading nature of European licensing to women, including public records which made it difficult to leave the profession, various arbitrary regulations and demeaning inspections, and general failure to regulate brothels on terms fair to the prostitutes.<sup>422</sup> Official European licensing schemes were ended, in large part, in response to international conventions that bound nations to end the "white slave trade" in women and girls that was alleged to be due largely to the demand for prostitutes occasioned by licensed brothels.<sup>423</sup>

None of these arguments would be decisive against some form of licensing if there were good independent reasons for such licensing. First, the appeal to the double standard rests on an unexamined valuation of chastity that made sense in a sexually hypocritical era, but that makes little sense today when the answer to the double standard appears to be not equal chastity but equal sexual freedom.<sup>424</sup> Second, the form of European licensing was arbitrarily demeaning to women because it was clearly designed not for the realistic protection of the rights of prostitutes but for the protection of their male customers at all costs.<sup>425</sup> However, the excesses of

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* 204-64.

<sup>419</sup> See notes 90-104 *supra* & accompanying text.

<sup>420</sup> See K. MILLETT, *supra* note 320, at 10-11, 30-31, 35-36, 72, 84-85, 121; *Prostitution: a Non-Victim Crime?*, *supra* note 30.

<sup>421</sup> See note 91 *supra* & accompanying text.

<sup>422</sup> See note 90 *supra*. For a powerful American attack to similar effect, see A. FLEKNER, *supra* note 36. See also Seligman, *supra* note 397, at 12-113, who, while noting the defects of European licensing, places the best American arguments against prostitution on moral grounds, *id.* 59-64, appealing, at the last, to "the Puritanical sentiment which prevails in this country," *id.* 147.

<sup>423</sup> See notes 108-13 *supra* & accompanying text.

<sup>424</sup> See note 91 *supra*. See also notes 289-309 *supra* & accompanying text.

<sup>425</sup> One critique notes: "According to this system of regulation, the police would treat her much as a chattel, and would keep her in good health for her clients' sake." Seligman, *supra* note 397, at 67.

licensing in Europe are not decisive of the merits of a licensing scheme that would accommodate the rights of the prostitutes. Such a scheme, for example, could ensure adequate and fair protection in their business dealings without making regulatory authorities the moralistic and often sadistically retributive police, and could keep records of prostitutes absolutely confidential, destroying them when the prostitute leaves the profession. Third, the "white slave trade" argument appears to have been a moralistic attack on commercial sex per se, overstating and distorting the facts. Often the trade consisted of consenting mature adults who wished to travel to a foreign country to be prostitutes, not of underage girls or bound-and-gagged women.<sup>426</sup> Of course, there are moral objections to international traffic in compulsory adult or voluntary underage prostitution, but there are moral objections to prostitution itself in these forms. If this was the object of the "white slave" opponents, it should have been addressed as such, not in the form of hysterically overbroad arguments that trenched on the rights of mature adults to determine where and how they would live.<sup>427</sup>

The problem with licensing is not that there are good arguments against it, but that there are no powerful arguments for it. The argument of prophylaxis of venereal disease appears to be weak, as there is no compelling evidence that licensing realistically advances this end.<sup>428</sup> Less restrictive alternatives are available that would more rationally do so. For example, cheap and non-coercive medical inspections that prostitutes would have strong incentives to use could be made available.<sup>429</sup> Adequate protection of the rights of prostitutes and customers would be secured by fair enforcement of existing criminal laws against force and fraud. Probably the best way to aid prostitutes to protect themselves from unfair business

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<sup>426</sup> It appears to have been a marked tendency of Victorian purity reformers to embroider the facts of often consensual prostitution into a picture of involuntary coercion. See M. PEARSON, *supra* note 90, at 32-33, 49-50, 105-06. Today there is no evidence that prostitutes, except in remote instances, enter into or remain in the profession involuntarily. S. JANUS, B. BESS & C. SALTUS, *A SEXUAL PROFILE OF MEN IN POWER* 150 (1977); Lemert, *Prostitution*, in *PROB. SEX BEHAVIOR* 68, 84 (E. Sagarin & D. MacNamara eds. 1968). Helene Deutsch suggests that many stories of white slavery are fantasy inventions of prostitutes used on their gullible patrons. See I. H. DEUTSCH, *supra* note 280, at 262-63. Some older accounts of prostitution suggest the fantasy that prostitution is per se slavery, and thus must have a slaveholder. See A. FLEXNER, *supra* note 36, at 107.

