

# CONTRACTARIANS AND FEMINISTS DEBATE PROSTITUTION

SIBYL SCHWARZENBACH\*

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## INTRODUCTION

The debate on prostitution between liberal contractarians and many feminists appears to have reached an impasse and the two positions seem irreconcilable. The contractarian analysis characteristically argues for decriminalization, and yet rests on assumptions about the nature of human sexuality which feminists vehemently reject. Many feminists, on the other hand, remain silent on the issue of decriminalization. In this Article I will examine influential contractarian and feminist positions and will attempt to expose the limitations of each. In the end I will offer my own argument for the decriminalization of prostitution.

In examining the contractarian and feminist positions, I will focus on three articles which capture the essence of each position. Lars Ericsson, a representative contractarian, is the author of the first article, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*.<sup>1</sup> In this article, he proposes the legalization of what he terms "sound prostitution." Carole Pateman, an influential feminist critic of contractarian theory, is the author of the second article, *Defending Prostitution: Charges Against Ericsson*.<sup>2</sup> In this article, Pateman attacks the very possibility of "sound prostitution." Finally,

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\* Assistant Professor of Philosophy, Baruch College of the City University of New York. Ph.D., 1985, Harvard University. Professor Schwarzenbach was a Fulbright Scholar and spent two years at the University of Heidelberg, Germany. This Article was originally written in response to a talk by Carole Pateman entitled "What's Wrong with Prostitution?" which was presented at the Baruch College (C.U.N.Y.) Colloquium for Philosophy, Politics, and the Social Sciences on May 11, 1987. Professor Schwarzenbach is currently at work on a book entitled ON CIVIC FRIENDSHIP to be published by the University of Michigan Press.

1. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 ETHICS 335 (1980).

2. Pateman, *Defending Prostitution: Charges Against Ericsson*, 93 ETHICS 561 (1983) [hereinafter *Defending Prostitution*]. This Article will also focus on Pateman's new book, THE

Laurie Shrage, also a feminist critic, is the author of the third article, *Should Feminists Oppose Prostitution?*,<sup>3</sup> which offers another variant of the feminist critique.

In general, feminists find themselves in a bind when it comes to forming a position on prostitution. While claiming that they are not per se opposed to decriminalization, many feminists offer such scathing critiques of prostitution (arguing that domination, exploitation, and violence are essential features of the phenomenon) that one is left with no positive reasons for making decriminalization a reality.

Shrage, for instance, claims her position is "consistent with decriminalization," yet her work concludes that since "commercial sex, unlike marriage, is not reformable," feminists should "outwardly oppose prostitution itself."<sup>4</sup> I think it fair to say that such a stance is inconsistent with bringing about the decriminalization of prostitution.<sup>5</sup>

Pateman, too, argues that the prostitute, due to the very nature of the prostitute-client relationship, sells not only her sexual services, but her actual "body" or her "self." At the same time, Pateman maintains that she is not opposed to decriminalization.<sup>6</sup> If, however, prostitution did entail the sale of bodies and selves, prostitution would be another form of slavery. If this were the case, how could anyone *not* be opposed to decriminalization? Slavery, after all, has long been illegal<sup>7</sup> and is no longer practiced in this country.

It is perfectly consistent, of course, to argue that prostitution is morally wrong and that, therefore, it should not be legalized under any circumstances; this is in fact the official position in most of the United States today (in contrast to many European countries<sup>8</sup>). Thus, if we are to take decriminalization seriously, we must come up with weighty arguments in its favor, and not merely pay lip service to it.<sup>9</sup>

Accordingly, in the following paper I shall be concerned with the arguments which would facilitate the movement towards decriminalization. These

SEXUAL CONTRACT (1988) [hereinafter *SEXUAL CONTRACT*], and especially on chapter seven of this book entitled "What's Wrong with Prostitution?"

3. See, e.g., Shrage, *Should Feminists Oppose Prostitution?*, 99 *ETHICS* 347 (1989).

4. *Id.* at 360.

5. One should note at this point that many prostitutes themselves argue for decriminalization. See, e.g., *A VINDICATION OF THE RIGHTS OF WHORES* (G. Pheterson ed. 1989) [hereinafter *RIGHTS OF WHORES*] (volume also discusses political activities undertaken by prostitutes including the organization and proceedings of the First and Second World Whores' Congresses in Amsterdam in 1985 and in Brussels in 1986, respectively).

6. C. Pateman, Presentation of Paper "What's Wrong with Prostitution?," Baruch College (C.U.N.Y.) Colloquium for Philosophy, Politics, and the Social Sciences (May 11, 1987). In her response to critics, Pateman asserted that she was not opposed to decriminalization.

7. See U.S. CONST. amend. XIII, § 1.

8. See *RIGHTS OF WHORES*, *supra* note 5, at 70-73 (author compares the legal status of prostitution in the United States with that in European countries).

9. For a feminist position, other than the one expressed in this Article, that defends the view that prostitution should be legalized, see Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1907, 1921 (1987).

arguments will show that there is something "right" about prostitution which the law violates by criminalizing the activity. This paper will try to locate this "something" and examine it from an explicitly feminist point of view.

## I.

### THE CONTRACTARIAN DEFENSE OF "SOUND" PROSTITUTION

I shall only briefly summarize the liberal contractarian position on prostitution because its major tenets are by now familiar.<sup>10</sup> The contractarian argues that opposition to commercial sex derives primarily from outmoded attitudes towards sexuality. According to this position, once we acknowledge our Puritan heritage, in general, and our critical attitude toward female promiscuity, in particular, for what they in fact are — lingering prejudices — and once we recognize that the need for sexual gratification is a need similar to the need for food and fresh air (and hence should be readily available), our opposition to commercial sex will vanish.<sup>11</sup> The contractarian concludes that we will begin to recognize that a person's right to sell his or her sexual services is neither more nor less of a right than that involved in selling his or her labor-power in any of its multifaceted forms.<sup>12</sup>

As typified by Ericsson, liberal contractarians do not condone prostitution as it is now practiced. Ericsson sets forth a model of "sound prostitution" which incorporates numerous reforms of prostitution as it is now practiced.<sup>13</sup> First of all, "sound prostitution" must entail decriminalization; the prostitute must be given the same rights as anyone else, including the right to rent or own a suitable location for her business, and to have legal protection from exploitation by pimps, landlords and abusive customers.<sup>14</sup> Second, the phenomenon must be cleansed of child and teen prostitution (on paternalistic grounds) and, perhaps, combined with anti-drug programs.<sup>15</sup> Third, the profession must be "freely chosen" or at least no more forced than a number of other legal trade choices.<sup>16</sup> Fourth, it must be equally available to both sexes; as it now stands most prostitutes are women and their clients are men, but this is a contingent and not inevitable aspect of the phenomenon.<sup>17</sup> Finally, and perhaps most importantly, prostitution must be practiced within a social climate freed from emotional prejudice and stigma.<sup>18</sup> Ericsson concludes that "in order to improve prostitution, we must first and foremost improve our

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10. In so doing, I shall refer primarily to the theories of Lars Ericsson. See generally, Ericsson, *supra* note 1. For another discussion of the contractarian position on prostitution, see D. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW* (1982), especially chapter three entitled "Commercial Sex and the Rights of the Person."

11. Ericsson, *supra* note 1, at 338-41.

12. *Id.* at 342.

13. *Id.* at 362.

14. *Id.*

15. *Id.* at 363.

16. *Id.* at 366.

17. *Id.*

18. *Id.* at 365.

attitudes towards it."<sup>19</sup>

The contractarian, as Pateman notes, extends the liberal ideas of the free market, the pursuit of individual freedom and equality of opportunity, to sexual relationships.<sup>20</sup> Ericsson does not, however, argue that commercial sex is ultimately desirable, only that it is acceptable given certain "ubiquitous and permanent imperfections of actual human societies."<sup>21</sup> According to Ericsson, these imperfections include the inevitable frustration of sexual needs produced by any society, the general human propensity, not only for variety, but even for mysterious and perverse gratification, as well as the desire for intercourse free from entangling cares and civilized pretenses.<sup>22</sup>

## II.

### THE FEMINIST CRITIQUE

According to Carole Pateman, "the central feminist argument" against liberal contractarianism is "that prostitution remains morally undesirable, no matter what reforms are made, because it is one of the most graphic examples of men's domination of women."<sup>23</sup> Pateman argues that liberal contractarianism, in general, and Ericsson's position, in particular, "systematically exclude the patriarchal dimension of our society from philosophical scrutiny."<sup>24</sup> In other words, Pateman argues that Ericsson neglects what Pateman (following Adrienne Rich) calls "the law of male-sex right"<sup>25</sup>: the traditional right possessed by men guaranteeing them access to, and power over, women's bodies.<sup>26</sup>

Historically, this right has been justified by various arguments and myths, the most powerful myth perhaps being that men have a natural and uncontrollable sexual urge which would be dangerous for society not to recognize and to accommodate.<sup>27</sup> Moreover, Pateman shows how conceptions of "masculinity" are today still closely intertwined with the presumed capacity and right of men to dominate women. Echoing Karl Marx's famous analysis of the domination of wage-labor by capitalists,<sup>28</sup> Pateman claims that despite all talk of

19. *Id.* at 366.

20. *Defending Prostitution*, *supra* note 2, at 561.

21. Ericsson, *supra* note 1, at 366.

22. *Id.* at 360.

23. *Defending Prostitution*, *supra* note 2, at 561.

24. *Id.*

25. *Id.* at 2.

26. *SEXUAL CONTRACT*, *supra* note 2, at 2.

