FEDERALISM, THE MANN ACT, AND THE IMPERATIVE TO DECRIMINALIZE PROSTITUTION

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I. INTRODUCTION

The Mann Act of 1910 makes it a felony knowingly to transport women or girls in interstate or foreign commerce for the purpose of prostitution, debauchery, or any other immoral purpose.[1] A 1986 amendment deleted "debauchery" and "immoral purpose" and substituted "any sexual activity for which any person can be charged with a criminal offense."[2] The original statute was the product of an era of moral panic in the early twentieth century that has long since passed.[3] Although the statute was aimed at pimps and panderers, the Supreme Court broadly construed it to apply to customers of prostitutes and the prostitutes themselves as conspirators. The limited enforcement since World War II, both before and after the 1986 amendment, is recognition that the statute caused great harm and had little deterrent effect. Thus, any rational analysis of the history of the Mann Act leads to the conclusion that it is ready for repeal.

Repeal of the Mann Act could be the first step in a campaign to decriminalize prostitution. The AIDS epidemic makes regulating prostitution more compelling today than ever before, and health regulation can effectively occur only after decriminalization. The question, therefore, is whether prostitution, an act that most people consider immoral, but that has not been significantly deterred by its illegal status, should be decriminalized so that the government can institute necessary health regulations. It is uncertain, however, whether politicians who realize the need for decriminalization can afford to invest capital in a fight against the leaders of the religious right who oppose decriminalization.

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[1] 36 Stat. 825 (1910), as amended 18 U.S.C.A. §2421(supp. 1992). In 1986, Congress replaced "women" or "girls" with "individuals" so that the statute applied both to procurers of both sexes. 100 Stat. 3511 (1986). *See* S. Rep. 99-194, 99th Cong., 1st Sess. (1985). This amendment is not testimony to the continued public interest in this archaic statute, but instead was a response to the argument that all federal statutes should be gender-neutral.

[2] Child Sexual Abuse and Pornography Act of 1986, Pub. L. 99-628, 100 Stat. 3511-2.

[3] FREDERICK K. GRITTNER, WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW 61-75 (1990); DAVID LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 1-14 (1994).

This analysis begins with a survey of the economics of prostitution. Decriminalization would allow willing adult prostitutes to seek protection from being cheated or battered by customers, protection they dare not seek as illegal sellers of sex.[4] Contrary to the argument of some feminist commentators, a contract between consenting adults to sell sexual services is not slavery.[5] Both the factory worker and the prostitute survive hard physical labor by separating who they are from what they do. Just as the person on the assembly line in a factory separates his personality from his hands and feet and the part of the brain that makes them work, so the willing prostitute separates her personality from her sexual equipment.[6]

In this paper, I will argue that the Supreme Court misconstrued the Mann Act by failing to recognize basic principles of federalism and the distinction between procedure and substance. First, the Tenth Amendment confirmed the basic structure of federalism under the Constitution: that the national government is one of delegated, enumerated powers, with the residuary powers reserved to the states.[7] The Supreme Court ignored this fundamental principle in key decisions interpreting the Mann Act. It misinterpreted the Commerce Clause by erroneously applying two key terms of the original Mann Act, "debauchery" and "any other immoral purpose," to noncommercial sex. The language of the 1986 amendment, "sexual activity for which any person can be charged with a criminal offense," applies mostly to noncommercial activity, such as rape and child sexual abuse.

Second, the Supreme Court misused a fundamental element of legal classification: the distinction between procedure and substance. Constitutional clauses delegating jurisdiction to the various federal and state courts are procedural. Article III, Section 2 of the Constitution defines federal jurisdiction, which includes all cases arising under the laws of the United States. The words that give federal courts jurisdiction under the Mann Act are "in interstate or foreign commerce."[8]

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[4] DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW 116-27 (1982).

[5] For a survey of the literature, *see* Sibyl Schwarzenbach, *Contractarians and Feminists Debate Prostitution*, 18 N.Y.U. REV. OF LAW & SOC. CHANGE 103 (1990).

[6] CAROLE PATEMAN, THE SEXUAL CONTRACT 206-09 (1988).

[7] *See* THE FEDERALIST No. 39, at 262 (Madison) (E. Bourne, ed. 1947); McCulloch v. Maryland, 17 U.S. (4. Wheat.) 316, 404 (1819); U.S. CONST., amend. X. The recent decision in United States v. Lopez, 115 S.Ct. 1624 (1995), illustrates the continuing significance of federalism. The Court held that the Gun-Free School Zones Act of 1990 exceeded the power of Congress under the Commerce Clause because the statute applied to the mere possession of guns, not to transactions.

[8] *See* Wilson v. United States, 232 U.S. 563, 566-67 (1914). Though the girls in this case were transported by interstate train, the Court noted that transportation by common carrier was not essential to interstate commerce jurisdiction. An agent of defendants, paid to recruit girls in Wisconsin for prostitution and bring them to Illinois, was in interstate commerce regardless of the means of transport. *Id.*

Congress should not encroach on the residual powers of the states by giving the federal courts jurisdiction to decide substantive matters that are reserved to the states. For example, a national wills act governing the validity and probate of all wills that were transported by the mails or in interstate commerce would use federal commerce and mails jurisdiction to preempt one segment of the law of wills, an area of substantive law not enumerated in Article I as federal. A federal tort statute that redefines negligence for all automobile torts where the vehicle crossed state lines before the impact causing damage to another's person or property would also use Commerce Clause jurisdiction to invade state tort law. Similarly, "debauchery" and "any other immoral purpose" in the 1910 Mann Act and criminal sexual activity in the 1986 Act, when not limited to commercial transactions, are of the same character as a federal wills act or a federal auto torts act. These statutory clauses have noncommercial aspects which the Constitution leaves to the states to regulate; the national government cannot validly regulate them by using the jurisdictional clause, "in interstate or foreign commerce."

