



## Yale Journal of Law & the Humanities

Volume 5

Issue 1 *Yale Journal of Law & the Humanities*

Article 16

January 1993

# Beyond Transgression: Toward a Free Market in Morality

Elizabeth Fox-Genovese

Follow this and additional works at: <https://digitalcommons.law.yale.edu/yjlh>

 Part of the [History Commons](#), and the [Law Commons](#)

### Recommended Citation

Elizabeth Fox-Genovese, *Beyond Transgression: Toward a Free Market in Morality*, 5 YALE J.L. & HUMAN. (1993).

Available at: <https://digitalcommons.law.yale.edu/yjlh/vol5/iss1/16>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law & the Humanities by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

# Beyond Transgression: Toward a Free Market in Morality

Richard A. Posner. *Sex and Reason*. Cambridge: Harvard University Press, 1992. Pp. vii, 458. \$29.95.

## Elizabeth Fox-Genovese

With his special gift for contrariety, Judge Richard Posner places his ambitious investigation of the vicissitudes of sex under the aegis of a quote from Aristotle's *Nicomachean Ethics*: "Pleasures are an impediment to rational deliberation, and the more so the more pleasurable they are, such as the pleasures of sex—it is impossible to think about anything while absorbed in them." Posner then devotes the ensuing 442 dense pages to challenging Aristotle's assertion. That sex and reason normally make incompatible bedfellows should not be taken as evidence that it is impossible to subject sex to the rigors of reason. Sex, Posner suggests throughout the book, must be considered as one form of behavior among many, no more nor less immune to the operations of the rational mind.

Posner's commitment to the power of rationality, as he understands it, constitutes the great strength and ultimate weakness of his work. And it is easy to imagine that many readers will find his rational foray into sex infuriating. He has no patience for the facile confusion of sex with passion, much less of sex with desire, which so mesmerizes contemporary critics. Posner's discussion of sex has more to do with theories of animal behavior than with the feelings of individuals. In this respect the great strength of Posner's book overlaps with its most disturbing weakness, namely, his determination to organize complex human behavior in predictable—and largely determined—patterns.

Throughout *Sex and Reason* Posner sails against the tide of recent political attitudes that emphasize the claims of subjectivity and personal experience and cluster together in what is loosely known as the "politics of identity." Personalism, Posner forcefully argues, does not preclude flagrant efforts to impose normative judgments upon others. So he turns to a combination of economics and sociobiology to place contemporary passions in perspective. In this sense *Sex and Reason* embodies the mind of an unflinching skeptic who is willing to question anything and to be

bound by little or nothing. Human history and contemporary challenges alike emerge from Posner's pages as manifestations of structural—he prefers “functional”—patterns. To see ourselves from his perspective is to see ourselves as just another colony of ants. The experience is humbling and, up to a point, salutary. It assuredly provides a welcome corrective to the imperialistic personalism that leads people of various political positions to attempt to impose their “values” upon others. Up to a point, the perspective is admirable, reminding us that we are manifestations of life rather than its essence. It was, notwithstanding differences, the perspective of the great theologians (e.g., Thomas Aquinas).

My reservations about Posner's view of sex derive less from his attempt to locate our immediate debates in a broad, agnostic perspective than from his underlying assumptions about rationality, which he unflinchingly identifies with the rationality of free-market, neoclassical economics. That this rationality must, in the measure possible, abstract from passion is not the issue. Posner's insistence upon the legitimate claims of rationality implicitly aligns him against those—notably feminists and critical legal theorists—who so insistently proclaim that any claim of rationality or, heaven forbid, impartiality in the law mocks and masks the domination of some over others. It is this domination which the law serves, pretenses to the contrary notwithstanding. The issue, however, is the basis upon which one defends abstraction from the play of individual passions and interests.

Here, in my judgment, Posner takes something less than the neutral ground he claims. The defense of rationality in intellect and impartiality in the law does not require a grounding in free-market economics and may even be weakened by it. Not all societies, indeed precious few, have shared our predilection for the freedom of commodities and transactions as proxy for justice among individuals. Indeed, to turn Posner's tactics upon him, one could argue that across history and cultures, societies have been more likely to privilege the reproduction of the community than the private economic gain of individuals. Anticipating this kind of objection, Posner counters that his model does not depend upon the transhistorical projection of economic relations, but upon economic reasoning, which he equates with rational choice and which, in his view, does apply across history and culture (pp. 86-87).

Defending his economic theory and method as an attempt to find “unity in diversity,” Posner dismisses the predictable objections that his perspective is “dehumanizing, ideological, complacent, imperialistic, reactionary” (p. 86). He insists fairly that the point of any theory is to organize seemingly disparate phenomena into categories that permit meaningful analysis. Here and throughout, Posner identifies his primary enemies as those who claim priority for the immediacy and irreducibility of personal experience. But personalism does not constitute the strong-

est, nor even a good, ground from which to criticize him. I have no serious quarrel with Posner's interest in identifying general patterns in human behavior. My quarrels are, first, with his tendency to return in each instance to what he sees as unchanging patterns of behavior, and, therefore, to neglect the historical development of specific human communities and societies; and, second, with his tendency to attribute modern individualist reasoning to societies in which the primacy of the individual was entirely foreign.<sup>1</sup>

In a crude way it is safe to assume that human societies, in contradistinction to their individual members, do tend to follow broad productive and reproductive strategies and tend to develop norms and taboos to justify and enforce them. As they become more entrenched and more complex, societies may well develop internal conflicts, initially, over norms and eventually, as in our case, even over taboos. Over time the politics of societies also tend increasingly to articulate their growing divisions by class and even, eventually, by gender, race, and ethnicity. Over time the history of the justification and enforcement of the norms and taboos acquires its own force. As a result, societies' pursuit of what might seem to an impartial observer to be their "objective," rational strategies is mediated by the history of how they have become themselves. As the paleontologist Loren Eiseley has pointed out, human evolution proceeds within a human, not a "natural" environment and human beings mature to a world that has been shaped by other human beings.<sup>2</sup> Notwithstanding the considerable virtues of Posner's model, it does not take adequate account of the complex social and cultural environment in which the current debates about sexuality are occurring.