<sup>427</sup> See note 426 *supra*.

<sup>428</sup> See A. FLEXNER, *supra* note 36, at 204-64; A. SION, *supra* note 34, at 41-43; Seligman, *supra* note 397, at 98-113.

<sup>429</sup> This is the English practice, in which the treatment of venereal disease is voluntary, free, and confidential and open to all, with the police taking no part in the detection or treatment of venereal disease. See A. SION, *supra* note 34, at 53-54.

dealings with customers and pimps would be to provide legal facilities in the form of unions of prostitutes that would bring the force of collective organizational self-protection to this atomistic profession.<sup>430</sup>

In general, licensing is an appropriate prerequisite to valid exercise of a service profession when there is a long professional education and when incompetence in providing the service will disastrously affect the interests of customers.<sup>431</sup> Prostitution does not appear to satisfy either of these conditions, although arguably the development of specialized classes of prostitutes (for example, specialists in initiating virgin youth into sex or in certain kinds of sexual and psychological therapy)<sup>432</sup> might at some point reasonably be subject to some form of licensing on the grounds that special training is needed and that important customer interests are thus furthered.

### B. *Regulations of Place, Time, and Method*

In continental Europe and England, regulations of place, time, and method take two different forms. First, in England, street solicitation for prostitution is forbidden, so that solicitation takes place through ambiguously worded advertisements placed in various journals or in certain well-known locations.<sup>433</sup> A likely motive for the English form of regulation may have been the desire not that prostitution cease to be centered in the well-known London theatre and shopping district where it has familiarly been located, but that it cease to take the form of the obtrusive solicitation that was distressing to many theatre-goers and shoppers who could not conveniently avoid exposure to unwelcome solicitations. The English solution was to end such street solicitations entirely, requiring customers and prostitutes to seek one another out by more discreet means. In continental Europe, the form of regulation appears to be some form of zoning whereby solicitation is legal only in certain well-known districts of the urban centers.<sup>434</sup> In West Germany, Hamburg's famous Eros Center was intended to centralize prosti-

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<sup>430</sup> Consider the unionization attempts of Margo St. James in forming the prostitutes' union, COYOTE, an acronym for "Call Off Your Old Tired Ethics." See Haft, *supra* note 30, at 8-9.

<sup>431</sup> See H.M. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 873-76 (tentative draft 1958).

<sup>432</sup> See notes 59-65, 379-80 *supra*.

<sup>433</sup> See notes 94-96 *supra* & accompanying text.

<sup>434</sup> See note 113 *supra*.



tutes in one building complex.<sup>435</sup> Such businesslike centralization appears to be unappealing to customers and prostitutes alike,<sup>436</sup> but prostitutes do tend to cluster in certain parts of town.<sup>437</sup>

In the event of decriminalization in the United States, the English solution would clearly be appealing in a city like New York where prostitution tends to cluster in the theatre district and where absolute prohibitions on solicitation would obviate the problem of obtrusive solicitation of people who cannot conveniently avoid presence in the district on other business. As in London, there might be an interest in concentrating prostitution in this area while attacking the problem of obtrusive solicitation. However, first amendment considerations in the United States might make the English solution of absolute prohibitions on solicitation unconstitutional.<sup>438</sup> A more precise solicitation statute would have to be drawn in order to accommodate the interests of prostitutes and customers and at the same time secure the rights of others not to be subject to obtrusive solicitations. Obviously, much further study must be made of this matter.

Alternatively, the continental European solution could be explored. Forms of regulatory zoning could limit solicitation to certain well-known parts of town little frequented by people on other business so that the interests of customers and prostitutes could be accommodated and obtrusive solicitations minimized.<sup>439</sup>

<sup>435</sup> See A. SION, *supra* note 34, at 39-40. See also note 113 *supra*.