II. THE SOCIAL ECONOMICS OF PROSTITUTION

One should view the demand for the services of female prostitutes in terms of the basic biological instincts of males which testosterone induces, in relation to the psychological desires of some males to have short-term, non-emotional relations with females.[9] Class and psychological attitudes dictate the demand for paid sexual services in an industrial society.[10] One substantial group is comprised of very low-income males who believe that they have insufficient income to court and financially support a permanent partner.[11] Another group of males has the adequate income to marry, but has psychological problems that cause them to reject sustained emotional relations with a female.[12] A third group is married males who are not satisfied with sex in their marriages.[13] The fourth group of males, married and unmarried, may

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[9] For a theoretical analysis of the demand and supply functions for prostitution, *see* DARYL A. HELLMAN, THE ECONOMICS OF CRIME 133-43 (1980).

[10] *See* CHARLES WINICK & PAUL M. KINSIE, THE LIVELY COMMERCE: PROSTITUTION IN THE UNITED STATES 193-206 (1971).

[11] Alfred C. Kinsey, *Social Level and Sexual Outlet*, *in* CLASS STATUS AND POWER 300-08 (R. Bendix and S. N. Lipset, eds. 1953).

[12] Kingsley Davis, *Prostitution*, *in* CONTEMPORARY SOCIAL PROBLEMS 262-88 (R. K. Merton and R. A. Nisbet, eds. 1961)

[13] Albert Ellis, *Why Married Men Visit Prostitutes*, 25 SEXOLOGY 344-47 (1959).

consider sexual variety an adventure that is less costly when purchased from a prostitute.[14]

The widespread existence of prostitution in industrial societies indicates that the demand for sexual services is very great. The earliest survey evidence was in the 1948 Kinsey Report.[15] The survey estimated that three and a half to four per cent of total U.S. male sexual activity involved prostitutes.[16] For unmarried males, three point seven per cent of total sexual activity for those in their late teens, over nine and a half percent for those between thirty and forty and over fifteen percent for those over forty involved prostitutes.[17] The estimate for married males was that about one percent of sexual activity involved prostitutes.[18] In the more recent period of sexual liberalism, demand for prostitutes seems to have declined. A 1991 survey of males aged twenty to thirty-nine reported that 6.7 per cent had at some time paid for sex.[19] A recent major study of sexuality reported that 8.6 per cent of persons aged eighteen to fifty-nine had ever paid for sex, but in the twelve months of the study only 0.4 per cent responded that they had paid for sex.[20]

As for the supply of female prostitutes, the key inducement to enter the industry is the perception that a prostitute can earn much more in this line of work than in alternate employment.[21] Many commentators have suggested that the great majority of prostitutes are willing members of the profession and that only a small percentage are unwilling workers under the total control of pimps.[22] Also, many drug addicts become prostitutes to finance their addiction.[23]

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[14] For a consumer survey of reasons for visiting prostitutes, *see* WINICK & KINSIE, *supra* note 10 at 193-98.

[15] A. C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 286, 503 (1948).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Daniel H Klepinger et al., *Perceptions of AIDS Risk and Severity and their Association with Risk Related Behavior among U.S. Men*, 25 FAMILY PLANNING PERSPECTIVES (No. 2) 74, 79 (1993). The 1991 National Survey of Men contained 3,321 extended interviews.

[20] EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 402, 435 (1994).

[21] HELEN REYNOLDS, THE ECONOMICS OF PROSTITUTION 11-14 (1986).

[22] *See* Linda M. Rio, *Psychological and Sociological Research and the Decriminalization or Legalization of Prostitution,* 20 ARCHIVES OF SEXUAL BEHAVIOR 205, 210 (1991) and authorities cited therein.

[23] Marsha Rosenbaum, *Work and the Addicted Prostitute,* in JUDGE LAWYER VICTIM THIEF 131-50 (Nicole H. Rafter and Elizabeth A. Stanko, eds. 1982); Jody Miller, *Gender and Power on the Streets: Street Prositution in the Era of Crack Cocaine,* 23 J. CONTEMPORARY ETHNOGRAPHY 427-52 (1995).

In 1968, one survey estimated that there were 300,000 to 500,000 women and girls in the United States selling sexual services, full-time or part-time.[24] This would be approximately 0.3 to 0.6 per cent of the female population ages fifteen to thirty-five. The gross revenues of these persons is estimated at approximately $20 billion.[25] One commentator, Helen Reynolds, has explained the differences between different types of prostitutes and the estimated fees for each type.[26] These types include streetwalkers, masseuses, escorts, bar prostitutes, call girls, and brothel inmates. The prices in the 1968 study ranged from as low as $10 for some streetwalkers to over $100 for some call girls. The possibility of moving up the hierarchy from streetwalker to call girl was slim.[27] At the higher income levels, pimp involvement decreased and the danger of arrest declined.[28] It was much more likely, in fact, that over time a prostitute would move down the income hierarchy. If drug problems increased, she might be less able to handle her affairs, fall under the control of a pimp, and find it necessary to move into a brothel.