Within living memory sex has moved from behind the veil of propriety—some would say hypocrisy—with which bourgeois societies sought to shroud it, into the glare of public and frequently acrimonious discussion. At an accelerating rate since the late 1960s, sexual issues have become the most visible signs of political and cultural contention in a vigorously contentious society. The list includes abortion, homosexuality, pornography, rape, sexual harassment, surrogate motherhood, incest and other forms of sexual abuse, exploitation, and exhibitionism. If nothing else, the extent and intensity of the discussions confirm that sex is anything but a private matter, although according to Posner, knowledge about sex remains sketchy and imprecise.

The sex wars pit those who seek to shore up what they regard as traditional family values against those who seek to defend the maximum indi-

---

1. For an elaboration, see my *Feminism Without Illusions: A Critique of Individualism* (Chapel Hill: University of North Carolina Press, 1991); and for my views on the complexity of economic reasoning, see my *The Origins of Physiocracy: Economic Revolution and Social Order in Eighteenth-Century France* (Ithaca: Cornell University Press, 1976).

2. Loren Eiseley, *The Immense Journey* (New York: Random House, 1957).

vidual autonomy in experience and expression. This is the familiar war between those who defend the fetus's right to life and those who defend a woman's right to choose to have an abortion, between those who oppose and those who defend the extension of homosexual rights, between those who oppose and those who defend the allocation of federal support for an exhibit of Mapplethorpe's photographs. Innumerable guerrilla wars, in which the alignment of parties becomes murky, cut across this great divide. Thus feminists, who normally support a woman's right to choose to have an abortion, split over the question of surrogate motherhood and over restrictions upon the dissemination of pornography.<sup>3</sup>

As suggested by the language of rights, in which so many of the issues are cast, the sex wars are primarily being fought on the terrain of law. In *Sex and Reason* Posner proposes to bring some order into the debates, first by summarizing the vast literature on sex for the benefit of his fellow judges who, he wittily suggests, tend "to know next to nothing about the subject beyond their own personal experience"—which may be even more limited than that of ordinary citizens because of the elaborate screening procedures that virtually exclude people with "irregular sex lives" from the judiciary (p. 1). Second, and more ambitiously, Posner aims to present a positive and normative theory of sexuality "that both explains the principal regularities in the practice of sex and in its social, including legal regulation and points the way toward reforms in that regulation" (pp. 2-3).

Posner, while acknowledging both the "intense emotionality of the sexual act" and the grounding of sexual desire and preference in human biology, holds that sexual behavior, like other aspects of volitional human behavior, is subject to rational choice, which, in his view, means the principles of economic analysis (p. 3). Yet he seems faintly puzzled, and even a little impatient, to find that, to date, sexuality has escaped the grasp of rationality. And to correct this inattention, he advances a "functional, secular, instrumental, utilitarian" theory that draws heavily upon what he calls "the economic theory of sexuality" (p. 3).

Posner insists upon the significance of sexuality in contradistinction to sex, which is not what his theory or its rivals are about. The term "sexuality" signals a concern with the social context and implications of sex, including attitudes and customs as well as practices. Sexuality, in this sense, is a concern of law and, by extension, of an economic theory of the law. He regards the principal—"uncompromising, truly unassimilable"—rival to the economic theory of sexuality as "a heterogeneous cluster of moral theories" (p. 3). Posner respects the moral theories of sexuality, both because of their intrinsic interest and because most mem-

---

3. For a recent example, see Tamar Lewin, "Furor on Exhibit at Law School Splits Feminists," *New York Times*, Friday, 13 Nov. 1992, B9.

bers of our society subscribe to them. But they are not his primary concern. Moral and religious beliefs, by which some would judge sexuality, cannot be reduced “to genuine social interests or practical incentives,” which makes them incompatible with the broadly scientific outlook that informs his own economic theory (p. 4).

### HISTORY AND SEXUALITY

*Sex and Reason* falls into three distinct but overlapping parts: “The History of Sexuality,” “A Theory of Sexuality,” and “The Regulation of Sexuality,” with the first two understood as the indispensable backdrop or building blocks for the third. Posner’s cavalier romp through the history of sexuality, admittedly prefaced with caveats and apologies, shows all of the disregard for complexity and ambiguity common to enthusiastic system-builders, even the most learned and insightful. In this section Posner is primarily concerned to sketch the range of variation in social attitudes toward and regulation of sexual practices and attitudes. Within a broad range, he especially seeks to demonstrate the far-reaching differences between two basic types of societies, respectively based on companionate and noncompanionate marriage.

This distinction forms the bedrock of Posner’s distinction between two major groups of sexual practices and attitudes. In his view societies that practice noncompanionate marriages, including polygamy, tend to sequester women and to sustain very permissive attitudes towards various forms of extra-marital sex, thus effectively severing erotic from procreative sex. In contrast, societies that practice companionate marriage emphasize the bond between erotic and procreative sex and, accordingly, display a much lower tolerance for sexual adventures and deviations of all kinds.

Fifth-century Athens offers his clearest example of what he takes to be the consequences of noncompanionate marriage. There, he believes, men married women whom they probably did not love and with whom they were not expected to spend much time except for the occasional obligatory sexual encounters that produced offspring. The objects of their sexual interest and desire, Posner contends, were adolescent boys of their own class or accomplished, upper-class courtesans. The Greeks, Posner insists, openly accepted homosexual acts, although not between men of the same age and class and not between lesbians, but their understanding of homosexuality differed significantly from ours. Posner does not believe that the men of the Athenian citizen class were especially preoccupied with homoerotic desire: For them homosexuality was one among many possible forms of sexual release available to men who were not yet married or not emotionally tied to their wives. Many Greek men, like prison inmates today, were what he calls “opportunistic homosexuals”—

men who would take the anus of an attractive young boy if the vagina of an attractive young woman were unavailable (p. 149).