27. Shrage discusses some of these myths which, she claims, "structure the social meaning of the prostitute's business in our culture." Shrage explicitly mentions four such myths: "First, people in our society generally believe that human beings naturally possess, but socially repress, powerful, emotionally destabilizing, sexual appetites. Second, we assume that men are naturally suited for dominant roles. Third, we assume that contact with male genitals in virtually all contexts is damaging and polluting to women. Fourth, we assume that a person's sexual practice renders her or him a particular 'kind' of person, for example 'a homosexual,' 'a bisexual,' 'a whore,' 'a virgin,' 'a pervert,' and so on." Shrage, *supra* note 3, at 349.

28. Marx argues that despite a new personal or political independence, in contrast to the

“free contractual relations” between the sexes, the continuing social domination and subjugation of women by men is being hidden and denied.<sup>29</sup>

Recently, feminists tend to be united in the belief that liberalism’s methodological individualism essentially renders invisible the problem of the continued social domination of women.<sup>30</sup> One may, however, accept the first premise of Pateman’s line of attack, while simultaneously denying her conclusion that commercial sex remains morally undesirable no matter what reforms are made. Such is the position taken in this Article.

To begin with, even the most cursory glance at the social and political history of Western civilization confirms Pateman’s general thesis that men have traditionally enjoyed a “sex-right,”<sup>31</sup> giving them access to and control over women’s bodies, while women have, in general, been denied such control over men’s bodies. It is well known, for instance, that at one point in Roman law the *Paterfamilias* literally “owned” his wife, children and slaves; he could essentially do with them what he willed; the law did not protect wives, children, or slaves from physical harm or even death.<sup>32</sup> In late feudal times, one can still find a form of ownership over wife, children, and servant. This form of ownership is reflected in Kant’s category of rights in *rem* over *personam*.<sup>33</sup> Finally, in eighteenth century England, under the legal principle of “unity of person,” married women in England and America, well into the nineteenth century, could neither divorce nor hold private property in their own names. Under this principle, even the wages that women earned in factories or through other employment outside the home legally belonged to their husbands.<sup>34</sup>

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ancient slave or serf, modern wage-labor is nonetheless economically and objectively dependent on the capitalist class. Consequently, “the system of wage labor is a system of slavery.” K. MARX, *Critique of the Gotha Program*, in *THE MARX-ENGELS READER* 535 (R. Tucker 2d ed. 1978).

29. *Defending Prostitution*, *supra* note 2, at 561-62; see also Shrage, *supra* note 3, at 349.

30. See, e.g., Vadas, *A First Look at the Pornography/Civil Rights Ordinance: Could Pornography Be the Subordination of Women?*, 84 J. PHIL. 487, 511 (1987) (author discusses the view that pornography “contributes to the actual and literal creation of women as a subordinated class”).

31. *Defending Prostitution*, *supra* note 2, at 199.

32. See, e.g., H. MAINE, *ANCIENT LAW* 128 (1986) (1st ed. 1861).

33. Kant defines the object of his category of rights in *rem* over *personam* as “the status of another in relation to me” and he lists under the category wives, children, servants, and other “passive citizens.” I. KANT, *The Metaphysical Elements of Justice*, in *THE METAPHYSICS OF MORALS* ¶ 4, at 54-55, ¶ 46, at 78-80 (J. Ladd trans. 1965). Ladd failed to translate paragraphs 10 and 22 which further explain Kant’s notion.

Hegel explicitly criticizes Kant for conceiving relationships between persons in terms of property. G. HEGEL, *PHILOSOPHY OF RIGHT* ¶ 40, at 39 (T.M. Knox trans. 1942) (1st ed. 1821).

34. William Blackstone discussed the doctrine of “union of person” between husband and wife and stated, “[B]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing.” 1 W. BLACKSTONE, *COMMENTARIES* 442 (1st ed. 1775). In more practical terms, this meant that all of the personal property brought to the marriage by a wife came

It is important to note the relationship between the history of patriarchy and the growing commercialization of society in the context of women's struggle for autonomy, especially because many feminists tend to neglect the degree to which the market has actually facilitated women's independence. With the phenomenon of prostitution, we find ourselves at a "crossroads." On the one hand, women are just beginning to obtain full rights over their own bodies and actions.<sup>35</sup> This development is no doubt due in part to the growing commercialization of society and to the legal right, increasingly being granted everyone, to sell their labor-power on the market and, more generally, to control their own limbs and actions. By extension of *this* particular trend (reflected in the contractarian position), however, one would think that the prostitute too should be allowed to enter the market with her brothers and sisters.

The commercialization of traditional female roles, on the other hand, understandably causes consternation. Women have traditionally performed sexual services for men, cared for children, cleaned their own homes, and have done all these things without pay.<sup>36</sup> There is still considerable resistance to the commercialization of these roles, as in the case of public day care. There even remains controversy over whether women should work outside the home. The recent controversies surrounding surrogate motherhood and pornography surely reflect a fear of the invasion of capitalist market relations into the more intimate spheres of the home and family.<sup>37</sup> And, if my reading is correct, Pateman's concern is that such commercialization of sex, rather than undermining patriarchy, actually extends it. The reason she gives is that the prostitute's presumed contract with her customer is not a typical employment contract at all; in contrast to the wage-laborer, the prostitute does not merely sell her "labor-power," but her body itself which cannot be separated from her

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under the exclusive control of her husband. He could spend her money, including wages, sell her slaves or stocks, and appropriate her clothing and jewelry. With regard to real property, he could make managerial decisions concerning her lands and tenants and control all rents and profits received. M. SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 14-15 (1986). It was not until well into the latter half of the nineteenth century, with the passage of married women property acts, that most women in America obtained the right to divorce, as well as the right to hold private property on their own. E. FLEXNER, *CENTURY OF STRUGGLE* 62-65 (rev. ed. 1959); see also Chused, *Married Women's Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1397-99 (author discusses several married women property acts and compiles a thorough list of such laws throughout the United States). For just a few of these acts, see Act of Mar. 11, 1844, No. 66, 1844 Mich. Pub. Acts 77; Act of Mar. 25, 1845, ch. 208, 1845 Mass. Acts 531; Act of Apr. 7, 1848, ch. 200, 1848 N.Y. Laws 307.

35. The right of a woman to terminate an unwanted pregnancy was not constitutionally recognized until 1973 with the Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973). Even now, however, this right is in danger of being denied. See *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989).

36. See N. COTT, *THE BONDS OF WOMANHOOD* 19-63 (1977); see also B. HARRIS, *BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY* 32-72 (1978).

37. See, e.g., *American Booksellers, Inc. v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (constitutionality of anti-pornography statute); *In re Baby M.*, 109 N.J. 396, 537 A.2d 1227 (1988) (surrogate motherhood); see also C. MACKINNON, *FEMINISM UNMODIFIED* 163 n.1, 149 n.22 (1987).

person.<sup>38</sup> While the capitalist is interested only in the *products* of the wage-worker's labor, the client of the prostitute is interested in the prostitute's actual *body*.<sup>39</sup> Prostitution is fundamentally different from wage labor, Pateman claims, because it violates the intimate relationship between personality and physical embodiment.<sup>40</sup>

This point is central to Pateman's critique of prostitution, and she reiterates it numerous times. Indeed, mention of this point pervades much feminist literature on prostitution.<sup>41</sup> Pateman states, "When sex becomes a commodity in the capitalist market so, necessarily, do bodies and selves."<sup>42</sup>

Prostitution, in Pateman's eyes, is one of the last vestiges of the male sex-right; if a man can no longer legally "own" a female body outright, he can still, through prostitution, possess one for a limited period of time, and thereby gain public recognition as a woman's sexual master.<sup>43</sup> I shall argue, however, that on this point Pateman commits a critical error in not recognizing that the contractarian's claim that the prostitute does *not* sell her body, but rather a "service," is a legitimate one.

Before I try to show this, however, I must clarify what it means to have property in one's person or in one's body. I wish to suggest that if one looks generally both to our philosophical tradition, as well as to received common sense, there are at least two different conceptions of "ownership" relevant to this discussion.

### III.

#### PROPERTY IN ONE'S PERSON

Of the two distinct and important conceptions of ownership which may be found in the modern Western tradition,<sup>44</sup> the first is the more familiar and is usually understood as "private property." As originally set forth by John Locke,<sup>45</sup> such property is defined by a number of characteristics. First, private

38. *Defending Prostitution*, *supra* note 2, at 562.

39. SEXUAL CONTRACT, *supra* note 2, at 203-04 ("In contrast to employers, the men who enter into the prostitution contract can have only one interest: the prostitute and her body . . . . In prostitution, the body of the woman, and sexual access to that body, is the subject of the contract.").

40. *Id.* at 203, 206-07 ("the services of the prostitute cannot be provided unless she is present; property in the person, unlike material property, cannot be separated from its owner.").

41. *Defending Prostitution*, *supra* note 2, at 562, 564; SEXUAL CONTRACT, *supra* note 2, at 202-08. See generally S. BROWNMILLER, MAKING OUT ON PROSTITUTION *passim* (1971) (author repeatedly speaks of the prostitute's "selling her body" or, conversely, describes the male client as "buying another human being's body.").

42. *Defending Prostitution*, *supra* note 2, at 562.

43. SEXUAL CONTRACT, *supra* note 2, at 208.

44. See, e.g., S. Schwarzenbach, Towards a New Conception of Ownership (unpublished dissertation, Harvard University 1985) (available from the author) [hereinafter *New Conception of Ownership*]; Schwarzenbach, *Locke's Two Conceptions of Property*, 14 SOC. THEORY & PRAC. 141 (1988) [hereinafter *Conceptions of Property*].