It is impossible to estimate the extent to which illegality limits the supply of prostitutes.[29] The general view is that prostitution is immoral because, contrary to marriage and similar emotional alliances, prostitution is the alienation of the body to the will of another and thus undermines the ultimate roots of the moral personality.[30] It is thus reasonable to hypothesize that even if prostitution were legal, the number of prostitutes would not increase substantially. Even presuming that legalization would raise prostitutes' income because they would no longer need to share fees with madams, pimps, lawyers or corrupt police, this advantage would be offset in part by income taxes previously evaded and higher medical expenses under state health regulations. Hence there is no reason to infer that incomes would rise enough to encourage significant increase in entry into the profession.

Many of the problems and costs associated with prostitution would not decrease with legalization.[31] Since legal prostitutes could seek police assistance, the costs of physical harm from pimps and customers should decrease, though they would not disappear. The proportion of psychologically unbalanced customers would not be reduced. The risk of venereal disease would

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[24] CARL P. SIMON & ANN D. WHITE, BEATING THE SYSTEM: THE UNDERGROUND ECONOMY 249-55 (1982); *see also* John D. Potterat et al., *Estimating the Prevalence and Career Longevity of Prostitute Women*, 27 J. SEX RESEARCH 233-43 (1990).

[25] *Id.*

[26] *See* REYNOLDS, *supra* note 21 at 14-16.

[27] *Id.* at 15.

[28] *Id.*

[29] For models of public policy, *see id.* at 35-59.

[30] RICHARDS, *supra* note 4 at 94-95.

[31] *See* REYNOLDS, *supra* note 21 at 16-18.

remain high since the rate of condom failure would be the same. Since prostitutes would not be arrested, the costs for legal services would go down, although many other operating cost would remain the same. The psychological cost of continuing a socially degrading occupation would continue and any resulting addiction to drugs (including alcohol) would probably not decrease.

The decriminalization of prostitution should reduce one key social cost: the cost of policing. This would enable the police to redistribute resources they currently use to investigate and arrest individuals involved in prostitution. One 1985 study reported that in sixteen of the nation's largest cities, only twenty-eight per cent of reported violent crimes resulted in arrests.[32] At the same time, police on average made as many arrests for prostitution as they did for all violent crimes combined.[33] Judges are overwhelmed by the sheer number of prostitution arrests, and the consequent judicial leniency toward prostitutes results in repeated arrests of the same offenders.[34] As Professor Packer concludes:

> Because judges are not moral monsters, they rarely give convicted prostitutes severe sentences. A short term in county jail is the normal maximum. More often, a suspended jail sentence or a fine is imposed. The woman may soon be back in court again. . . . The whole tedious, expensive, degrading process of enforcement activity produces no results: no deterrence, very little incapacitation, and certainly no reform.[35]

Despite the increasing number of violent crimes involving guns, the United States continues to devote a large portion of its scarce police resources to nonviolent misdemeanor prostitution arrests.

The great prevalence of prostitution in spite of its illegal status is similar to the thriving alcohol industry in the 1920's in spite of the constitutional prohibition of sale of alcoholic beverages and the criminal statutes enforcing the amendment.[36] Scholars commonly label this legal venture into prohibition as "the experiment that failed."[37] Consumption of alcohol did decrease somewhat, but the social costs of illegal alcohol and the great expansion of

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[32] Julie Pearl, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS L.J. 769 (1987).

[33] *Id.*

[34] *Id.* at 790.

[35] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 329 (1968).

[36] U.S. CONST., amend. XVIII, repealed by amend. XXI.

[37] *See generally* NORMAN H. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION, 158-80 (1976); ANDREW SINCLAIR, PROHIBITION: THE ERA OF EXCESS 173-219 (1960).

organized crime caused most citizens to welcome repeal of the Eighteenth Amendment.[38] Similarly, the demand for prostitutes cannot be significantly decreased by criminal statutes. The attempt to eliminate prostitution through legislation has also failed.

Although prostitution has been labeled a victimless crime, in fact, it is the prostitutes themselves who are victims, rendered such by the illegality of their profession.[39] Many prostitutes must work with pimps so that when arrested they will have someone to supply bail money for them and hire a lawyer.[40] The police know the futility of trying to end prostitution by making it a crime in a marketplace where there is a demand founded in psychological and biological needs for commercial sexual services.[41] Some proportion of police accept bribes from prostitutes, pimps or brothel madams to refrain from arrests.[42] In any case, the social costs of arresting and prosecuting prostitutes are essentially wasted since the defendants, when released, usually return to prostitution.[43]

Most persons who have studied prostitution support its legalization and state regulation.[44] Hundreds of thousands of American women who have chosen prostitution as a means of earning a living deserve the same police and judicial protections as other citizens.[45] Rather than expend public funds on police vice squads, prosecutors, and jail space, all of which have a minimal impact on the reduction of prostitution, the state could expend the same funds on services to rehabilitate prostitutes.

Finally, the presence of AIDS adds further urgency to the argument for decriminalization. The legalization of prostitution, followed by legislation mandating periodic compulsory health examination of prostitutes, would

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[38] *See* Humbert S. Nelli, *American Syndicate Crime: A Legacy of Prohibition, in* LAW, ALCOHOL, AND ORDER: PERSPECTIVES ON NATIONAL PROHIBITION 123-27 (David E. Kyvig, ed. 1985).