Posner takes Catholic and Protestant Europe as prime examples of companionate marriage, which concerns marriage between (more or less) social equals, who are expected to treat each other with love and respect and to share a close association in running the household and raising children. Like the mores of noncompanionate marriage, those of companionate marriage place a high premium on the pre-marital virginity and marital fidelity of wives, primarily to safeguard the legitimacy of offspring. Thus the professed mutuality of companionate marriage, with its ideal of confining sex to marriage, uneasily coexists with a persisting sexual double standard. Practice, Posner allows, did not always live up to the ideal: many peasants did not bother to marry; most marriages were arranged; members of the clergy frequently kept concubines or engaged in homosexual relations; prostitution flourished. From the early medieval through the modern eras, European societies, nonetheless, tended to proclaim their intolerance of extra-marital sex, from masturbation to homosexuality.

The sharp distinction between companionate and noncompanionate marriage serves Posner's argument well but slights the complexity of the historical record. For most of world history, noncompanionate marriages of various kinds have probably been the norm, especially among ruling classes (including the citizen class of fifth-century Athens), which primarily viewed marriage as an essential element in consolidating and advancing the interests of families. While the Catholic Church espoused the idea of companionate marriage, it did so, in part, as a way of attracting pagans to the Church and, increasingly, as a way of strengthening its position against powerful families. Officially, the Church also opposed extra-marital sex, though it felt compelled to tolerate it, to some degree, in practice. Thus in some ways the early-modern (companionate) Catholic nobility behaved much as Posner describes fifth-century (noncompanionate) Athenians as having behaved. The Protestant Reformation gave new impetus to the idea of companionate marriage, but the idea in its modern form seems only to have gained broad acceptance during the eighteenth century, when modern ideas of motherhood and female sexuality also took hold.<sup>4</sup> Tellingly, these developments coincided closely with the rise and expansion of capitalism, including the economic,

---

4. We know less about the beliefs and behavior of various peasant populations, although it is possible that, having less reason to be concerned with dynastic politics and more reason to be concerned with the smooth functioning of small agricultural households, they hewed closer to the practices, if not the ideology, of companionate marriage than did their social superiors. See my "Women and Work," *French Women in the Age of Enlightenment*, ed. Samia Spencer (Bloomington, Ind.: Indiana University Press, 1984), 111-27; Elizabeth Fox-Genovese and Eugene D. Genovese, *Fruits of Merchant Capital: Slavery and Bourgeois Property in the Rise and Expansion of Europe* (New York: Oxford University Press, 1983), ch. 11; Natalie Zemon Davis, "Ghosts, Kin, and Progeny: Some Features of Family Life in Early Modern France," *Daedalus* 106, no. 2: 87-114;

technological, and demographic changes that have so decisively shaped the changing relations of women and men during the twentieth century.

Posner's casual attitude toward historical complexity does not necessarily invalidate his argument—at least not at the abstract level at which he casts it. But that casual attitude revealingly underscores the functionalist nature of the argument. For Posner, history is more interesting as the raw material for theoretical system-building than as a process of development. Or, to put it differently, he has little interest in the specific dynamics of historical change. Brushing aside charges of reductionism, he claims that his goal is to identify central and recurring phenomena and to free them from the clutches of the specialized vocabularies beneath which their similarities are normally concealed. In this spirit he enunciates the claim “that much of the variance in sexual behavior and customs across cultures and eras is explained by a handful of factors, such as the sex ratio (which is far more variable than is usually assumed), the extent of urbanization, and, above all, the changing occupational role of women” (p. 86). In his attempt to explain the variance, he relies upon theory, which he views “as a source of testable hypotheses” (p. 86). He fails to note that his factors are not all of the same kind and, more seriously, that some, notably the occupational status of women, are not what social scientists call “independent variables”—that is, they are not, properly speaking, causative.

#### THEORIES OF SEXUALITY

Posner's intellectual interests emerge most clearly in his section on the theory of sexuality, in which he draws upon propositions from the biology of sex and from economics. He sensibly dismisses the notion that a viable economic theory of sex must explain everything about sex, maintaining that, as an analyst of rational choice, the economist “understands that choice is constrained by circumstances that may have nothing to do with economics” (p. 87). Thus, any such economic analysis must take the sex drive itself as given. Beyond that, such a theory must recognize that the possible range of sex acts is largely determined by biological and developmental factors and that the object of the sex drive is partly a given and partly a choice. These premises, Posner asserts, should not be taken as evidence that he assigns biology to the realm of determinism and economics to the realm of freedom. He views both theories as equally deterministic, insisting that both can be reduced to an analysis of benefits and costs. The difference between them lies in biology's concern with our uniform species and economics' concern with cultural, and hence

---

Lawrence Stone, *The Family, Sex, and Marriage in England, 1500-1800* (New York: Harper & Row, 1977).



local, benefits and costs that help to explain the variety of sexual customs and attitudes.

Even Posner's most thoughtful qualifications fail to grapple directly with a central problem in the application of rational choice theory to complex human relations, namely, that although people frequently—perhaps even normally—tend to behave rationally in the aggregate, they may not do so as individuals. He also slights the significance of societies' political choices, which may prove less than rational and which may shape a society's future development, thus altering the base line from which its future choices will be made. Rational choice theorists' obvious answer to my objection would be that even apparently irrational social choices may, upon further investigation, turn out to have been rational from a larger point of view. Thus, if you step back far enough, the Germans' election of Hitler in 1933 may have been the most rational response to a threatening situation, notwithstanding its ultimate costs. Such are the tautological pitfalls of any functionalist argument: What is had to be because it is.

Posner, who doubts that sexual preferences can be entirely explained by cultural factors, accepts most of the insights of sociobiology, notably that individuals and peoples strive to ensure maximum reproduction of their genes and that men and women pursue different sexual strategies. He especially emphasizes the biological foundation of the link between reproductive and sexual strategies. He considers fundamental the sexual distinction according to which men can inseminate countless women, whereas women, who must devote nine months to sustaining a fetus and frequently more to nursing an infant, can only receive infrequent insemination. This sexual division of labor leads women to pursue conservative sexual strategies, men to pursue aggressive ones. In his view the "overmastering male sex drive incites a competition among men for women" that may result in a few strong men's monopoly of a disproportionate number of women (p. 99).