45. J. LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT, ch. 5, ¶¶ 25-51, at 327-44 (P. Laslett rev. ed. 1965) (3d ed. 1968).

property is typically obtained by one's own efforts; for instance, it is something one has "mixed [one's] labor with"<sup>46</sup> or contracted for with another. If one owns property in this form, one can use, manage, and enjoy the property *exclusively* as one wills<sup>47</sup> — provided, of course, one does not harm others or infringe on their similar property rights.<sup>48</sup> In addition, as A.M. Honoré has shown, under this conception of private property is included the right to *alienate*, sell, and even *destroy* one's property if one should so wish.<sup>49</sup> In purchasing an automobile, for example, one can use it as one will (provided one does not harm others), and one even has the right to destroy it (dissemble it, say, and sell it for scrap) if one wishes. Some philosophers, such as Robert Nozick, actually seem to think that this is the form in which we possess our own bodies; Nozick advocates the right of the individual to commit suicide and even to sell oneself into slavery.<sup>50</sup> The vast majority of modern Western thinkers, however, believe that both one's body and personality are inalienable.<sup>51</sup>

The second conception of ownership is less well recognized than that of "private property," but is equally fundamental to the Western understanding of ownership. I shall call this conception "gift property" and here ownership is more properly conceived as a stewardship. Unlike private property, the genuine gift is an unearned value which is "bestowed" upon us by another (a donor) for our benefit. In this case the individual's will plays a less active role in the acquisition of the property. As one author has shown, the gift (unlike private property or a commodity) tends to be more than a simple transfer of value; insofar as the gift brings into being a new moral relationship between persons, it is a reality laden with subtle but very real "oughts":<sup>52</sup> Implicit in acceptance of an authentic gift are appropriate and inappropriate uses of it, and these uses are, at least in part, determined by the intentions and wishes of the donor. In accepting a gift, one becomes a participant, as it were, in the

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46. Whatsoever he then removes out of the state that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men.

*Id.* ch. 5, ¶ 27, at 329.

47. *Id.*

48. *Id.* ch. 2, ¶¶ 5-6, at 310-11.

49. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 113 (A. Guest ed. 1961). A.M. Honoré has given perhaps the most careful account of what the modern conception of private ownership includes. Honoré asserts that the right to use one's property as one pleases, the right to exclude others, the power to alienate the property, and an immunity from expropriation are the "cardinal features" of the institution of private property.

50. R. NOZICK, ANARCHY, STATE AND UTOPIA 331 (1978); see also Philmore, *The Libertarian Case for Slavery*, 14 PHILOSOPHICAL FORUM 43 (1982).

51. See generally New Conception of Ownership, *supra* note 44 (author argues that "personality" and limb are considered essentially inalienable entities in the works of nearly all of the most prominent modern Western thinkers, including Immanuel Kant, G.W. Hegel, Karl Marx, Jean-Jacques Rousseau, and John Rawls).

52. Camenisch, *Gift and Gratitude in Ethics*, 9 J. REL. ETH. 6 (1981); see also *Conceptions of Property*, *supra* note 44, at 146 (author further explains the notion of stewardship).



way of life of the giver.<sup>53</sup> If this is the case, "owning," in this instance, comes closer to being a form of guardianship or stewardship.

In Locke's theory, for example, our life, limb, natural freedom, and equal political jurisdiction are original gifts granted to us all by God while we are in the state of nature.<sup>54</sup> We did not "earn" such values; they were freely and generously given to us. According to Locke, therefore, we are not free to do with such "gifts" what we will; we ought not injure nor destroy our life and limb, because ultimately both belong to God, whose "servants" we remain.<sup>55</sup>

Locke's intuition regarding the fundamental stewardship of our bodies appears to be alive today despite the fact that the surrounding theological justifications are no longer universally accepted.<sup>56</sup> That is, in nearly all modern societies, a person may not cut off her hand and sell it, nor may a person alienate herself or life to another in slavery. The point is that we still continue today to treat our bodies and lives, in large part, as "gifts;" they are not private property, but objects of our stewardship. As individuals, we did not create our own life and limb. Whatever the ultimate explanation of their source, whether God, history, or nature, we nonetheless continue to treat them as gifts. The notion that life is a "gift" of which we are stewards may account for why many think a seventy-year old has a right to commit suicide, but that a teenager does not. The teenager, it is often argued, has not lived long enough to fully appropriate and make his or her life her own "private" possession.

When most people speak today of "owning" their bodies, I believe they often implicitly make use of *both* of these conceptions of ownership in mind. Indeed, true self-possession of one's life, limb, and actions entails the capacity to consider them under both conceptions of property. As I grow older, the

53. See Camenisch, *supra* note 52, at 1. For example, if an old philosophy professor of mine has given me a rare edition of Kant's works, do I not violate the "spirit" of the gift (and the intentions of the giver) if I turn the book over to a recycling plant?

54. J. LOCKE, *supra* note 45, ch. 2, ¶ 6, at 311 (Locke derives one's natural right to life, independence, and to equal political jurisdiction, from the fact that we are equally the products of God's "workmanship," and "furnished with like facilities.").

55. *Id.* Locke writes, "For Men being all the workmanship of one Omnipotent and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one another's Pleasure." See also *id.* at ch. 4, ¶ 32, at 332; see also *Conceptions of Property*, *supra* note 44, at 141.

56. Locke's justification of our basic rights to life and limb is essentially theological. See *supra* note 54 and accompanying text. More recent attempts to justify holding sacred the rights to life and limb, however, find their basis in "reason." In Kant's view, for instance, the basic right of freedom can no longer rest on an appeal to God, but what he calls "the fact of reason." See generally I. KANT, *CRITIQUE OF PRACTICAL REASON* 31, 43, 48, 94, 108 (L. Beck trans. 1956). For G.W. Hegel and more recently J. Rawls, our basic rights are conceived as an important historical development of the modern period. See generally G. HEGEL, *supra* note 33, ¶ 57; Rawls, *Justice as Fairness: Political Not Metaphysical*, 1985 PHIL. PUB. AFFAIRS 225. See also *New Conception of Ownership*, *supra* note 44, at 37-38; *Conceptions of Property*, *supra* note 44, at 162; Schwarzenbach, *Rawls, Hegel and Communitarianism* 7-8, 30 (unpublished manuscript on file with author to be published in a forthcoming issue of J. POL. THEORY) [hereinafter *Communitarianism*]. In all these interpretations, the right to life and limb is viewed as an unearned gift or a "given" with which each begins life.

stewardship of my body and acts, although normally never fully abandoned, does become more fully "mine" and subject to my private will. We fall short, however, of condoning the treatment of our bodies and lives as simple private property, as mere alienable and destructible things.

I will not pursue further this distinction here.<sup>57</sup> Suffice it to note that in the debate between Pateman and the liberal contractarian, each side emphasizes different aspects of these conceptions of property. Pateman, for instance, appears to rely on an implicit notion of inalienable stewardship (although she does not use this terminology). For example, she argues that contracting out one's body, whether in prostitution or in slavery, violates moral personality's necessary, physical embodiment in the world.<sup>58</sup> Her account implies that our lives and limbs are "not ours" to sell, and, therefore, society must set limits on prostitution as it does on slavery.<sup>59</sup>

The contractarian, on the other hand, who relies more extensively on a private property conception would argue that Pateman's analysis misses a crucial point. The contractarian will contend that the prostitute who practices what is called "sound prostitution" does *not* sell or alienate her body to another in the sense of private property even temporarily. For instance, the prostitute does not grant the customer rights of destruction over her body; the prostitute merely grants the customer merely circumscribed "use" of her body for a very limited period of time. The contractarian maintains that selling such "limited use," or restricted aspects of oneself, is no different from selling or renting one's labor-power in a number of other fully legitimate forms.<sup>60</sup>

#### IV.

#### THE SALE OF LABOR-POWER

The debate between Pateman and Ericsson centers on the question of whether it is possible for a person to alienate an aspect of her concrete self temporarily, and yet not at the same time alienate *herself*. To answer this question, it is important to look more closely at the concept of labor-power, a notion which was first carefully analyzed by Hegel in his *Philosophy of Right*.<sup>61</sup> I turn to Hegel at this point, not only because Pateman and other feminists refer to him, but because Hegel's analysis of wage-labor remains one of the most careful and trenchant.<sup>62</sup>

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57. For a more extended account, see *Conceptions of Property*, *supra* note 44, at 141.

58. *SEXUAL CONTRACT*, *supra* note 2, at 206-08.

59. *Id.*

60. Ericsson, *supra* note 1, at 343, 346.

61. G. HEGEL, *supra* note 33, ¶¶ 65-67, at 52-54, 241 (Hegel does not use the term "labor-power" as such; rather he describes the process by which individuals alienate certain concrete activities in the work process without surrendering their personalities).

62. *SEXUAL CONTRACT*, *supra* note 2, at 147; *see also* Radin, *supra* note 9, at 1892-96 (author makes use of Hegel's theory in her analysis of market-alienability).