[39] *See* KAREN DECROW, SEXIST JUSTICE 209 (1974); Charles Rosenbleet & Barbara J. Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373 (1973); M. Anne Jennings, *The Victim as Criminal: A Consideration of California's Prostitution Law*, 64 CAL. L. REV. 1235 (1976).

[40] *See* WINICK & KINSIE, *supra* note 10, at 109-20.

[41] *See* PACKER, *supra* note 35 at 328-31.

[42] *See* WINICK & KINSIE, *supra* note 10 at 214.

[43] *See* Llad Phillips & Harold L. Votey, THE ECONOMICS OF CRIME CONTROL 71-72 (1981), citing cost data in E. Vorenberg & J. Vorenberg, *The Biggest Pimp of All: Prosecution and Some Facts of Life,* 239 ATLANTIC MONTHLY 1977, at 239.

[44] *See* text and sources cited in JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL, ch. 9 (1979); Therese M. Wandling, *Decriminalization of Prostitution: The Limits of the Criminal Law*, 55 OREGON L. REV. 553, 560-63 (1976).

[45] RICHARDS, *supra* note 4 at 94-95.

significantly improve the odds of reducing the spread of AIDS and other sexually transmitted diseases.

III. IMMIGRATION LAW BACKGROUND

Examining the series of federal immigration laws that made importation of prostitutes a crime is necessary before analyzing the Mann Act of 1910. Section 3, enacted in 1875, made it a felony to import women into the United States for the purpose of prostitution.[46] A 1903 amendment to the statute also made it felonious to import any woman or girl, or hold one of them after importation, for the purpose of prostitution.[47] The Immigration Act of 1907, made it a felony to import any alien woman or girl for the purpose of prostitution or any other immoral purpose.[48]

Unlike the Mann Act, legislators founded the Immigration Act on principles of sovereignty. They did so by borrowing from international law the principle that every nation has the power to control the entry of aliens: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[49] The power to control entry is thus crucial to a nation's protection of its sovereignty.

A second constitutional foundation of Section 3 of the Immigration Act was the power of Congress to make all laws necessary and proper to enforce treaties entered by the President under Article II, Section 2, that have received senatorial consent.[50] The Treaty of Paris of May 18, 1904 for repression of trade in white women received senatorial consent on March 1, 1905. While the President did not announce the United States' adherence to the treaty until June 15, 1908, it can be argued that this was merely a delayed formality, and that section 3 of the Immigration Act of 1907 was in part based on the 1905 senatorial consent to the treaty.[51]

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[46] 18 Stat. 477 (1875).

[47] 32 Stat. 1213 (1903).

[48] 34 Stat. 898 (1907), as amended, 8 U.S.C.A. §1328 (1990).

[49] Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892), citing EMIR DE VATTEL, LAW OF NATIONS, Book 2, §§94, 100 (J. Chitty, ed. 1858); R. PHILLIMORE, 1 COMMENTARIES UPON INTERNATIONAL LAW ch. 10, §219 (1854). *See* Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889).

[50] This is pursuant to the sweeping clause of U.S. CONST. art. I, § 8, cl. 18. *See* 45 CONG. REC. 1034 (1910) (statement of Rep. Keifer), quoting John B. Moore, 5 DIGEST OF INTERNATIONAL LAW 166 (1906); Prevost v. Greenaux, 60 U.S. (19 How.) 1 (1858).

[51] *See* H.R. REP. No. 47, 61st Cong. 2d Sess., 13 (1909).

The key opinion interpreting the phrase, "any other immoral purpose," in Section 3 of the Immigration Act of 1907 is *United States v. Bitty*.[52] Bitty brought his mistress to the United States from England to live with him. He demurred to the indictment charging him with a felony under Section 3. The Circuit Court sustained the demurrer.[53] Since the phrase "any other immoral purpose" was ambiguous, the court turned to the report of the committee of the House of Representatives to search for the context in which the phrase was used.[54] The report demonstrated that the phrase was added "in order to prevent undesirable practices alleged to have grown up in relation to the immigration of prostitutes."[55] Since this referred to commercial vice, the court applied the rule of *ejusdem generis* and held that "other immoral purpose" in this context had to be limited to commercial sale of sexual services.[56] Thus, a mistress was not a prostitute.

The Supreme Court reversed, ordering the Circuit Court to overrule the demurrer.[57] Bitty was to be tried as a felon. Justice Harlan for the Court stated that "full effect must be given to the intention of Congress as gathered from the words of the statute."[58] It was clear, however, that "for any other immoral purpose" was ambiguous and required interpretation. Harlan rejected the narrow application of *ejusdem generis* by the Circuit Court:

> The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse.[59]

Quoting Chief Justice Marshall, Justice Harlan explained that "though penal laws are to be construed strictly, they are not to be so strictly as to defeat the obvious intention of the legislature."[60]

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[52] 208 U.S. 393 (1908).

[53] United States v. Bitty, 155 F. 938 (C.C.S.D. N.Y. 1907).

[54] *Id.* at 939.

[55] *Id.*

[56] *Id.* at 939-40.

[57] *See Bitty*, 208 U.S. 393.

[58] 208 U.S. at 401.

[59] *Id.* at 402.

[60] *Id.*

Harlan ignored the Immigration Commission Report that considered only commercial vice.[61] The reasonable inference from the report should have been that "any other immoral purpose" would relate to the importation of pimps, madams and other managers of prostitutes and to paid sexual performers who were not prostitutes. Without contextual foundation, Harlan concluded that the statutory words implied an intention by Congress to view importation of a mistress as an immoral purpose.