Although Posner acknowledges the limits of sociobiology, he takes seriously the biological foundations of human sexuality and holds that the best explanation for "real," in contradistinction to opportunistic, homosexuality is genetic (p. 296). Here, as elsewhere throughout the book, he asserts that the core of homosexuality lies not in the occasional participation in homosexual acts but in homosexual preference. He suggests that "real" homosexuals, of whom there are fewer women than men, account for roughly 2.5 percent of the population—not the 10 percent or more that homosexual activists normally claim (p. 294). Yet he views genes as influences on behavior, not determinants of it. Genes may well incline women to pursue a conservative sexual strategy, but in cultures in which women do not depend upon men, "many women resist the genetic inclination and abandon the conservative strategy" (p. 109). Sim-

ilarly, real homosexual men pursue different strategies and face different problems in accordance with their social and cultural milieu. In a society of noncompanionate marriage, a homosexual can meet the minimal responsibilities of marriage and procreation while pursuing his erotic life elsewhere; in a society of companionate marriage, that strategy becomes problematic.

The problem with this argument brings us back to Posner's timing of the emergence of companionate marriage. Throughout the medieval and early modern periods, divorce remained virtually unavailable—with Henry VIII of England a notorious exception. Thus, although married men had affairs, frequented prostitutes, raped lower-class women, and engaged in sexual acts with other men, they were not significantly more likely to dissolve or escape from their marriages on that account than were ancient Athenians. Even after the ideology of companionate marriage took hold during the eighteenth century, divorce remained difficult and uncommon. And, significantly, there was no clear recognition of homosexuality as a possible expression of male identity. Although the causation remains obscure, it is clear that homosexuality emerged as a recognized identity toward the end of the nineteenth century,<sup>5</sup> at roughly the same time that divorce became more accessible and that mothers began to get custody of children upon the dissolution of a marriage.

In our own time, the term "homosexual" has gradually given way to the self-affirming term "gay," and even to "queer," as an explicit act of cultural reappropriation. That the period of this evolution has also been marked by the emergence of no-fault divorce and, more recently, by the public affirmation of the choice of single motherhood, should make us thoughtful. What we might call the transformation of homosexuality from one sexual practice among many to a self-proclaimed erotic identity has, above all, coincided with the modern world's unprecedented acceptance of love and personal gratification as an appropriate standard for social norms and practices. Posner does not explore the connection.

Posner develops his understanding of these changes in discussions of the theory of sexuality from the perspective of economics, optimal regulation, and morality. Drawing heavily upon comparisons with contemporary Sweden, he emphasizes the revolutionary changes in women's lives, sexuality, and gender relations that have exploded during the twentieth century. Sweden, he suggests, has effectively turned reproduction over to women by substituting the tax-payer for the husband as the source of maternity and child support. Under these conditions Swedish women, who no longer need male protection, have little reason "to surrender their freedom and share control of their children" (p. 168). And

---

5. Michel Foucault, *The History of Sexuality, Volume 1, An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 43.

Sweden represents but a specific instance in a general trend of women's declining economic dependence upon men, which, in turn, has led women to shift their sexual strategy. With male protection of steadily diminishing importance to women, women have proven steadily less willing to "provide the commodity used to purchase that protection—female chastity" (p. 171). For Posner, this decline in female chastity constitutes "the most dramatic manifestation of the sexual revolution" (p. 171).

#### MORALITY AND THE REGULATION OF SEXUALITY

Posner's historical and theoretical discussions, which are richer and more extensive than this sketch can capture, lay the foundation for his exploration of and recommendations for the regulation of sexuality in the United States today. Posner advances evidence that suggests that the United States tends to punish sex crimes more heavily than do other developed nations, but to punish non-sex crimes less heavily. Significantly, the United States also seems to criminalize more forms of sexual conduct than do other developed nations. Posner openly acknowledges that his evidence, which derives from his somewhat arbitrary comparison of non-random samples, should hardly be taken as conclusive. Problems with the evidence notwithstanding, his basic argument is intuitively plausible, and all the more interesting since we do know that the United States leads the industrialized world in violent (non-sex) crime.<sup>6</sup>

The evidence that the United States punishes sex crimes more heavily than other industrialized nations might easily be taken to suggest that the legacy of Puritanism continues to weigh heavily on American culture, although Posner gives more credit to the Catholic Church than the Protestant denominations for attempting to enforce puritanical sexual attitudes. More interesting and important is Posner's suggestion that the true source of American public attitudes towards sex lies in the country's moral and religious diversity. We are, in effect, a nation of contested moralities and our anxieties about those differences tend to result in punitive rather than permissive attitudes. In contrast, Sweden, which is at once more religiously homogeneous and more homogeneously non-observant, is much more permissive and yet ends up with not merely fewer sex crimes but fewer abortions.

These and other considerations lead Posner to propose that rational thinking about sex requires that we sever sex from morality—that we learn to regard sex with moral indifference. According to his positive economic theory of sexual behavior, it is reasonable to attribute the type and frequency of different sexual practices—in contradistinction to the sex drive and sexual preference—to "rational responses to opportunities

---

6. On the prevalence of violent crime, see, for example, Deborah Prothrow-Stith with Michael Weissman, *Deadly Consequences* (New York: HarperCollins, 1991).

and constraints” (p. 111). From this perspective it logically follows that if the costs of one kind of sexual behavior become too high, rational individuals will substitute another that costs less. When heterosexual male prisoners lack access to women, they will turn to men. When the costs of infanticide skyrocket, women who wish to terminate pregnancies will turn to abortion. And so forth. If we learn to regard sex with moral indifference, we will accept only such limitations of sexual freedom as are “required by economic or other utilitarian conditions” (p. 180).

Posner’s main quarrel with the moral theory of sex lies in his conviction that it has lost its hegemony. If all, or even most, Americans accepted Christian sexual morality, if such offenses against that morality as prostitution, adultery, homosexuality, or fornication “evoked as wide and deep an antipathy as infanticide, gladiatorial contests, or suicide, those offenses would be immoral. Period” (p. 232). Demonstrably they do not. And since unanimity of feeling on such matters has dissipated, “their morality is contestable” and the invocation of moral traditions will prove ineffectual (p. 232). Argument will not suffice to convince someone that infanticide is a bad thing. And anyone who seriously demands that you provide an argument against infanticide “inhabits a different moral universe” (p. 230).