Pateman seems to view the concept of labor-power, in general, as nothing but a political fiction. She claims that to sell one's labor-power, the ability to put one's mind and body to work, in *any* form means that one adopts the position of a subordinate by entering into a rela-

In keeping with the modern tradition, Hegel argues that our substantive personalities are not for sale; we are each but the first steward of them.<sup>63</sup> Under his notion of substantive personality, Hegel includes not only our life and limb (our bodies), but also our reason, freedom of will, ethical life, and religion.<sup>64</sup> I presume that he would also include our sexuality. The fact that these aspects of our substantive personalities are not for sale, Hegel suggests, is already universally recognized in the modern system of rational law.<sup>65</sup>

In his careful account of personality, however, Hegel stresses a dual aspect of our personality; he distinguishes between the concrete empirical self, on the one hand, and the self as rational agency which is able to "abstract" or "distance" itself from any *particular* state of mind or action, on the other.<sup>66</sup> Hegel writes:

Single products of my particular physical and mental skill and of my power to act I can alienate to someone else and I can give him the use of my abilities for a restricted period, because, *on the strength of this restriction*, my abilities acquire an external relation to the totality . . . of my being.<sup>67</sup>

In other words, the human personality is distinguished precisely by its capacity for "expression" (*Entäußerung*),<sup>68</sup> by its ability to distance itself from particular products, actions or aspects of its physical being.

This distancing ability need not be interpreted (as Pateman does and as Marx sometimes seems to)<sup>69</sup> as a necessarily alienated activity. Hegel is simply pointing to a capacity which underlies, not only our modern political personalities, but much of our everyday human life; we each have the ability to obtain critical distance not only from others, but even from many aspects of our own particular selves, actions, and products. Hegel cites the examples of art works, lectures, sermons, and even prayers as expressions of our substantive personalities or abilities which we can relinquish or sell to the wills of

relationship of domination and submission. SEXUAL CONTRACT, *supra* note 2, at 146-49. I shall not decide here whether this is in fact the case (or whether it is an accurate portrayal of Marx's theory). I will simply contend that our society in general, right or wrong, does not treat it as such. My point here relates only to the distinction between prostitution (which is criminalized in our society) and other widespread and perfectly legal forms of wage-labor. The question is whether this distinction has any valid basis, and, for this purpose, Hegel's analysis is helpful.

63. G. HEGEL, *supra* note 33, ¶ 66, at 52-53 ("Therefore, those goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible.").

64. *Id.*

65. *Id.* ¶¶ 36, 40, 43, 57, at 37-41, *Preface* at 3; *see also* New Conception of Ownership, *supra* note 43, at 37-48.

66. G. HEGEL, *supra* note 33, at ¶¶ 67-68, at 54.

67. *Id.* ¶ 67, at 54 (emphasis added).

68. *Entäußerung* means both to express and externalize in German.

69. *See* SEXUAL CONTRACTS, *supra* note 2, at 146-47; Radin, *supra* note 9, at 1891-98; K. MARX, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER, *supra* note 28, at 70-81, 109-25.

others.<sup>70</sup> Definite restrictions, however, always apply to such relinquishment: by alienating too wide a range of one's abilities, or too much of one's time, the result is that one's moral personality, self, and ultimate stewardship are clearly violated.<sup>71</sup>

Allow me to illustrate this important point by way of an example which parallels quite closely the case of prostitution. Assume I am a dancer; my body is not separable from the dance I perform. Those who come to see me dance, therefore, are interested not in some product separable from my body but in *my body itself*. If I have freely decided to dance, society will not today condemn me or consider it a transgression of my moral personality if I do so for a wage. My autonomy has not been infringed simply because others make temporary visual use (as it were) of my body's activities. It is my decision to make public and sell particular expressions of my physical being for a restricted period of time. If, however, there are no boundaries to the time I must dance (*i.e.*, if I must dance non-stop all evening), or if I must relinquish the wider range of my abilities (such as my reason, my religion, etc.), my moral personality will clearly be violated.

## V.

### THE CASE OF SEXUALITY

My claim is that, in the end, there is no relevant legal difference between the case of the dancer and that of "sound prostitution." First, let us distinguish "sound prostitution" from clear cases of "unsound prostitution." If the prostitute is under-aged, if she is tricked or forced (in any reasonable sense of the term) into the profession, if she must perform sex for hours (or continually all day), if she must, in doing so, alienate a wider range of her abilities (such as her reason), if her life or limb are at risk in any way, then her moral personality is clearly infringed.

But if, on the other hand, a mature woman decides when and where to offer a particular expression of her being (use of her body for a stipulated period of time) to a particular man or to another woman for touch, if the surroundings are safe and healthful, if she always retains the right not to have to perform any act which is distasteful to her, why should people claim that her moral personality is being violated? The woman has in no way relinquished her general stewardship, but has only treated various, circumscribed expressions of herself as alienable property. She has not sold "her body," in the sense of private property to another; she has only granted limited use.

A natural response here is that sexuality is surely of a different order than other forms of wage-labor such as dancing or acting on stage. It is not so easy, however, to determine what this difference is. One might argue that "visual

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70. G. HEGEL, *supra* note 33, ¶¶ 66-69, at 52-56.

71. *Id.* ¶ 67, at 54 ("By alienating the whole of my time, as crystallized in my work, and everything I produced, I would be making into another's property the substance of my being, my universal activity and actuality, my personality.").

touch” by strangers is less intimate and distasteful than “physical touch” by a stranger, especially “physical sexual touch.” Many women begin to experience sensations of horror, repulsion, humiliation, or disgust at the mere thought of being in the prostitute’s position. Such responses to an activity, however, are not sufficient grounds for rendering that activity illegal.

This point was well articulated in a British Command Paper issued by the *Committee on Obscenity and Film Censorship*. The Committee stated that, “[i]f one accepted, as a basis for coercing one person’s actions, the fact that others would be upset even by the thought of [the performance of] those actions, one would be denying any substantive liberty at all.”<sup>72</sup> Many activities, at least at first, cause nearly universal experiences of revulsion: internal organs spewing forth from the butcher’s knife, the cold touch and putrid smell of the cadaver to the undertaker, the surgeon’s slicing open of human flesh. These activities, however, are not considered illegitimate. (It goes without saying that no one should be forced to have to perform them.) And here it is of critical importance to stress that sexual responses are hardly uniformly experienced by particular women. Many, perhaps most, women are repulsed by even the thought of the physical touch of a stranger, but others do not experience such an adverse reaction. One’s reactions will, of course, depend on one’s cultural and sexual history.<sup>73</sup> The degree of choice or coercion, as well as the background level of health and safety, are of the foremost importance.

Similarly, just as responses among individual women vary significantly, so does the delineation of acceptable moral and social behavior between cultures. Western women, for example, freely expose their faces in public and sometimes expose their bodies on a nude beach, but a traditional Arab woman will often experience shock, embarrassment, and severe humiliation if only her veil happens to slip from her face.<sup>74</sup> It is important to note that only a short time ago our own culture forbade women from acting and dancing on a theatrical stage, and that such an appearance not only spelled social ruination, but prompted public outcries of “whore!”<sup>75</sup>

A possible objection at this point might be that serious work as a prostitute can never be adequately limited in time or regulated, because such activity

72. REPORT OF THE COMMITTEE ON OBSCENITY AND FILM CENSORSHIP, 1979, CMND. No. 7772, at 99-100 cited in R. DWORKIN, A MATTER OF PRINCIPLE 335-72 (1985).

73. I do not mean to overlook the fact that the sexual history of many prostitutes is often one of sexual molestation, incest, and child-abuse. Kohn, *Shattered Innocence*, PSYCH. TODAY, Feb. 1987, at 54 (studies of prostitutes document a higher rate of childhood sexual abuse than in the general population); see also Goleman, *Sad Legacy of Abuse: The Search for Remedies*, N.Y. Times, Jan. 24, 1989, at C1, col. 5 (studies indicate that there are a large number of victims of child abuse among prostitutes). This state of affairs, however, must be battled on its own grounds.

74. For discussions regarding the veil (chador), the wearing of which is largely limited to Muslim women of the urban upper and middle classes, see generally WOMEN IN THE MUSLIM WORLD (L. Beck & N. Keddie eds. 1978).

75. For a discussion of the Victorian stance on the actress as “Fallen Woman,” and the use of the phrase “Public Woman” to apply to both performer and prostitute, see N. AUERBACH, *The Rise of the Fallen Woman*, in WOMEN AND THE DEMON 182 (1982).

will always tend to have a “numbing” effect on general sexual responsiveness. If prostitution incapacitates one for normal sexual relations, then, by hiring out for sex, it might be argued that the prostitute’s work may be analogous to selling an essential bodily organ.

I believe the most adequate response to this frequent objection is that there does not appear to be any empirical evidence to support this concern. On the contrary, prostitutes not only appear as capable as the rest of us of forming long-term, intimate sexual relationships, but there is even some evidence that the prostitute’s level of sexual satisfaction is higher than the average woman’s.<sup>76</sup> Thus, the objection that such activity has a “numbing effect” is based on one of the many myths surrounding the phenomenon of prostitution.

There is a fine line between selling one’s abilities and selling one’s self. I am suggesting, however, that the line is drawn in the United States in the wrong place: all forms of commercial sex among consenting adults are criminalized, except in the state of Nevada,<sup>77</sup> whereas many other distasteful, dangerous, and unhealthy activities and occupations (e.g., butcher, surgeon, bodyguard, or soldier) are legal. From a legal standpoint, therefore, there begins to be good justification for claiming that the choice of a mature woman or man who decides at some point in her or his life to sell sexual services, and who retains the right not to perform any distasteful act, as well as the right to interrupt the whole process at will, should not be stigmatized and forbidden to do so however much someone else’s personal morality may rebel. For what is at issue here is one of the most fundamental individual rights of all — the right to direct one’s own life, limb and actions as one sees fit.<sup>78</sup>

Finally, the prostitute no more sells “her body” than the dancer for hire does. In both cases the individual remains the ultimate steward of her physical being and each relinquishes only particular, restricted expressions of herself for limited periods of time. This fact alone is enough to distinguish “sound prostitution” from slavery — a practice where bodies and selves are literally bought and sold.<sup>79</sup>

Although I have tried to show that Pateman’s claim that the prostitute

76. D. RICHARDS, *supra* note 10. Even if evidence of higher sexual satisfaction turns out to be spurious (which only further empirical studies can reveal), this result would not automatically support continued criminalization; it might only require more stringent restrictions of the type and hours of work allowed, restrictions similar to those implemented in many other forms of employment.