In 1934, the Supreme Court decided *Hansen v. Hoff*,[62] which attempted to limit the scope of the *Bitty*. It interpreted the language of Section 3 of the Immigration Act of 1917, which excluded from admission to the United States persons entering the country "for the purpose of prostitution or for any other immoral purposes."[63] *Hansen* involved a citizen of Denmark who resided in Los Angeles. She entered a sexual relation with a married man but did not live with him and was not supported by him. She traveled to Europe with him and upon reentry to the United States was ordered deported. The Supreme Court reversed the order of deportation and distinguished *Bitty*. In *Bitty*, the phrase "any other immoral purpose" was applied to a mistress who lived with the defendant and was supported by him. In *Hansen*, the Court held that extramarital relations short of concubinage are outside the *ejusdem generis* limits of immoral purpose.[64] Here, the purpose of the journey was to visit her parents and the purpose of the return to the United States was to resume her legitimate job.

IV. CONSTRUCTION OF THE MANN ACT

The Mann Act was originally called the "White Slave Traffic Act."[65] Section 2 of the Act made it a felony knowingly to transport in interstate or foreign commerce or in the District of Columbia "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[66]

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[61] *Id.* at 401-02

[62] 291 U.S. 559 (1934).

[63] 39 Stat. 874 (1917).

[64] *Hansen*, 291 U.S. at 562.

[65] Congress amended the statute in 1948 and deleted "White Slave Traffic Act." 62 Stat. 812.

[66] 36 Stat. 825 (1910):

> Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage

Thus, although the popular name of the Act suggested otherwise, the operative language of the statute was not limited to white females. Since proposals for the act had originated in the House Committee on Immigration and Naturalization, it is clear that its first aim was to strengthen the existing law against panderers and procurers in foreign commerce.[67] Even after the House Committee on Interstate and Foreign Commerce took over the dominant role in sponsoring the legislation, its report refers to the HR12315 bill as one "to regulate and prevent the transportation in interstate and foreign commerce of *alien* women and girls for immoral purposes."[68] However, the language of the Mann Act in its final form made clear that it was not limited to alien women, but applied to all women and girls in interstate and foreign commerce.

The debates in Congress and the committee reports make it clear that the objective was to punish panderers and procurers of unwilling prostitutes, those who were equivalent to slaves.[69] The legislative record shows that the legislators did not consider what percentage of women were forced into prostitution. This is significant because it lead to the erroneous inference that most white prostitutes were enslaved. The legislative history demonstrates that Congress intended the courts to apply the three statutory terms—prostitution, debauchery, and "any other immoral purpose"—only to commercialized vice. This view should have been reinforced by the rule of

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> in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution of debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction, thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

[67] IMPORTATION AND HARBORING OF WOMEN FOR IMMORAL PURPOSES, S. DOC. 753, 61st Cong., 3d Sess. 68-69 (1910). This report is not limited to white women; it devotes two pages to Chinese and Japanese women. *Id* at 68-69.

[68] White Slave Traffic Act, H.R. Rep. 47, 61st Cong., 2d Sess., at 1 (1909).

[69] "The characteristic which distinguishes 'the white slave trade' from immorality in general is that the women who are the victims of the traffic are unwillingly forced to practice prostitution." *Id.* at 10. Congressman Saunders quoted the Immigration Commission Report with similar statements. 45 CON. REC. 1037 (1910). *See* GRITTNER, *supra* note 3, at 86-91.

statutory construction that penal statutes shall be narrowly construed in order to protect the accused.[70]

Under the language of the statute, panderers and procurers were not the only potential felons. The Supreme Court held in *Hays v. United States*[71] that a prostitute's potential customer could be indicted for a felony if he supplied her a train ticket for interstate travel for the purpose of having sexual intercourse with him. Any male traveler who employed a prostitute, and without knowledge of the Mann Act took her across a state line, would likely be willing to pay blackmail rather than ruin himself and his family in a felony trial.[72]

The Congressmen who drafted the Mann Act seem to have paid no attention to the possibility that some of the supposed victims, willing prostitutes, might also find themselves felons. Any willing prostitute ran the risk that she could be indicted along with her procurer. When this issue was finally considered in *United States v. Holte*,[73] the Supreme Court held that the prostitute could be prosecuted for conspiracy to violate the Mann Act. Clara Holte was indicted under the U.S. Penal Conspiracy Act of 1909[74] for conspiring with one Laudenschleger to transport herself from Illinois to Wisconsin for the purpose of prostitution. Justice Holmes, for the majority, reversed the District Court decision which held that the woman was not a party to the offense, but only the victim. Holmes recognized that the general language of the Mann Act could be interpreted to include not only the "white slave," but also the willing professional prostitute who was not a victim. If the woman were the first to suggest the crime of transportation in commerce for the purpose of prostitution, she was guilty as a conspirator.[75] Justice Lamar dissented, pointing out that the Mann Act was aimed only at panderers and procurers and treated the women as victims.[76] He felt that mere consent of the woman could not change her statutory status from victim to wrongdoer,

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[70] NORMAN J. SINGER, SUTHERLAND STAT. CONST. §59.03 (4th ed. 1986).

[71] Hays v. United States, 231 F. 106 (8th Cir. 1916), *aff'd*, 242 U.S. 470 (1917). The application of the Mann Act to a defendant transporting a willing prostitute in the District of Columbia was affirmed in United States v. Beach, 324 U.S. 193 (1945).