Posner passes lightly over the ubiquitous conflicts among those who inhabit different moral universes, leaving the reader to wonder if he believes that such conflicts will yield to the commanding logic of economic rationality. Had he paid more attention to history, he might have noticed that if history teaches anything, it assuredly teaches that inhabitants of different moral universes frequently have great difficulty in coexisting peacefully. He does acknowledge that the United States today combines an extraordinarily high level of allegiance to Christian beliefs with an extraordinarily high rate of crime, but does not dwell upon possible explanations.

More to the point, and independent of specific crimes, the varied moral universes of different Americans are resulting in ferocious disputes, most dramatically over abortion, but also over homosexuality, pornography, and more. In the spirit of economic rationality, Posner valiantly attempts to maintain neutrality with respect to these struggles, steadfastly refusing to credit the validity of moral claims on one side or the other. From time to time, however, he betrays his impatience with the sexual radicals, most notably Marcuse, who, he contends, remain passionately committed to their own version of a moral conception of sex, notwithstanding its apparent reversal of the traditional religious conceptions. As Posner shrewdly remarks, “the idea that polymorphous perversity is the road to Utopia has been shown to be no more convincing than the contrary idea” (p. 240). He might well have added that the defenders

of various forms of sexual liberation yield nothing to their adversaries in the sanctimonious passion with which they defend their views.

The tendency emerges most clearly from the debates over abortion, in which the practical issue of the availability of abortion must be separated from the terms in which that availability is defended. Increasingly, proponents of available abortion have cast their position in the argument of individual rights.<sup>7</sup> Arguments abound that, for women, access to abortion constitutes a fundamental, constitutional right. Underlying these arguments, and occasionally surfacing within them, lies the moral premise that pregnancy constrains women's equality in relation to men. Since men cannot be burdened by pregnancy, respect for equality demands that women not be burdened either. Proponents of this view believe their cause to be one of the most rudimentary fairness and morality.

As Posner suggests in his discussion of abortion, the clashes that rend American culture are not simply over ideology, however much they are those, but clashes over material interests as well, for example, child support payments. He rightly argues that many of the women who oppose abortion are attempting to defend the frayed remnants of a world in which men were held to protect and support women.<sup>8</sup> The virtual disappearance of female virginity as a commodity to be traded for male protection and support has left them vulnerable, especially since it has already been encoded in no-fault divorce. Many women do understand, however, that the public acceptance of abortion would indeed release men from virtually all responsibility for procreation and thus deliver the death blow to marriage as we have known it.

#### TOWARD A FUNCTIONAL VIEW OF SEXUALITY

Posner is at his best in such passing observations—and the book abounds with them—which demonstrate his capacity for empathy and humane understanding. He displays, throughout, an acute grasp of the monumental—I am tempted to say revolutionary—significance of the changes in women's situation in the late twentieth century. Yet he resolutely eschews the least trace of sentimentality. His own primary interest obviously lies in the possibility of scientific understanding—the ability of the human mind to grasp the scheme of things entire. Such an enterprise leaves scant room for sentimentality or *parti pris* of any kind. It is diffi-

---

7. For a fuller development of this argument, see Elizabeth Fox-Genovese, "Feminism and the Rhetoric of Individual Rights, Parts I & II," *Common Knowledge*, nos. 1 & 2 (1992). Similar arguments can also be found in Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987); and her *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

8. For confirmation of this position, see, for example, Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984); and Faye D. Ginsburg, *Contested Lives: The Abortion Debate in an American Community* (Berkeley: University of California Press, 1989).

cult, if not impossible, fairly to charge Posner with taking sides, although one can imagine a Christian theologian who charges him with hubris. For Posner, above all, wants passionately to understand how it works. This passion for functionalism leads him to speculate whether, in the end, "a moral conception of sex . . . is vital to civilization" (p. 240). Obviously, he thinks not. In his view, only by divorcing sex from morality can we hope to construct a rational system of regulation, although he falls cautiously and uncharacteristically silent on how the divorce is to be effected. Yet it defies credulity to suggest that those who will go to the wall to defend their own moral position will suddenly decide that sexual issues have no moral consequences at all.

In his third section Posner brings to bear on the specific problems of regulation his general emphasis "on seeking functional explanations for rules and practices often thought to be based unreflectively on tradition, superstition, or misogyny" (p. 243). He displays, throughout, a commendably judicious and thoughtful tone, as well as considerable sensitivity to the emotionally and ideologically charged positions of others. His proposals for regulation embody a radical break with the attitudes and practices of the past, albeit a radicalism expressed in the sober tones of reason. Here the significance of his "scientific" functionalism finally becomes clear: rather than arguing that the only response to our current crisis over the appropriate limits, if any, to sexual self-expression is to embrace functionalism, he elides the present with the past by asserting that regulations of sexuality have never been anything but functional. Thus, however reasonable and possibly constructive his specific suggestions, we would miss the larger significance of his bold project were we to divorce them from the more comprehensive judicial philosophy from which they derive and which they articulate.

Consider marriage. Stripped to its functional essentials, marriage has served as the cornerstone of the regulation of sex and reproduction. Across history and cultures, "marriage-related laws regulating sex have been on the whole efficient adaptations to social conditions" (p. 266). Posner allows that even polygamy and the prohibition of divorce have, in time and place, served important social purposes, notably forms of protection for women and children. In a similar spirit he insists that all societies have manifested an inverse relation between restrictions on marriage, and nonmarital sex. In a regime of noncompanionate marriage, nonmarital sex of all kinds will abound; in a regime of companionate marriage, nonmarital sex will diminish. By this logic, if we abolished all restrictions on marriage, we would, by the same token, abolish all distinctions between marital and nonmarital sex.