77. See NEV. REV. STAT. tit. 15, § 201.354 (1986-1989) (“It is unlawful for any person to engage in prostitution . . . except in a house of prostitution . . .”); see also NEV. REV. STAT. § 244.345 (1986-1989) (section provides for licensing of houses of prostitution).

78. See J. LOCKE, *supra* note 45, ch. II ¶ 4, at 309; see also D. RICHARDS, *supra* note 10, at 84 (author gives one of the most careful accounts of an individual “right to sexual autonomy”). A right to individual sexual autonomy, if recognized, also protects other sexual practices still considered illegal and “abnormal,” such as homosexual sex.

79. This is not to deny that there exists *de facto* a world-wide practice of forced prostitution which must be prohibited. See generally K. BARRY, FEMALE SEXUAL SLAVERY (1984). It is precisely because there is such an extensive black market for prostitution that we must distin-

“sells her body” confuses two separate notions of ownership, and although I have emphasized certain similarities between prostitution and other kinds of wage-labor, I have not yet explained prostitution’s *differentia specifica*. I have not explained what it is that distinguishes prostitution from other forms of wage-labor and makes it appear *as if* bodies and selves are, in fact, for sale. It emerges quite clearly at this point that what is in fact being alienated or violated, even in “sound prostitution,” is not some physical or bodily integrity, but rather a delicately constructed social identity.

## VI.

### CULTURAL CONSTRUCTIONS OF SEXUALITY

I will now address the question of why the prostitute appears to be selling her very self. Why is such a sharp line drawn today between a prostitute and, for example, a dancer? Recall that little over a century ago people did *not* distinguish the two very clearly.<sup>80</sup> This difference in attitudes suggests that what is being violated in both the case of a twentieth century prostitute and that of the nineteenth century dancer is not some “natural” relationship between a woman and her body, but a culturally constructed norm of female personality.

There is little doubt that our society reifies persons in terms of their sexual practices.<sup>81</sup> Most of us consider our sexuality to lie at the “heart” of our being, rather than at the periphery. This may be attested to by the hostility with which persons with sexual preferences other than the traditional heterosexual preferences (such as prostitutes and homosexuals) are often treated.<sup>82</sup>

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guish legitimate or “sound” cases of commercial sex from the forced and altogether unacceptable practices. In this way, we can concentrate our energies on eliminating the latter.

It might be noted here, that the legalization of the sale of certain forms of sexual activity on the market *need not* extend the overall power of the market in our lives. On the contrary, decriminalization could work to limit, regulate, and, protect the persons involved in the performance of various types of sexual services which are, *de facto*, being sold on the black market this very moment.

Granting certain traditional female activities (sexual services or surrogate motherhood for example) legitimacy on the market could work in conjunction with other efforts to *limit* the overall effect the market has on our lives in other areas. The legitimization of these services could be combined with greater efforts to establish unions, reduce the work day in general, and raise the minimum wage. Thus, the effect of decriminalizing prostitution need not be to expand the market, but may simply allow women to obtain a greater legitimate share of it. For, the fact remains that “the market” as it now exists is deeply “sexist”; it tends to remunerate the labor of men, while devaluing the traditional labor of women such as pregnancy, housework, child-care, and the servicing of sexual and other needs.

The move to recognize certain limited expressions of women’s traditional roles as legitimate objects of market transactions (if combined with general efforts to restrict the overall power of the market) could work, not to expand the market, but simply to correct the present gender imbalance within it. Of course, the idea of women becoming economically strong and powerful — of capitalizing on their traditional training and roles — instills fear in the hearts of many.

80. See N. AUERBACH, *supra* note 75, at 182-83.

81. See Shrage, *supra* note 3, at 356.

82. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of a

This general distrust and hostility is most often directed toward the whole person and not just toward his or her "deviant" acts; such generalizations rely on the assumption that one's sexuality is one of the core elements of one's being. It appears, however, that we reify persons in terms of their sexual practices less so today than we did one hundred years ago. Consider, for example, the situation of the nineteenth century, upper-class, Victorian woman. Her general respectability rested upon a tightly circumscribed conception of legitimate sexual behavior. She was not only forbidden to have sex for money, but she was not to have sex with more than one man (her husband) or for more than one purpose (reproduction). Preferably, she expressed no sexual desire or satisfaction.<sup>83</sup>

The social construct of the Victorian woman limited the whole of a woman's legitimate personality to her role as wife and mother. Since this construct was violated if the woman acted on stage or spoke out in public, it was also believed that her very "self" was violated if she performed such activities. Such public activities lay on the hither side of the Victorian woman's circumscribed role; public performance of any sort was strictly censored and likely to lead to the woman's social ruin.<sup>84</sup> Today, by contrast, we consider a woman's pursuit of "public" activities and a career, such as acting, to be fundamentally "liberating." What was once considered a violation of woman's true "self," is now considered to be essential to the full development of that same "self."

By the same token, it may be that the prostitute's activities simply violate a contemporary social norm of female activity, rather than her very being. After all, one must remember that the contemporary norm for female behavior still, to an extraordinary degree, limits a woman's legitimate personality to the role of wife and mother. A woman is still called "slut" and "whore" simply if she has more than one sexual partner; these appellations are tools of social control, limit what is acceptable behavior, and reflect our continuing sexual double standard. Quite clearly, our society has not freed itself from its Victorian legacy; "good women" are still expected to be virtuous and chaste (albeit yielding to their husbands) and a woman's sexual drive is still perceived to be far less powerful than a man's.

Luckily these myths are in a state of disintegration. They have not, however, been completely eliminated from our culture. Indeed, might not a further disintegration of this social construct of female personality be liberating for women, just as dancing on stage or speaking in public, was in the nineteenth century?

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Georgia anti-sodomy law); see also Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. Tol. L. Rev. 811, 868-75 (1984) (author lists anti-sodomy statutes in 25 states and the District of Columbia as of 1984).

83. B. HARRIS, *supra* note 36, at 41-42; see also N. AUERBACH, *supra* note 75, at 64 (author discusses the nineteenth century conception, in the popular imagination, of the respectable Victorian woman as an "angel," essentially "immune from the human condition.").

84. See E. FLEXNER, *supra* note 34, at 41-61 (author discusses the early attempts by women in the nineteenth century to win the right to speak in public and to hold public meetings).



As both Pateman and Shrage indicate, however, the matter is not so simple. Although the prostitute's activity flies in the face of restrictive social conceptions of women as primarily wives and mothers, there is an even deeper and more oppressive norm of female activity which prostitution seems to reinforce. Prostitution is completely consistent with the norm of female behavior which identifies, as a woman's ultimate purpose in life, dedicated service to a man or master.<sup>85</sup>

The phenomenon of prostitution perpetuates the myth that there is something "right" or "natural" about women devoting their entire lives to the well-being and pleasure of the male sex. And indeed, as I shall demonstrate, Ericsson's contractarian account may be shown to rest implicitly on numerous assumptions about "our natural sexuality" which are far from innocent.

The weakness in Ericsson's contractarian account of "sound" prostitution (as Pateman and Shrage have pointed out) lies in his inability, or refusal, to recognize current sexual norms as but one cultural construction among different possible constructions. In his argument for decriminalization of prostitution, Ericsson relies on premises about sexuality which are far from uncontroversial. Specifically, Ericsson assumes that certain characteristics traditionally associated with masculinity — an unrelenting desire for sex and an indiscriminating selection of sexual partners — are human norms which, he claims, will survive all attempts at abolishing prostitution.<sup>86</sup> Rather than trying to end prostitution, Ericsson argues, we should acknowledge and decriminalize it because "it is after all less difficult to alter our views, attitudes, and values than to alter *our physiological nature*."<sup>87</sup>

The positing of "our physiological nature" in this manner by Ericsson rightly outrages feminists. Such generalizations ignore the vast literature which has revealed the astonishing diversity and complexity of sexual behavior in different times and places,<sup>88</sup> not to mention the differences in our own culture between what may be called "typical" male and female responses.<sup>89</sup>

Scholars continue to reveal how, for instance, in our society, a woman's eroticism is differently constituted than that of the predominant image of male

85. SEXUAL CONTRACT, *supra* note 2, at 208-09; Shrage, *supra* note 3, at 352, 354.

86. Ericsson, *supra* note 1, at 360. The positing of predominantly "male" sexual behavior (and an extreme form of it at that) as the standard for all human behavior is found over and over again in the literature on sexuality. See, e.g., Earle, *Depersonalized Sex and Moral Perfection*, 2 INT'L J. MORAL & SOC. ST. 203, 204 (1987) (author claims "sexual desires never have whole or integral persons as their objects").

87. Ericsson, *supra* note 1, at 362 (emphasis added).

88. See, e.g., 1-3 M. FOUCAULT, *THE HISTORY OF SEXUALITY* (R. Hurley trans. 1990) (In this three volume work, Foucault gives a series of historical analyses juxtaposing different "discourses" on sexuality in Victorian times (in volume I), Ancient Greece (in volume II) and in the Hellenistic period (in volume III)).