[72] *See* LANGUM, *supra* note 3 at 77-96. There are no estimates of the total numbers or dollar amounts of such extortion since 1910.

[73] 236 U.S. 140 (1915). *See* Marlene J. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEORGETOWN L.J. 1111 (1984).

[74] 35 Stat. 1096 (1909).

[75] 236 U.S. at 145. The Court later held that mere consent of the woman to be transported in violation of the Mann Act cannot be the basis of a conspiracy prosecution against her. She must have been an active planner of the violation to be validly charged with conspiracy. Gebardi v. United States, 287 U.S. 112 (1932).

[76] 236 U.S. at 146 (Lamar, J. dissenting).

since "[t]o hold otherwise would make the law of conspiracy a sword with which to punish those whom the traffic act was intended to protect."[77]

The Supreme Court upheld the constitutionality of the Mann Act in *Hoke v. United States*.[78] In that case, Effie Hoke and Basil Economides were charged with knowingly inducing Annette Baden and her sisters to travel from New Orleans, Louisiana to Beaumont, Texas for the purpose of prostitution. The trial court overruled a demurrer that challenged the power of Congress under the Commerce Clause to regulate interstate transportation of women for prostitution.[79] After trial and conviction, the defendants appealed. The Supreme Court affirmed.[80] Justice McKenna, writing for the Court, emphasized the great breadth of the Commerce Clause: "The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary."[81] He did not treat the issue that is argued here, the distinction between jurisdiction and substance. The substantive object of the transportation in *Hoke* was prostitution, commercial transactions in sex. It was correctly subsumed under the plenary power of Congress under the Commerce Clause to regulate all transactions among the several states.[82] While citations were unnecessary in a constitutional ruling, McKenna cited the transport of lottery tickets and impure food for the purpose of sale in other states as analogous violations of statutes based on the Commerce Clause.[83]

The first case where the issue of federalism was raised in reference to the Mann Act is *Athanasaw v. United States*.[84] Here there was no charge of prostitution or any other commercial vice. Defendants were charged with violating the Mann Act for transporting a girl for the purpose of debauchery. Seventeen-year-old Agnes Couch responded to an advertisement for chorus girls in Atlanta and signed a contract to appear in Tampa, Florida. On Couch's first day at the Tampa theater, members of the company made improper sexual advances toward her, and the police were called. Defendants Athanasaw and Sampson, operators of the theater, were indicted, convicted of debauchery, and sentenced to prison. On appeal, the convictions were affirmed. Justice McKenna, writing for the Court, upheld the following jury

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[77] *Id.* at 148 (Lamar, J. dissenting).

[78] 227 U.S. 308 (1913).

[79] United States v. Hoke, 187 F. 992 (D.C.E.D.Tex., 1911).

[80] *Hoke*, 227 U.S. at 320.

[81] *Id.*

[82] *See* WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 84-186 (1953); MICHAEL CONANT, THE CONSTITUTION AND THE ECONOMY: OBJECTIVE THEORY AND CRITICAL COMMENTARY 90-92 (1991).

[83] Champion v. Ames, 188 U.S. 321 (1903); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

[84] 227 U.S. 326 (1913). *See* Langum, *supra* note 3, at 72-75.

instructions on the meaning of debauchery: "to corrupt in morals or principles; to lead astray morally into dishonest and vicious practices; to lead into unchastity."[85] The question in this case was "whether the employment to which the defendants called the girl and the influences with which they surrounded her tended to induce her to give herself up to a condition of debauchery which eventually, necessarily, and naturally would lead to a course of immorality sexually."[86]

Athanasaw did not involve commercial vice. Vulgar language had shocked the modesty of the girl, and the police rescued her fifteen minutes later. The substance of the offense had no commercial aspect. Debauchery that did not propose or lead to paid transactions in sex had no foundation in the Commerce Clause. Therefore, the indictment should have been dismissed.[87]

In *Caminetti v. United States*,[88] the Court had to interpret the statutory language, "for any other immoral purpose." The defendants were two young married men from California who took their mistresses by train to Nevada for a weekend that included sexual relations. There was no evidence that the women were paid and the indictment did not charge the defendants with transporting the women across state lines for the purpose of prostitution. Caminetti and Diggs were convicted on counts relating to immoral purpose, and the conviction was affirmed.

Attorneys for the defendants argued that the statute was limited to commercial vice. They cited the title of the statute, the White Slave Traffic Act, and the Congressional committee reports that concerned only sale of sexual services.[89] They also relied upon an opinion of the Attorney General, in a case of potential prosecution of a customer of a prostitute, that the element of traffic was absent and that such the case was not "within the spirit and intent of the Mann Act."[90] The attorneys failed to make the argument suggested here that the constitutional allocations of governing power barred federal prosecution of non-commercial sex under a penal statute enacted pursuant to the Commerce Clause.

Justice Day, for the majority, wrote that the meaning of the language of the Mann Act was unambiguous, therefore a duty of interpretation did not

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[85] 227 U.S. at 331.

[86] *Id.* at 332.

[87] While *Athanasaw* was not overruled, the Supreme Court in 1954 repudiated the doctrine of "leading into temptation." United States v. Amadio, 215 F.2d 605 (7th Cir.), *rev'd per curiam*, 348 U.S. 892 (1954).