In Posner's judgment, the growing economic power and personal independence of women, together with the disappearance of the legal status of illegitimacy, have brought us remarkably close to this situation. West-

ern nations have effectively laid the groundwork for “the replacement of marriage [as] a status relationship—that is a relationship imposing rights and duties that cannot be altered by contract—by contractual cohabitation, the relationship at issue in ‘palimony’ cases” (p. 264). As contract continues to erode the status of marriage, it will become increasingly difficult for “society to withhold legal recognition of unconventional forms of voluntary sexual relationships, including polygamous and homosexual relationships,” even if it refuses to call them marriages (p. 266). And if the law continues to develop in this direction, cohabitation contracts and marriages are likely to become increasingly indistinguishable, so that, eventually, all such relations will be marriages or there will be no marriages at all. Why not then conclude that, with marriage reduced to a voluntary contract between any two individuals who chose to enter into it for any duration they wish, an hour with a prostitute would be one among many forms of marriage rather than an instance of nonmarital sex?

Posner returns to marriage in his discussion of policies toward homosexuality. Could it not, he queries, plausibly be argued that as “heterosexual marriage becomes ever more unstable, temporary, and childless,” it becomes more and more difficult to distinguish it from homosexual relations? But might that growing similarity not, he continues, be less a point in favor of homosexual marriage than one in favor of chucking marriage as a distinct institution and explicitly recognizing it as a contract? The real problem, Posner allows, lies in the entitlements that accompany marriage. Should homosexual couples enjoy marital benefits in inheritance, social security, income tax, welfare payments, adoption, medical benefits, life insurance, immigration, and the rest? Should they have the same rights of adoption and custody as heterosexual couples? Posner believes that we would do best to treat each of the entitlements separately, rather than as a group; he also believes that none alone and maybe not all together justify a decisive rejection of homosexual marriage. The salient issue should be whether the costs outweigh the benefits. For the moment, however, he avers, public hostility to homosexuality forces the conclusion that homosexual marriage is not a feasible option.

Many readers will doubtless find it significant—and even sinister—that Posner so easily defers to a presumed public opinion with respect to homosexual marriage. But in accepting the unlikelihood of public support for homosexual marriage, he artfully dodges the more serious questions concerning the allocation of social resources. The entitlements that accompany marriage as a relation and a status embody some residual public concern about the conditions under which children live and mature. The United States, with its customary preference for private rather than public support of children, has, much more than other indus-

trialized nations, entrusted almost the entire economic responsibility for children to their parents. Had we an extensive network of family support, we probably would not face the issues that Posner raises. We have, in effect, identified marriage as the core of family life, as the privileged locus of social transfer payments. No wonder that, under these conditions, we face an escalating battle about who has a right to enjoy those benefits. But, by the same token, we have tied a cultural—for some, a moral—preference to have children reared in a heterosexual setting to economic benefits for individuals. In this sense our delinquency with respect to public support for reproduction has fueled an acrimonious debate about the putative morality of limiting marriage (economic advantages for specific individuals) to those who profess one form of sexual preference rather than another.

Posner brings his special combination of logic and social realism to bear upon all of the other difficult and contested issues of sexual regulation: homosexuals as teachers, homosexuals in the military, contraception, abortion, sodomy, pornography, nudity, and coercive sex. The logic of his position remains fundamentally hostile to any regulation that curtails the personal autonomy of adults, but time and again he backs off the extreme position out of respect for what he takes to be strong community sensibility. Thus he presents us with a paradox: He unilaterally rejects the alternate theories of sexuality, notably Christian morality, as adequate justifications for regulation, but frequently accepts other people's adherence to them. He shows altogether less patience with the sensibilities of radicals, notably some feminists, who seek new justifications for regulation. If, he impatiently observes, we cannot distinguish between a Reubens and a Playboy centerfold because both embody patriarchy and misogyny, then we cannot regulate the dissemination of either. As ideologies, both patriarchy and misogyny are protected by the First Amendment.

Posner reserves his greatest impatience for the liberal Supreme Court of 1965 to 1977, which, in his judgment, effected its own sexual revolution. In a succession of decisions, notably in *Roe v. Wade*, the Court's "curious appropriation of the word privacy to describe what is not privacy in the ordinary sense but rather freedom is an attempt by semantic legerdemain to make sexual liberty appear to occupy a different plane of social value from economic liberty. It does not" (p. 335). The problem does not lie in the description of a prohibition against abortion as "a deprivation of a pregnant woman's liberty"; the problem lies in the description of it "as a denial of due process of law" (p. 336). By its reasoning and rhetoric, the Court opened itself to the suspicion that the justices were following their own values and politics, which seemed, however oddly, "aligned with those of the student radicals of the 1960s, for whom sexual liberty and political liberty were . . . two sides of the same



coin, while economic liberty they considered a mask for exploitation” (p. 338).

Posner reproaches the Court for having combined the deregulation of sexuality with the regulation of the economy, for having reduced liberty to sexual liberty while hampering the beneficent effects of economic liberty. He further reproaches it for having taken sides, on the basis of inadequate and even faulty legal reasoning, in the war between competing cultural and social values. The principal opposition to abortion, he reminds us, comes not from macho types and Don Juans, who probably favor it because it relieves them of responsibility, but from women and men who genuinely believe in the sanctity of fetal life. For many of those who support abortion, he continues, abortion constitutes the very symbol of feminism. “Should the Supreme Court take sides between feminism and antifeminism” (p. 340)? Should it take sides between the differing economic interests represented by the different groups of women? Do not such battles appropriately belong in the legislatures rather than in the courts? And finally, “Can we rightly call antiabortion laws even *prima facie* discriminatory against women if in fact they help some women and hurt others” (p. 341)?

Make no mistake. Posner does not oppose abortion, at least not during the early months of a pregnancy. He bitterly opposes the grounds upon which *Roe v. Wade* was decided. Above all he reproaches the Court for having failed to formulate “a coherent body of constitutional doctrine to decide issues of sexual autonomy” (p. 350). Firmly convinced that any responsible policy must be resolutely secular and must be grounded in utilitarian, pragmatic, and scientific arguments, he believes that the Court of the late 1960s and early 1970s simply substituted one system of “morality” for another, thus seriously jeopardizing the long-range prospects for a responsible, rational policy in keeping with the changing economic conditions of our society.