89. For some of the literature illustrating such differences, see generally S. HITE, *THE HITE REPORT: A NATIONWIDE STUDY OF FEMALE SEXUALITY* (1976); *PHILOSOPHY AND SEX* (R. Baker & F. Elliston eds. 1985); M. SHERFEY, *THE NATURE AND EVOLUTION OF FEMALE SEXUALITY* (1966); *THE SEXUALITY OF MEN* (A. Metcalf & M. Humphries eds. 1985).

eroticism: urgency and philandering.<sup>90</sup> A woman's sexual satisfaction, all such literature shows, remains far more closely tied to the rest of her emotional life: to a need for security, stable relationships, intimacy and other emotional needs. Considering that the primary social roles of women over the centuries have been as wife and mother, that a woman's sexual desire remains tied to her emotional relationships with others is hardly surprising. If such recent literature is correct, Ericsson's assertion regarding the existence and character of "our physiological nature" takes on a sinister quality. By positing characteristic male sexuality as physiologically determined, Ericsson unwittingly at best, removes much of contemporary male sexual practice from the possibility of all criticism. The following passage of Ericsson's illustrates this.

It is . . . naive to think that an open, honest, and equal relationship between partners would do away with the demand for prostitution. Sexual attraction and the lack of it are largely irrational phenomena and as such they are only marginally influenceable (thank heaven!) by open, honest discussions between equal men and women.<sup>91</sup>

Thank heaven for the irrational, male sex urge forever closed to human reason! Ericsson's argument is a paradigm of self-congratulatory ideological intelligence; it typifies those who wish neither to reflect deeply on, nor to introduce reason into, the domain of their own habits and blind impulses. Instead, they proclaim the present state of their own passions, urges, and obsessions as somehow fixed in the nature of the universe.

Much recent feminist discussion of sexuality, by contrast, can be viewed as an express attempt to "bring reason" to the situation. The feminist discussion unveils the brutality, violence, and degradation that goes hand and hand with so much contemporary sexual practice.<sup>92</sup>

Surprisingly enough, however, a number of astute feminists commit another more subtle version of the naturalistic fallacy. In her article, *Should Feminists Oppose Prostitution?*,<sup>93</sup> Shrage illustrates that she is fully aware of the degree to which different practices of sexuality are indeed cultural constructions. She notes, for example, that in other times and places the selling of sex did not spell oppression, nor induce loss of social recognition, as it does in

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90. See Eardley, *Violence and Sexuality*, in *THE SEXUALITY OF MEN*, *supra* note 89, at 93. Tony Eardley argues that during the nineteenth century Charles Darwin's study of evolution and his theory of natural selection gave a powerful "scientific rationale for the double standard of female chastity and male philandering." *Id.* Eardley asserts that the model of male sexual urgency and promiscuity, on the one hand, and female chastity and receptivity, on the other, was perfectly consistent with Darwin's hypotheses. According to Eardley, Darwin himself believed that the "evolutionary role" of the female sex was to restrain the "animal urges" of men. *Id.* Indeed, this double standard persists today despite the growing awareness of women's sexual needs and pleasures.

91. Ericsson, *supra* note 1, at 360.

92. See generally K. BARRY, *FEMALE SEXUAL SLAVERY* (1984); A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); C. MCKINNON, *FEMINISM UNMODIFIED* (1987); *Defending Prostitution*, *supra* note 2; Shrage, *supra* note 3.

93. Shrage, *supra* note 3, at 349-51.

our society today. In support of this proposition, Shrage cites Gerda Lerner's study of Babylonian temple prostitution:

For people who regarded fertility as sacred and essential to their own survival, caring for the gods included, in some cases, offering them sexual services. Thus, a separate class of temple prostitutes developed. What seems to have happened is that sexual activity for and in behalf of the gods or goddesses was considered beneficial to the people and sacred.<sup>94</sup>

Moreover, Shrage admits that in a society where the rationale for the impersonal provision of sex is conceived in terms of the promotion of nature's sacred fecundity, the social import of prostitution differs substantially from that of a society in which the rationale is expressed in terms of the "restraint" of male sexual urges or the release of repressed natural needs.<sup>95</sup>

Shrage claims to have adopted a relativist approach which she justifies in part by distinguishing the consequences for prostitutes in ancient Babylonia from those in our society. In Babylonia, for instance, prostitutes were appreciated for the social or spiritual needs which they fulfilled, and they occupied a respected position in society.<sup>96</sup> Despite Shrage's new approach, however, she concludes, as does Pateman,<sup>97</sup> that in our society, the "social meaning" of commercial sex is supported by cultural principles oppressive to women. Hence, to engage in or to tolerate prostitution is "politically reactionary" and feminists should "outwardly oppose prostitution itself."<sup>98</sup>

Once again, as in Pateman's argument, Shrage's conclusion does not follow from the sound beginnings of her argument. In fact, Shrage's position, in the end, differs little from Pateman's; the difference between the two is merely that Shrage incorporates into her argument the realization that sexual practices and their "social meanings" may differ in different societies.<sup>99</sup> Both thinkers nevertheless conclude that because the practice of prostitution in our society is generally one of domination, "its legitimization degrades all women."<sup>100</sup>

Interestingly enough, despite Shrage's recognition that the "social meanings" of the same sexual act may differ in different societies, she apparently denies that the "individual meaning" of the same sexual act *within* the same society can differ at all.<sup>101</sup> Her discussion forces her to deny the possibility that what one person experiences as degrading and humiliating need not be

94. Lerner, *The Origin of Prostitution in Ancient Mesopotamia*, 11 SIGNS: J. WOMEN CULTURE & SOC. 236, 239 (1986), *quoted in* Shrage, *supra* note 3, at 349.

95. Shrage, *supra* note 3, at 350.

96. *Id.* at 349-50.

97. *See id.* at 360 n.32, *citing* *Defending Prostitution*, *supra* note 2, at 563.

98. Shrage, *supra* note 3, at 360.

99. *Id.*

100. *See* note 29 *supra* and accompanying text.

101. Shrage, *supra* note 3, at 351-58.

experienced in that way by another.<sup>102</sup>

Yet, if this were not possible — if the dominant “social meaning” of a phenomenon remained monolithic and closed to all competing interpretations within a particular society and was not capable of conscious modification by individuals — then it would be difficult to see how such “social meanings” could ever change over time. Yet, change they clearly do.<sup>103</sup> For instance, how did it ever come about that women broke through the strict Victorian morality that forbade them to dance on stage? Surely a *part* of the change was brought about by the actions of many particular women who simply refused to consider themselves “harlots” or “whores” despite their public dancing or speaking activity.<sup>104</sup> These women refused to submit to the dominant social meaning and, thus, succeeded over time in altering that social meaning.

There is, however, an additional problem with Shrage’s position. I concede that despite variations in the “individual meaning” of a particular action, there may be a general “social meaning” which attaches to a particular type of activity. This general social meaning provides the backdrop, as it were, against which individual acts derive a certain significance. I also concede that the predominant “social meaning” of prostitution at this time in our society is oppressive of women. Prostitution today depends on principles which embody a view of women as subservient, as essentially subordinate to male needs and desires, and as a repository for the release of male tension. I insist, however, that social meanings are not simple definitions; they do not embody natural, self-evident principles from which a unique conclusion can be deduced. Shrage fails (as many proponents of the concept of a “general social meanings” do<sup>105</sup>) to recognize that not only are social meanings relatively loose and unstable, but they are subject to change from various directions.

Where Ericsson posits his version of male sexuality as an unchanging physiological given, Shrage regards women’s present oppression as inextricable from impersonal sex in general. But why, granting that the social meaning of prostitution is still predominantly one of male domination, does the current meaning dictate “opposition” to prostitution rather than decriminalization and reform?

To this question Shrage gives a most cursory dismissal. She claims that legitimate commercial sex would have to be predicated on principles other

102. *Id.*

103. One might propound some crude materialist model of social change which I would reject on other grounds.

104. See N. AUERBACH, *supra* note 75, at 180 (author discusses the social “transforming power” of the “Fallen Woman” in the Victorian literary imagination).

105. See, e.g., M. WALZER, SPHERES OF JUSTICE 6-10 (1983). Walzer bases his arguments on his identification of “social meanings.” Specifically, he contrasts “social meaning” to “essential meaning.” The former, in contrast to the latter, are “historical in character” and “change over time;” they are the product of shared social practices. *Id.* at 9. Nonetheless, Walzer’s theory may be criticized for directly deriving various conclusions as if such meanings were stable and unambiguous. See Schwarzenbach, *Valuing Ideal Theory: Reflections on Virginia Held’s Critique of Rawls*, 21 METAPHILOSOPHY 171 (1990).

than the need to satisfy the presumably uncontrollable and socially destabilizing sexual appetite of men.<sup>106</sup> And indeed this is true. As I stated in my critique of Ericsson<sup>107</sup> above, he grounds decriminalization and reform on the need to provide outlets for the irrational but ubiquitous urge of men. This principle of sexual urgency goes hand in hand with a view of women as servile to such sexual urgency. Shrage herself fails to uncover any other possible set of principles which might support decriminalization:

I am unable to imagine nonpernicious principles which would legitimate the commercial provision of sex and which would not substantially alter or eliminate the industry as it now exists. Since commercial sex, unlike marriage, is not reformable, feminists should seek to undermine the beliefs and values which underlie our acceptance of it.<sup>108</sup>

As I argued above, however, the newly emerging recognition of women's right to control their own body, limb, and action as they think fit is crucial to their newfound and developing freedom.<sup>109</sup> Hence, the principle of individual (sexual) autonomy,<sup>110</sup> and not some ubiquitous male sexual urge, underlies the call for decriminalization and reform of prostitution. This principle of individual autonomy is not even mentioned by Shrage or Pateman.