[88] 242 U.S. 470 (1917). *See* LANGUM, *supra* note 3, at 97-138; R. ANDERSON, THE DIGGS-CAMINETTI CASE 1913-1917: FOR ANY OTHER IMMORAL PURPOSE, 2 Vols. (1990).

[89] 61 L.Ed. 447 (1917).

[90] *Caminetti*,242 U.S. at 498.

arise.[91] He held that "immoral purpose" could be used in its "ordinary and usual sense" when applied to transporting a mistress.[92] He then referred to the immigration case of *United States v. Bitty,*[93] where "any other immoral purpose" was applied to importing a mistress. He seems to have observed no distinction between moral standards in an immigration act based on a principle of the law of nations and the Mann Act based on the Commerce Clause, an enumerated power limited to transactions.

In applying the rule of construction of *ejusdem generis,* Justice Day again refused to limit "any other immoral purpose" to commercial vice.[94] Here again, he emphasized that the plain meaning of "immoral purpose" determined the construction, and that this went beyond commercial vice.

In this crucial case, giving the first authoritative construction of "any other immoral purpose" under the Mann Act, counsel failed to argue, and the court failed to take into account, the interaction between the issues of federalism and the procedure/substance distinction. The statutory phrase "in interstate or foreign commerce" was a jurisdictional clause needed to bring the issue before the federal courts. The substantive regulation referred to transportation of women and girls for prostitution, debauchery or any other immoral purpose. Here the second fundamental issue, determining whether the substance of the statute can be subsumed under a constitutionally enumerated power, comes into play. Only prostitution concerned commercial transactions under Commerce Clause regulation. Debauchery and immorality were non-commercial. These items were reserved to the states just as much as regulating the making of wills or defining negligence in local auto torts.

Justice McKenna, who four years earlier in *Athanasaw* had pushed non-commercial debauchery into the same genus as commercial prostitution, dissented in *Caminetti.*[95] McKenna rejected the majority view that "any other immoral purpose" was unambiguous.[96] If the term was not to cover all of human morality, judicial construction of the language was necessary. The Court had to choose between all sexual immorality or sexual immorality in

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[91] Frankfurter has asserted that "the notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage . . . to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice . . . A statute, like other living organisms, derives significance and substance from its environment, from which it cannot be severed without being mutilated." United States v. Monia, 317 U.S. 427, 431 (1943) (Frankfurter, J., dissenting).

[92] This was in effect a denial of a diversity of value judgments about morals in American society. Compare the view that moral conduct is a subjective concept. TAMOTSU SHIBUTANI, SOCIAL PROCESSES 166-68 (1986); *see* MORRIS GINSBERG, ESSAYS IN SOCIOLOGY AND SOCIAL PHILOSOPHY: ON THE DIVERSITY OF MORALS, Vol. 1, (1956).

[93] 208 U.S. 393 (1908).

[94] 242 U.S. at 487.

[95] 242 U.S. at 496. Chief Justice White and Justice Clarke joined in this dissent.

[96] 242 U.S. at 496-97

commercial transactions. As noted above, the committee reports demonstrated that the objective of Congress was to stop panderers and procurers in interstate commerce.

Mortensen v. United States[97] posed a factual situation that demonstrated that even the language "transport in interstate commerce". . . "for the purpose of prostitution" could be ambiguous. The Mortensens, who operated a house of prostitution in Grand Island, Nebraska, planned a vacation trip by auto to Salt Lake City, Utah. Two prostitutes, who were employees of the defendants, asked to come along for the vacation. After the vacation, all four drove back to Nebraska and the prostitutes reentered their trade at the Mortensen house. The Mortensens were indicted for transporting the women across state lines for the purpose of prostitution, were tried by a jury, and convicted. The Court of Appeals affirmed the conviction by a vote of 2 to 1.[98]

The Supreme Court reversed by a vote of 5 to 4. Writing for the majority, Justice Murphy found that there was a lack of relevant evidence from which the jury could properly find, beyond a reasonable doubt, that the trip was for the purpose of prostitution within the meaning of the Mann Act.[99] The return journey was part of the vacation and not for the purpose of prostitution.[100]

The great "liberals" on the Court dissented. Chief Justice Stone, for himself, and Justices Black, Douglas and Reed, argued that the jury finding was supported by ample evidence.[101] But the only evidence was that the women willingly chose to return to commercial vice. This was another case in which counsel for defendants failed to raise and argue explicitly the rule for strict construction of penal statutes.[102] The presumptions arising out of that rule should have given strong additional support for the defendants.

In *Cleveland v. United States,*[103] Mormons who transported plural wives across state lines in their private automobiles for purpose of cohabitation were convicted of violating the Mann Act.[104] As in the *Mortensen* case, the preliminary issue of federal jurisdiction was ignored.

Justice Douglas, for the majority, affirmed the conviction. He cited the *Bitty* case as a "forceful precedent" for construction of the phrase "immoral purpose" in the Mann Act, failing to note that the statute in the *Bitty* case arose under the inherent national power to limit immigration, not the com-

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[97] 322 U.S. 369 (1944).

[98] Mortensen v. United States, 139 F.2d 967 (8th Cir. 1943).

[99] 322 U.S. at 375.

[100] *Id.*

[101] 322 U.S. at 377.

[102] SINGER, *supra* note 70 at § 59.03.

[103] 329 U.S. 14 (1946).