Unlike many conservatives, Posner does not count himself among those who revere “original intent” and has no interest in retarding or distorting the progress of economic development, even if that development forces us to rethink or conceivably jettison our most cherished beliefs. In keeping with a truly secular and pragmatic attitude, justices, in his view, must be willing to “invalidate state or federal laws on constitutional grounds without insisting that the invalidation be firmly grounded in the text of the Constitution” (p. 350). For those who are not prepared to do so will probably end by rejecting “the very idea of a constitutional right of sexual autonomy, or at the very least refuse to extend it beyond the existing precedents, narrowly interpreted” (p. 350).

#### THE AGE OF SEXUAL AUTONOMY

Posner clearly believes that the age of sexual autonomy has arrived,

although we have not yet figured out how to deal with it. He drives the point home in a discussion of reproduction, from adoption to surrogate motherhood, arguing that modern technology has opened the prospect of the separation of reproduction from sex. Modern reproductive technologies have provoked mixed reactions from feminists, although Posner expresses bemusement that feminists should worry about the decline in mothering since feminism has so aggressively sought to liberate women from traditional roles. But then, he notes, with a deadpan twist of the knife, "Fertility is just another asset, like a professional degree or other job-market human capital" (p. 425). Should men ever succeed, through cloning or artificial wombs, in completely freeing reproduction from women, women who are no longer needed as mothers probably would experience a reduction in their income. For the foreseeable future, however, artificial reproduction strengthens the bargaining position of women in relation to men, increases women's full income relative to that of men, and, accordingly, "presages a further shift in sexual attitudes and behavior toward the Swedish model" (p. 432).

The Swedish model fascinates Posner, although he does not entirely approve of it. Sweden, he believes, has largely succeeded in freeing sexuality from the manacles of morality and reproduction from the control of men. Sweden has also gone a long way toward the assimilation of marriage as status to marriage as contract, offering couples who wish to cohabit but not to undertake the commitment of marriage a cohabitation contract, which also provides homosexuals with a facsimile of marriage. Posner especially approves Sweden's extensive program in sex education and easy access to contraception, which, in his judgment, help to account for the comparatively low level of unplanned teenage pregnancies and abortions. The Swedish nonmarital birth rate nonetheless remains very high "because marriage confers relatively few benefits on Swedish women" (p. 166). Hence the paradox that although Sweden is, in most respects, "a more socialistic society than the United States," as evident in its extensive system of child welfare, "it may in matters related to sex more nearly approximate a free-market society than the United States does" (p. 167).

Notwithstanding Posner's deep reservations about Sweden's regulated economic system, he clearly believes that other Western societies are living through changes that should bring them closer to the Swedish free market in sex. He believes, in other words, that we will not respond adequately to the changes of our times unless we succeed in separating sex, morality, and reproduction from one another and in thinking dispassionately—scientifically—about each on its intrinsic merits. However contradictory it may seem, the various forms of artificial reproduction do simultaneously emancipate women from dependence upon men and men from dependence upon women, "for anything that severs reproduc-

tion from sexual intercourse reduces the dependence of each sex on the other" (p. 425).

Posner is too cautious, or perhaps too much of a gentleman, openly to celebrate the changes that are engulfing us. He even demonstrates guarded respect and sympathy for the proponents of traditional morality, who are losing the cultural war. He is much harder on liberal justices, radical feminists, and assorted other radicals, possibly because he recognizes them as dangerous opponents in the battle to shape the future. But it is hard not to believe that, at least on some level, Posner does welcome their projected brave new world of sexual autonomy. After all, as he assuredly understands, the mutual dependence of women and men upon each other, and of children upon both, anchored the dense fabric of beliefs and practices that have made up civilization and that, not incidentally, offered the most durable barrier to the unfettered progress of the market.

#### RATIONAL CHOICE JURISPRUDENCE

The rise and triumph of sexual autonomy bring personal life completely in line with the workings of the market, which Posner regards as the most reliable standard for human relations and social policies. The rapidity and novelty of the changes through which we are living seem to sever us from traditional moorings. Sex offers Posner an unparalleled opportunity to press the merits of his preferred vision of jurisprudence. In this respect *Sex and Reason* can profitably be read as a gloss on and case study for his theoretical treatise, *The Problems of Jurisprudence*, in which he elaborates his judicial philosophy—although, hostile to metaphysics, he would probably prefer a word like attitudes—and identifies himself as, above all, a libertarian and a pragmatist.

The brand of pragmatism that I like emphasizes the scientific virtues (open-minded, no-nonsense inquiry), elevates the process of inquiry over the results of inquiry, prefers ferment to stasis, dislikes distinctions that make no practical difference—in other words, dislikes “metaphysics”—is doubtful of finding “objective truth” in any area of inquiry, is uninterested in creating an adequate philosophical foundation for its thought and action, likes experimentation, likes to kick sacred cows, and—within the bounds of prudence—prefers shaping the future to maintaining continuity with the past.<sup>9</sup>

Posner elaborates his distaste for blind devotion to continuity with the past in his rejection of the claims of natural law. Attacking Ronald Dworkin, he dismisses the concept, arguing that to confuse law with morality is first to strip it of its distinctiveness and subsequently to con-

---

9. Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), 28.

fuse it with politics, a confusion which ultimately leads to its own negation—no law.

Without social, cultural, and political homogeneity, a legal system is not able to generate demonstrably right, or even professionally compelling, answers to difficult legal questions, whether from within the legal culture or by reference to moral or other extralegal norms—the traditional province of natural law. For without either nature, or a political, social, and moral community so monolithic that the prevailing legal norms are “natural” in the sense of taken for granted, natural law can be but a shadow of its former self—can be but a name for the considerations that influence law even though not prescribed by a legislature or other official body.<sup>10</sup>

In *Sex and Reason* Posner relies upon the collapse of moral consensus in the United States to justify his “pragmatic” and skeptical investigation of sexual practices and norms. His investigation of sexuality thus manifests his conviction that the responsibility of a judge must always be to substitute “the humble, fact-bound, policy-soaked, instrumental concept of ‘reasonableness’ for both legal and moral rightness.”<sup>11</sup>

Posner apparently equates his attack on natural law and other illusions of moral rectitude with an attack on bigotry, superstition, and irrationality. In directing his attack on natural law against Dworkin, he cleverly, if perversely, associates the defense of moral certainty and natural law with liberals and radicals. In this spirit he contemptuously associates Marcuse’s permissive notion that polymorphous perversity paves the road to Utopia with the repressive ideas of Catholic and Victorian sexual theorists, arguing that there is nothing to choose between them. All of those who support one or another moral theory of sexuality fall into the same trap, namely, the assumption that a moral conception of sex “is vital to civilization” (p. 240). For Posner, it is not.