<sup>436</sup> A. SION, *supra* note 34, at 39.

<sup>437</sup> *Id.* 39-41.

<sup>438</sup> England has imposed an absolute prohibition on solicitation applicable to willing and unwilling buyers with the idea that the right of citizens against obtrusive solicitation "should be the prime consideration and should take precedence over the interests of the prostitute and her customers." WOLFENDEN REPORT, *supra* note 1, at 140. In the United States, assuming the legality of the transaction between the willing buyer and seller (through decriminalization, in the case of prostitution), it would seem that regardless of the commercial nature of the solicitation, recent case law would require first amendment protection. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 743 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>439</sup> Zoning of the solicitation for prostitution may be an importantly different question from zoning of the prostitution itself. There may be no reasonable objections to the former; obtrusive solicitations are not protected by the rights of the prostitute or the customer, and zoning is one reasonable way to accommodate the rights of all concerned without violating the rights of any. There may also be just grounds for zoning the business of prostitution itself, but the justification seems of a different kind. If the business of a prostitute involves no obtrusive solicitation (assume a quite discreet call girl), the business cannot be zoned to one area on the ground of protecting the rights of people not to be obtrusively solicited. The considerations that might justify such zoning are the same that justify barring certain businesses from residential neighborhoods, namely, avoiding certain kinds of business-associated noises and disturbances. Prostitution, as a form of commercial service, may be zoned on grounds applied in an even-handed way to other businesses. But

In addition to appropriate forms of zoning and solicitation regulations, consideration should be given to a limitation of commercial sex to brothels, as is currently the case in Nevada.<sup>440</sup> Such regulations, which are another form of licensing, are problematic in the absence of effective regulations protecting the economic and social rights of prostitutes and forms of unionization which would assure some measure of equal bargaining power to prostitutes.<sup>441</sup> The European history of such regulated brothels is a sorry one.<sup>442</sup> Certainly, forms of brothel are not, in principle, illegitimate.<sup>443</sup> But to require that brothels be the only form of legitimate commercial sex seems unwarranted.

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suppose a zoning provision allows certain kinds of commercial services in a neighborhood, but forbids prostitution, although the prostitute in question has only occasional, very discreet customers who are in no way uncivil, noisy, or otherwise disturbing, and who are in fact more congenial than the customers of the permitted commercial services. Suppose, in short, that the ground of the zoning prohibition on prostitution is derived solely from the thought that the neighbor is a prostitute engaged in commercial sex. If, as we have already seen, perceptions of such kinds, without any rational ground, cannot be a proper basis for the exercise of the public morality in defining acts as criminal, the question arises whether such perceptions can be permitted to be the just basis for the exercise of the zoning power. This raises large questions that we cannot pursue here but that should be pursued at some point: if we can understand why the criminal law cannot justly rest on such grounds, must similar scrutiny be extended to the zoning power? Of course, there are significant moral distinctions between the absolute prohibitions of the criminal law and the regulations of time, place, and order that underlie zoning. Certainly, considerations are justly available for the exercise of the zoning power that are not available to the criminal law—for example, aesthetic considerations. But it seems wrong to suppose that these more extensive justifying considerations with respect to zoning justify anything and everything. There are limits on the invidious zoning out of the poor and racial minorities. See *Buchanan v. Warley*, 245 U.S. 60 (1917). There may also be limitations of analogous kinds in the proper zoning of commercial sex. For an opinion which seems strikingly unaware of such limitations, see *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). But cf. *Moore v. City of East Cleveland*, 413 U.S. 494 (1976).