Further, Shrage's conclusion that "prostitution needs no unique remedy, legal or otherwise [and that] it will be remedied as feminists make progress in altering patterns of belief and practice that oppress women in all aspects of their lives"<sup>111</sup> is simply irresponsible. The claim that we should first work to change the "social meaning" of a phenomenon in the hope that the institution will then "wither away" on its own, in the meantime leaves the woman on the street corner continually exposed and vulnerable to a host of hazards and dangers. This position denies the prostitute many of the rights the rest of us take for granted. These rights include legally enforced protection against bodily harm, fraud, and rape, the right to sell one's labor-power in non-harmful ways, the right to rent a safe and healthful place of work, and the right to travel and to freedom of association.<sup>112</sup> I will refer to this body of rights and equal enforcement of the law as the principle of political integrity of the person.

When this principle of the political integrity of the person is taken to-

106. Shrage, *supra* note 3, at 359-60.

107. See *supra* notes 86-91 and accompanying text.

108. Shrage, *supra* note 3, at 360.

109. See *supra* notes 35-36 and accompanying text.

110. This is one crucial principle, among other supplementary principles, which I will discuss below.

111. Shrage, *supra* note 3, at 360-61.

112. For a full list of the grievances and violations of prostitutes' rights, see RIGHTS OF WHORES, *supra* note 5, at 40-42. This book reproduces the WORLD CHARTER FOR PROSTITUTES' RIGHTS drafted by the International Committee for Prostitutes' Rights which met in Amsterdam in February 1985. *Id.*

gether with the principle of personal (sexual) autonomy, and combined with various further principles sometimes suggested by those who argue for decriminalization,<sup>113</sup> a powerful case for decriminalization in this country begins to emerge. And this, I insist, emerges from a feminist point of view.<sup>114</sup>

## VII.

### PROSTITUTION AS SEXUAL THERAPY

Let me now focus on one point that has begun to emerge: that commercial sex could be practiced as a form of sexual therapy.<sup>115</sup> By "sexual therapy" I do not have in mind the hackneyed defenses of those who assert that the prostitute plays a valuable social role insofar as her activity can "save" a dying marriage or provide a release for otherwise pent up and dangerous male urges.<sup>116</sup> Such therapy only works to maintain the status quo. By "sexual" or, better, "erotic" therapy, I refer to a therapeutic process which frees sexual gratification and erotic desire from their present fascination with domination and subservience.

One can easily imagine a society in which the physical and psychological well-being of *all* its members (including the physically and mentally disabled, the ugly, and the elderly) were equally valued. Such a society might further regard frequent and satisfying sexual experiences which were free of domination as a healthy, even necessary, component of a good life. Such a society might further believe that there is a direct correlation between healthy, mutually satisfying, and erotic relationships and a decrease in the incidence of violent crimes and other types of antisocial behavior.<sup>117</sup>

Commercial sex could surely exist in such a society; the difference would

113. For example, one such suggestion is that commercial sex could provide opportunities for sexual experimentation and even therapy. See notes 115-22 *infra* and accompanying text.

114. I ought to note that the form of my argument is not that of a deduction from self-evident first principles to a set of necessary conclusions. The model of practical reasoning I employ comes closer to a "balancing" or "weighing" of various considerations, the search for which has recently come to be called the method of "reflective equilibrium." *E.g.*, J. RAWLS, *A THEORY OF JUSTICE* 577-79 (1971). The premises from which such reflection begins are not, strictly speaking, self-evident, but are rather deeply held and widely shared beliefs in our Western tradition concerning the importance of individual freedom, sexual autonomy, and of the political integrity of the person. These principles are widely held despite the fact that such freedom and integrity have long been denied to women. The aim of this argument is thus to seek a "deeper congruence" between such firmly held general principles and our particularly conflicting judgments regarding women's behavior in general and the case of prostitution in particular. Such judgments may conflict, not only with each other, but with our widely held beliefs of the importance of individual autonomy.

115. See M. St. James, Speech to the San Diego County National Organization for Women (Feb. 27, 1982), cited in Shrage, *supra* note 3, at 357. Shrage refers to Margo St. James' argument in favor of the use of commercial sex for therapeutic purposes. Whereas St. James also emphasizes the possible aesthetic opportunities of impersonal sex, I am concerned mainly with its possible therapeutic uses.

116. See notes 85-91 *supra* and accompanying text.

117. This position was first carefully argued by Wilhelm Reich. W. REICH, *THE MASS PSYCHOLOGY OF FASCISM* 29-32, 191-93 (V. Carfango trans. 1970).

be, however, that commercial sex would not have, to use Shrage's language, the "same social meaning" as it does today.<sup>118</sup> In this hypothetical society, the prostitute could be respected for her wealth of sexual and emotional knowledge. It is this ideal of sexual relationships, in general, and of prostitution, in particular, which motivates and guides my argument for the legalization and reform of prostitution.

In response to the argument that the commercial sex provider might serve as a skilled sexual therapist, Shrage quips that "[t]he fact that prostitutes have such low social status in our society indicates that the society in which we live is not congruent with this imaginary one."<sup>119</sup> Here, Shrage reverses the order of cart and horse. Clearly our society is not congruent with this imaginary one in which prostitutes serve as sex therapists. Mere incongruence, however, is not the issue. The issue is whether or not such an ideal provides further support and guidance for the decriminalization and reform of prostitution.

On closer examination, Shrage's real complaint is that the claim that commercial sex could be elevated to "therapy" is simply implausible and helps to maintain the present status quo.<sup>120</sup> This complaint, however, derives from Shrage's tendency to regard the present "social meaning" of prostitution as monolithic and unyielding.

The idea that commercial sex can have a therapeutic value is not as far-fetched, nor as "ad hoc," as it may seem at first glance. Many male clients apparently seek out a prostitute not with the primary aim of sex, but with the hope of seeking emotional comfort and refuge.<sup>121</sup> Further, many psychiatrists have employed an experienced prostitute in order to help clients overcome severe sexual problems (a phenomenon more politely referred to as therapy with a "surrogate partner").<sup>122</sup>

Should the role of prostitute as skilled emotional and sexual therapist — a role which is just emerging into the light of day — be driven underground again? Should we not instead encourage prostitution's more humane aspects and recognize the wealth of sexual knowledge the prostitute often possesses, at the same time that we seek to disassociate from the phenomenon the male bias, brutality, and exploitation that make the practice so odious?

Additionally, moves to de-stigmatize (at least certain forms of) impersonal sex may well allow more women to seek out male or female prostitutes

118. See generally Shrage, *supra* note 3.

119. *Id.* at 358.

120. *Id.* at 357.

121. See D. RICHARDS, *supra* note 10, at 108, 115.

122. A "surrogate partner" is defined as "a trained woman who is paid to participate in therapy and sexual activity with a single man" in order to improve his chances of normal sexual functioning. W. MASTERS & V. JOHNSON, *ON SEX AND HUMAN LOVING* 499 (1980). According to Masters and Johnson, many therapists see this practice as "an important means of helping people," but given the current state of uncertainty regarding the possible transmission of the AIDS virus, the practice has declined in recent years. *Id.* Once the medical dangers are surmounted, however, the practice may well return.

(or sex therapy clinics). Such new freedom and possibilities for sex-therapy would afford people many more avenues for coming to terms with their often long-neglected sexual fears and frustrations. Should such activity begin to approach what I have called "erotic therapy" — should the attempt to alleviate sorrow and sexual suffering consciously be wedded to the project of overcoming domination and of learning for personhood — we then would have not only ample grounds for decriminalization of impersonal sex, but a model of "sound prostitution" which is positively moral.

A natural objection at this point is that the role of a prostitute could never be therapeutic in the above sense, considering that the relationship is that between a buyer and a seller. The skeptic will argue that whatever plausibility there is to the idea of the prostitute as therapist still stems from the idea that the woman's role is to service male needs and soothe their bruised egos. In other words, the skeptic will finally maintain that the notion of prostitute as therapist directly reinforces the traditional notion that a woman's position is one of dependency and submission to a man. It requires too great a leap of the imagination to view the prostitutes' activity as even potentially undercutting dominance and submission between the sexes.

My response is, first, that the prostitute as therapist model does not reinforce women's traditional subordinate position, because therapists are generally in a powerful position in relation to their clients. Second, some form of therapy must play a critical role in the permanent deconstruction of traditional male sexual practice, whatever other moral, economic, and political means are used at the same time. If women were to work together, and not in isolation, towards the goal of a general insistence on respect for personhood, they could (and I believe they eventually will) succeed in restructuring the dominant modes of culturally constructed sexual practices. Indeed, the goal of restructuring our present set of sexual practices must lie at the heart of any worthy attempt to decriminalize prostitution. Decriminalization must not only facilitate the enforcement of the prostitute's individual rights. It must not only offer the prostitute more protection in the practice of her trade and encourage her to unionize and fight for better working conditions; it must also bestow a greater respect for the prostitute herself and for the nature and the art of her trade. Additionally, decriminalization would force society to acknowledge the sexual suffering and unhappiness that afflict so many.<sup>123</sup>

By contrast, it is the criminalization of prostitution which continues to keep prostitutes vulnerable, isolated, and dependent on pimps and other criminal elements of society and prevents them from depending on each other. Criminalization, that is, plays a major role in the perpetuation of the subservient and degrading role of the prostitute in our society. The most cursory comparison between the status of prostitutes in the United States and in those

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123. See RIGHTS OF WHORES, *supra* note 5, at 33-99.



countries where their activities are legal<sup>124</sup> proves this point.<sup>125</sup>

Moreover, the fact that the relationship between the prostitute and the client is "essentially" a relationship between a buyer and a seller, does not necessitate — as Pateman seems to think — a relationship of "dominance and submission."<sup>126</sup> It seems to be one of the lingering fantasies of the most infantile of all left-wing Marxist visions that all market transactions vanish completely and especially all at once. A more realistic, practical goal would be to isolate the most serious forms of economic and social injustices in the basic structure of society and to attempt to rectify these injustices first. In this attempt to isolate basic injustices we must distinguish "unsound" from "sound" cases of prostitution. The hope that prostitution can be eliminated through criminalization is counter to hundreds of years of experience. The effort, therefore, should be to legalize and reform prostitution rather than reject all forms of commercial sex.