The breathtaking assertion that civilization does not require a moral conception of sex exposes the full measure of Posner’s own kind of radicalism, which is grounded in his repudiation of the claims of history. By associating the moral theory of sex with permissive radicals on the one hand and repressive reactionaries on the other, Posner engages in a skillful sleight of hand that, whatever his intentions, leans toward nihilism. By categorically defining his opponents, he is attempting to structure the entire debate, excluding a broad group from traditional conservatives to moderate leftists who, differences among them notwithstanding, might not oppose all of his specific policy recommendations but would seriously question his libertarian premises.

---

10. Posner, *Problems of Jurisprudence*, 23.

11. Posner, *Problems of Jurisprudence*, 130.

## MORALITY OF SEX OR MORALITY OF REPRODUCTION?

Throughout *Sex and Reason* Posner plausibly argues that the most momentous change of modern times lies in the changing situation of women, who increasingly enjoy the prospect of economic independence and who have effectively lost the protections and the constraints of marriage. Posner argues that as women have gained access to the status of autonomous economic agents they have, by the same token, claimed control of their own sexuality and with it of reproduction. In his judgment these developments have virtually exploded previous sexual norms, moral as well as institutional. They thus invite—or dictate—the acceptance of “morally indifferent sex” (p. 85).

Posner appears to be advocating a world in which the only bonds among individuals result from their market relations. Many feminists, with some reason, would counter that women do not yet enjoy equality in the market with men and cannot expect to in the near future. They would further argue that the only way to protect women against male brutality and competition is to enlist a strong state in their cause. Posner, of course, has no use for the welfare state, much less for socialism. Yet it is far from clear that, left to its own devices, the market will provide adequately for women, much less for children. In this respect the world of poor, single teenage mothers in the United States probably offers a more faithful picture of the market at work than the comfortably situated single mothers of Sweden.

This contrast suggests that Sweden’s sexual freedom may not be as morally indifferent as Posner would have us believe. Sweden does provide for women and children, and not merely by disseminating sex education in the schools. Indeed, in an extraordinary concession, Posner admits that Swedish sex education seems to prove most effective when it is grounded in instruction by parents (note the plural) in the home. Posner also recognizes that Swedish—and even the more permissive Danish—cohabitation contracts for homosexuals do not include children. Thus Posner’s emphasis on the freedom of adults to engage in various sexual relations in various situations obscures the extent to which provision for children remains inescapably tied to a conception of sexual morality in the full sense.

Posner notes, without comment, that in Sweden the taxpayer has assumed the role of the husband in providing for women and children. In the United States, where the free market enjoys much greater latitude than in Sweden, the taxpayer assuredly has not. Indeed, it is permissible to speculate that male taxpayers, who frequently cannot be induced to pay private child support, may long resist assuming those responsibilities. Doubtless Posner is correct that our particular situation, with its appalling rates of teen pregnancy, unwanted pregnancy, violence, and all the rest, owes much to our moral and ideological diversity. Doubtless he is

also correct that the prospects for a complete victory by one or another morality are slight. But it does not follow from those premises that we should expect to sustain some facsimile of civilization with no moral concept of sex, nor does it follow that our accelerating collapse into an aggregation of autonomous (and, as Hobbes said, warring) individuals will produce any kind of civilization.

As it happens, I have no special difficulty with any of Posner's specific proposals for sexual policy, not because I agree with all of them, but because they are, on the whole, admirably thoughtful and respectful of what community sentiment is likely to tolerate. My difficulties concern Posner's premises about the divorce of sex from morality and reproduction, with their embedded disdain for the abiding consequences of history. The indisputable advantage of Posner's economic and sociobiological method lies in putting our personal parochialisms in a healthy, skeptical perspective. Sexual customs and moralities have varied tremendously across time and space. There is a dangerous arrogance in assuming that the assumptions of one society or time period necessarily hold for another.

Posner argues that the primary variations in sexuality cluster around two main types of marriage (companionate and noncompanionate), but in abstracting marriage from political systems, religions, and the rearing of children, he abstracts from the social fabric in which sexual moralities are elaborated, experienced, and transgressed. In the United States today, the level of transgression seems extraordinarily high relative to the Judeo-Christian norms in which so many Americans of different ethnicities were reared. And it is clear that prolonged public tolerance of transgression seriously erodes inherited beliefs, which are increasingly seen not to be about people's lives.

Sex and sexuality, however paradoxically, afford Posner an invaluable weapon in the justification of his libertarian commitment to the market as the ultimate arbiter of social differences. He seems to be arguing that since we have no hope of resolving our moral differences about sexuality, we might just as well leave them to the workings of the market. But his apparently forthright realism in this regard merely serves to repress another, and for him altogether more serious, topic—economics itself. For in Posner's mental universe, the sanctity of economics—understood as the minimally restricted capitalist free market—must be accepted as given. But since reproduction is as much a matter of economics as of sexuality, we are left with an uncomfortable message. For if we agree to divorce sex from morality and to divorce sex from reproduction, are we not thereby ominously agreeing to divorce reproduction from morality?

Sexual moralities have always coexisted with economic systems, which they variously shape and are shaped by. In that delicate balance, most people see economic systems as an embodiment and mirror of predictable

human greed and jockeying for advantage. Sexual moralities, in contrast, even when they are not scrupulously observed, tend to be viewed as normative stories about what it means to be civilized. Above all they embody the taboos that define the essence of human communities—the conditions of their reproduction. In the end, the sanctity and sense of responsibility with which we regard reproduction may be more important to a people's moral theory of sexuality than the specific acts in which consenting adults engage. And history suggests that markets alone cannot be trusted to fulfill that function.