<sup>440</sup> See C. WINICK & P. KINSIE, *supra* note 36, at 221-23. Nevada law prohibits prostitution in counties of over 200,000 inhabitants, meaning Las Vegas. Seven counties and two cities now license and regulate brothels; in five other counties there are no laws on the books either way, but bordello operators receive full police protection. Prostitutes are regulated in various ways under the Nevada system. First, they must register as prostitutes, and be fingerprinted, checked by health authorities, and licensed. These regulations assure that prostitutes leave behind in Nevada a record of participation in an activity illegal everywhere else. They must agree to stay in the brothel for specific periods of time, typically three-week stints. Some Nevada locales establish strict regulations governing hours when they may be in town, buildings where they are not permitted (bars, casinos, residential areas), and with whom they may associate (no boyfriends or husbands permitted). See Bode, *supra* note 30, at 24.

<sup>441</sup> See notes 422-30 *supra* & accompanying text. Feminists have made these criticisms of the Nevada brothel scheme. See Bode, *supra* note 30, at 24-25.

<sup>442</sup> See note 422 *supra*.

<sup>443</sup> Brothels, when fairly run, have the virtue of giving steady work without the possibly exploitative pimp-prostitute relationship. See Bode, *supra* note 30, at 23-24.

### C. *Laissez-Faire*

Finally, one may suggest a regime of *laissez-faire*. After decriminalization, there would be no licensing, nor any regulation, but only the application of existing criminal laws against force and fraud. The argument against forms of time, place, and manner regulation might suggest that such regulations are unnecessary. For all practical purposes, solicitations for prostitution occur in familiar locations where no reasonable person can claim surprise.<sup>444</sup> Furthermore, the presence of prostitution is, on balance, one of the colorful amenities of life in large urban centers. It should not be hidden and isolated, but robustly accepted as what in fact it is: an inextricable part of urban life.<sup>445</sup> In this view, forms of regulation are hypocritical and moralistic subterfuges of irresponsible politicians who seek to accomplish by isolation what they cannot legitimately achieve by prohibition.<sup>446</sup> While these arguments for *laissez-faire* do understate the sound reasons for regulation, they raise a central question that we should discuss in conclusion: what are the general advantages of the availability of commercial sexual services?

### VII. CONCLUSION

We began with the general claim that the decriminalization literature is defective in its failure to take seriously the kinds of moral judgments that should underlie the criminal law. Without making a serious attempt critically to examine these judgments, decriminalization proponents make arguments of utilitarian-based efficiency that do not explain why such costs are readily borne in some areas and regarded as excessive in others. The answer, we have argued, is that the cases that decriminalization proponents emphasize tend to be those in which underlying traditional moral judgments cannot be critically sustained, whereas other cases, which no one attempts to decriminalize despite comparably great enforcement costs, are sustained by still valid moral judgments. Thus, I have tried to show that more powerful, precise, and predictive decriminalization arguments are available when we discard the sterile utilitarianism of decriminalization advocates and harness serious moral theory to the analysis of these questions.

The arguments here proposed are of general significance not only to the practical guidance and advocacy of decriminalization,

<sup>444</sup> See Haft, *supra* note 30, at 21.

<sup>445</sup> See H. ELLIS, *supra* note 48, at 287-302.

<sup>446</sup> On the general problem of political hypocrisy regarding prostitution in urban centers, see Roby & Kerr, *supra* note 30.

but to criminal law theory in general. We are now in a position to take seriously the moral foundations of the criminal law in a critical and reasonable way.<sup>447</sup> We focused on prostitution because it is a striking area in which decriminalization has made negligible progress. This lack of progress was attributed to the failure to confront seriously the underlying moral arguments. Judgments of the immorality of prostitution are, we have argued, wrong; indeed, the right to engage in commercial sex is one of the rights of the person which the state may not transgress. In addition to these moral arguments centering on rights of prostitute and patron, we should note also the amenity that prostitution has traditionally been in the development of complex anonymous urban civilization.<sup>448</sup> People often critically discuss the anomic atomism of urban life<sup>449</sup> in contrast to the intimate solidarity of rural life. But fair social description requires that we also note the special goods that urban anonymity has fostered and made possible: release from onerous clan and family restraints, personal experimentation and competitive risk-taking, freedom and variety and the excitement of less-bounded horizons.<sup>450</sup> Prostitution, inevitably, has been part of this complex and variegated urban civilization, for traditionally prostitution has been one of the unconventional ways that women were able to tap some of the energy and promise of urban life.<sup>451</sup> The critical moral arguments here presented should, I hope, help release us from the American moralistic myopia that fails realistically to see prostitution as continuous with the other things we value in urban life: its liberty, diversity, and potential for individual risk-taking.