In sum, my complaint with feminists such as Shrage and Pateman is that they commit an error surprisingly similar to that of Ericsson. Ericsson erroneously posits a culturally based, typically male sexual practice as "natural" and fixed in human nature. Pateman and Shrage, on the other hand, take the present "social meaning" of prostitution as domination to be uniform and unyielding. The only way to proceed, according to Ericsson, is to allow things to remain as they are now (with a few minor adjustments here and there), while Pateman's and Shrage's proposals tend toward intolerance of each and every act of impersonal sex. The possibility of any deep and fundamental transfor-

124. The Western European countries in which prostitution is legal are The Netherlands, West Germany, Switzerland, and Austria. *RIGHTS OF WHORES*, *supra* note 5, at 52-102.

125. *Id.* at 52-102 (includes comparison of the status of prostitutes in various European countries, in the United States, and in Third World Countries). Being a prostitute is not even illegal in England and Italy, although the many state regulations and restrictions surrounding prostitution make it nearly impossible to practice it legally.

Prostitutes in the United States (due to criminalization of their activity) are forced to live underground and combine with other criminal elements in society in order to: protect themselves from potentially violent and abusive customers, battle police and avoid prison, as well as fight the discrimination of landlords and establish safe places to work. In contrast, prostitutes in the Netherlands and West Germany where prostitution is legal are struggling to have prostitution fully recognized as a profession on a par with other forms of work. If they succeed, prostitutes in the Netherlands and West Germany would contribute to, and be included in, the National Health System and the Government Pension Scheme, and be eligible for unemployment benefits. *Id.* at 70-73, 85-88. It seems that the other major complaints of prostitutes in the countries where prostitution is legal concern an unreasonable degree of "state interference" in the prostitutes' lives such as strict zoning laws and compulsory venereal disease examinations conducted by doctors not of their own choosing. *Id.* at 72.

Such concerns are of an entirely different order than those experienced by most American prostitutes — many of whom live in perpetual fear for their lives. In short, the position taken by the United States on the issue of prostitution closely parallels that of countries which routinely violate the individual rights of their citizens. See *RIGHTS OF WHORES*, *supra* note 5, at 264-80 (authors describing how prostitutes in Kenya and Indonesia are subject to continuous police harassment and even death, routine violations of their right to free speech and assembly as well as to extreme shame and social stigma).

126. See *SEXUAL CONTRACTS*, *supra* note 2, at 146-47; Radin, *supra* note 9, at 1891-98.

mation or evolution of present-day culturally constructed sexual practices eludes both the liberal contractarian and the radical feminist positions.

### CONCLUSION

Faced with the phenomenon of prostitution, American women are at a "crossroads" and can take either road. They can continue to downgrade their own sexuality, limit their eroticism to their role as spouse or parent (as has traditionally been the case), and now demand the same from men. Or, conversely, they can begin fully to acknowledge their sexuality, as well as how powerful and variously constituted it is and can be. One way of taking the latter road, it has been argued, is by the explicit call for decriminalization; by standing behind the prostitute and demanding her legal rights and safety, by attempting to better her working conditions as well as the profession's general self-conception through the formation of unions, and by creating alternative avenues for work if the woman should so desire.<sup>127</sup> At the same time, however, we must acknowledge how valuable such "erotic therapy" can actually be.

And thus to distinguish my position, first, from contractarian defenses of decriminalization, the portrait of "sound prostitution" here put forth is essentially a "feminist" one. The rationale in defense of "sound prostitution" cannot be that society must accommodate itself to some dangerous and ubiquitous male sex urge; such a rationale is increasingly being revealed as ideological, since it continues to view women as natural servants to a fickle and arbitrary master. The rationale I am proposing, in fact, comes closer to the reverse; the sexual autonomy of women must finally be recognized at the same time as dominant male sexual practice is publicly acknowledged as being in dire need of therapy. Dominant sexual practices are in need of a therapy which works to free sexual fascination and satisfaction, once and for all, from their present connection with violence, domination and subservience, a connection long established through custom and habit. But who is in a better position to perform such sexual therapy on men than women united together and working as a group? Who is in a better position to put forth alternative models of erotic gratification? In contrast to Ericsson's position, it does not suffice that our Puritan hangover (with its Christian denial of sensuous bodily pleasure) be rubbed away; we must simultaneously rid ourselves of our traditional male-tainted visions of sex. And there is no question here of positing some "physio-

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127. This is the approach adopted by Margo St. James in forming the prostitute's union in California entitled COYOTE (Call Off Your Old Tired Ethics). COYOTE is a civil rights organization which attempts to gain better working conditions for prostitutes. David Richards also notes that "probably the best way to aid prostitutes to protect themselves from unfair business dealings with customers and pimps would be to provide legal facilities in the form of unions of prostitutes, which would bring the force of collective organizational self-protection to this atomistic profession." D. RICHARDS, *supra* note 10, at 123. Again, such "organization" has to some extent already been achieved in many European countries. See *supra* notes 124-25 and accompanying text.

logical sexual urge" which always seems, in the end, to find fulfillment in the same crude way. The position here urged, by contrast, stresses the profound complexity of human sexuality. The account posits, in general, only a deep need in persons for equality, freedom, and respect, as well as for emotional and physical closeness. These are needs which, in our increasingly complex society, appear to demand ever new and creative methods of expression and fulfillment.

In contrast to the work of Pateman and Shrage, on the other hand, I am suggesting that a "feminist" account can no longer rest content with a depiction of a woman's exploited and victim status; a feminist account today must start from, and aim towards, female strengths. Both Pateman and Shrage simply ignore, in their discussions of prostitution, the important right which a mature woman possesses to control her own body and actions, and this in a manner that others (including other women) personally may find objectionable. The stewardship, however, is hers, not theirs.<sup>128</sup> Contemporary feminists should be as wary of falling into the trap of paternalism (or "maternalism") as we might wish Marxists had been of the idea of a "party-elite." Further, by failing to distinguish between the many different forms of impersonal sex — by viewing them all as one monolithic structure of domination of women by men — Pateman's and Shrage's accounts not only oversimplify the phenomenon, but actually render invisible much of the *de facto* power women at this moment possess: a power which grows out of their traditional roles as nurturers and healers, as care-takers not only of the soul, but of the body as well. And this is a role (irrespective of gender) which is being increasingly acknowledged today as critical to the health of any social order.

Finally, I wish to make it clear that my argument in no way depends on my putting forth sexual promiscuity as an ideal (and there is no evidence that decriminalization of prostitution leads to this). Nor am I claiming that commercial sex is particularly good sex or ultimately very satisfying. On the contrary, I am claiming that it need not be so in order for us to legitimize it or even consider it valuable. Further, it should be clear that I am not taking the stance (as Ericsson does) that the institution of prostitution as it is now practiced, or even as it may be practiced in the near future, is some "inevitable state of affairs" due, presumably, to some irrational and dark side of our natures. On the contrary, decriminalization of prostitution may be an important, even necessary step, to the institution's ultimate demise. That is, if the decriminalization process is wedded to a general and public acknowledgement not only that women have long been denied autonomy over their own limbs

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128. As one prostitute herself remarked in response to an International Abolitionist [of prostitution] Federation Congress:

They get hysterical about us! I am tired of all these people who lie all the time. It is not right to call prostitution a threat to humanity. It is ridiculous to mix up forced prostitution and child prostitution and slavery and exploitation with us: I am a free and conscious adult.

*Quoted in RIGHTS OF WHORES, supra note 5, at 14.*

and action, but also importantly that dominant male sexual practice is in desperate need of therapy — both points could be made explicit in the actual wording of the new legislation — such decriminalization may well allow prostitution as we know it to “wither away” or at least to transform itself into something else.

In slightly different words, the position defended here is one which claims that if we not only aim for the general alleviation of poverty, as well as for women’s equal participation in the full range of economic, social, and political power, but importantly, also work to reconstruct the fundamentals of received doctrine regarding male and female sexuality, then we can quite legitimately ask: what *need* will there be in the future for the phenomenon we *now* call prostitution? There may well be a continued need for intimate, long-term, and mutually satisfying erotic unions between persons. But this is a need which, paradoxically, we might better come to understand, appreciate, and even satisfy, if we at present stop stigmatizing all forms of impersonal sex.<sup>129</sup>

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129. I am well aware that this paper contains few, if any, concrete suggestions regarding how decriminalization might proceed in practice (whether there should be state licensing of erotic therapists, for instance, or to what degree there should be reasonable public regulation of the obtrusive solicitation of sex, or of the health conditions of prostitutes, and so on). For a discussion of such issues, see generally RIGHTS OF WHORES, *supra* note 5. My aim in this essay, however, has been slightly different; I have tried to lay bare a theoretical foundation for decriminalization from a distinctively *feminist* point of view. Nothing I have said thus far is meant to deny that the practical details of the legalization process are of the utmost importance and need still to be worked out. To the contrary, I have tried to shift the terms of the original debate in this direction: from the question of *whether* we should decriminalize prostitution to the question of *what form* such decriminalization should take.