I have tried to attack critically the widespread American Manichean vision of the prostitute as a degenerate affront to American moral values who must be made an example at all costs.<sup>452</sup>

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<sup>447</sup> See, for a further development of this thought, Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, note 24 *supra*.

<sup>448</sup> See H. ELLIS, *supra* note 48.

<sup>449</sup> See, e.g., William Wordsworth's *The Prelude*, Book VII, "Residence in London:"

Oh, blank confusion! true epitome  
Of what the mighty City is herself  
To thousands upon thousands of her sons,  
Living amid the same perpetual whirl  
Of trivial objects, melted and reduced  
To one identity, by differences  
That have no law, no meaning, and no end—

W. WORDSWORTH, *THE PRELUDE* 113 (E. Reynolds ed. 1932) (ll. 722-28).

<sup>450</sup> See H. ELLIS, *supra* note 48.

<sup>451</sup> See notes 355-66 *supra* & accompanying text.

<sup>452</sup> See note 139 *supra* & accompanying text.

When we scrutinize these values with care, we discover a remarkable and specifically American vision that explains the unique American treatment of prostitution. The prostitute is branded as the Puritans branded their deviants, as an evil and willful outcast whose criminal stigma supportively demarcates the ideals of the saints from the inexplicable and satanic evils of the sinner.<sup>453</sup> We must disclose this cruel vision for what it is: not a critical moral judgment but a remnant of a sectarian ideology secularized into a moral ideal of sentimental marriage that the condemnation of prostitution sanctifies. There is no better description of the cruel and morally ambiguous character of this Puritan vision than Shakespeare's Angelo<sup>454</sup> who, not acknowledging the continuity of prostitution with reasonable human interests and aspirations, isolates and denies his common humanity, and thus exemplifies the ultimate image of the unethical: self-righteously demanding of others, as judge, what one cannot oneself conform to as the judged. The moral condemnation of the prostitute rests on and expresses such isolation and denial, disfiguring the reasonable perception of the forms sex takes in our lives,<sup>455</sup> drawing sharply moralistic distinctions between the decent and the indecent when, in fact, there is a continuum of varying personal modes of sexual expression and fulfillment.<sup>456</sup> It is striking how deep in Western moral thought is the example of the condemnation of the prostitute as the paradigm of moral bad faith, of people's lack of moral title to cast the first stone.<sup>457</sup> When we extend to prostitutes concern and respect for their equality as persons,<sup>458</sup> we can see the source of the previous misperception. The failure to see the moral and human dignity of the lives of prostitutes is a moral failure of imagination and critical self-assessment:

. . . man, proud man,  
Most ignorant of what he's most assur'd,  
His glassy essence, like an angry ape,  
Plays such fantastic tricks before high heaven  
As make the angels weep. . . .<sup>459</sup>

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<sup>453</sup> For a fascinating general account of the Puritan way of handling deviants and its influence on later American institutions, which applies squarely to prostitution, see K. ERIKSON, *WAYWARD PURITANS* (1966).

<sup>454</sup> See W. SHAKESPEARE, *MEASURE FOR MEASURE*.

<sup>455</sup> This misperception blinds us to the reality of other more serious social problems. See, e.g., notes 321-29 *supra* & accompanying text.

<sup>456</sup> See notes 278-88 *supra* & accompanying text.

<sup>457</sup> See *St. John* 8:3-11 (King James).

<sup>458</sup> See H. ELLIS, *supra* note 48, at 312-18, 405-06, 409-19.

<sup>459</sup> W. SHAKESPEARE, *MEASURE FOR MEASURE*, Act II, sc. II, ll. 117-22, reprinted in *THE OXFORD SHAKESPEARE* 80 (W. Craig ed. 1966).