[104] United States v. Cleveland, 59 F. Supp. 890 (D.C. Utah 1944), *aff'd* 146 F.2d 730 (10th Cir. 1945).

merce clause.[105] Thus, "immoral purpose" that had been applied to mistresses in *Bitty* was projected without penetrating analysis into the Mann Act in *Caminetti*. This was the shaky foundation for asserting that the Mann Act was not limited to commercial sex. Without recognition of the limited scope of the commerce clause as an enumerated national power, he held the *ejusdem generis* rule of construction could not be used "more narrowly than the class of which they are a part."[106] Immoral non-commercial sex included polygamy, which was illegal under state laws. After noting that polygamy was not commerce, Douglas concluded: "the power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have the quality of police regulations is not consequential."[107]

Justices Black and Jackson dissented with a one-sentence explanation: "They are of the opinion that affirmance requires extension of the rule announced in the *Caminetti* case and that the correctness of that rule is so dubious that it should at least be restricted to its particular facts."[108]

Justice Murphy wrote a much longer dissent, first emphasizing the relativity of morals: "Polygamy, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears."[109] Applying the *ejusdem generis* rule to include such marriages, he argued, "ignores reality and results in an unfair application of the statutory words."[110] Murphy emphasized that the title to the White Slave Traffic Act and the Congressional reports on which the Act was based limited the law to unwilling prostitution, a narrow purpose with absolutely no connection to the practice of polygamy.

Justice Rutledge wrote a concurring opinion that was more realistically a dissent.[111] He opined that the *Caminetti* decision was wrong, as Justice McKenna's dissent in that case demonstrated. He believed that Congress' failure to amend the Mann Act in order to correct the *Caminetti* error was not an approval of *Caminetti*. Silence of Congress is not automatic approval, he cautioned, especially when the charge is the broadening of a penal statute in violation of the rule of strict construction.[112] The pressure of business and many political forces may interfere with Congressional review of court decisions and consequent statutory revision. Rutledge concurred only because

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[105] 329 U.S. at 16.

[106] *Id.* at 18.

[107] *Id.* at 19.

[108] *Id.* at 20-21.

[109] *Id.* at 26.

[110] *Id.* at 25.

[111] *Id.* at 21-24.

[112] *Id.*

five members of the Court refused to overrule *Caminetti*. He thus adhered to strict application of stare decisis to statutes. Like the other justices, he did not realize that there was a constitutional issue here. Under federalism, the Congress has no power to regulate non-commercial sex. If the constitutional issue had been briefed and argued, the Court could have adopted constitutional reasoning that rejects stare decisis.[113] As Justice Frankfurter had earlier noted, "the ultimate touchstone of constitutionality is the Constitution itself, and not what [the Court has] said about it."[114]

After World War II, and especially after 1960, society's opinion of sexual freedom changed radically.[115] Even before the 1986 Amendment to the Mann Act, the policy of the Justice Department had been to limit investigations and prosecutions to procurers and panderers of prostitutes. It was only when citizens filed complaints that female family members had been persuaded to cross state lines for private sex that there were prosecutions.[116] Additionally, while counsel have failed to argue the principle of strict construction of penal statutes, some lower courts in this era of greater sexual permissiveness had sought to limit the scope of the Mann Act. In *United States v. Prater*,[117] for example, the court reversed the conviction of a female transporter. Della Marie Prater had driven herself and Vivian Dearing from Missouri to Illinois under a contract to perform a striptease act at a party. At the party, Dearing engaged in sex for money. There was no evidence at trial that the defendant had known her partner would engage in prostitution. Thus the statutory requirement that she "knowingly transport for purpose of prostitution" was not met.[118]

In 1986 Congress finally found a way to limit the terms in the Mann Act that had attempted in vain to legislate morality. The technique used to evade outcry by moral fundamentalists was to emphasize that the primary purpose was to make the law gender neutral. Secondly, the amendments were hidden in the Child Sexual Abuse and Pornography Act of 1986.[119] The terms "debauchery" and "other immoral purpose" were deleted. In their place, the statute criminalized the knowing transport of any individual in interstate or foreign commerce with intent that such individual engage in prostitution "or

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[113] The power in the Supreme Court in constitutional cases to overrule past similar cases that the Court Rules were in error overrides the principle of strict application of *stare decisis* to statutes. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 57-60 (1961).

[114] Graves v. United States, 306 U.S. 466, 491 (1939).

[115] *See* LANGUM, *supra* note 3, at 221-41.

[116] *See, e.g.*, United States v. Marks, 274 F.2d 15 (7th Cir. 1959); Reamer v. United States, 318 F.2d 43 (8th Cir. 1963), cert. denied, 375 U.S. 869.

[117] United States v. Prater, 518 F.2d 817 (7th Cir. 1975). *See* United States v. Love, 592 F.2d 1022 (8th Cir. 1979).

[118] *Prater*, 518 F.2d at 820.

[119] Pub.L. No. 99-628, 100 Stat. 3511-12 (1986).

in any sexual activity for which any person can be charged with a criminal offense."[120] Both the former Section 3, which related to coercion and enticement, and the former Section 4, which related to girls under eighteen, required transport on an interstate common carrier. The 1986 amendments dropped that requirement and adopted the same language as the first section.

The new language in effect requires an intent to violate state criminal law relating to sexual activity. To the extent that states have repealed criminal statutes for fornication and adultery, the Mann Act can no longer be used to prosecute unmarried couples who cross state lines for a weekend of cohabitation. But most state criminal laws relating to sexual activity other than prostitution are not for paid activity. In other words, they are not commercial. Knowingly transporting persons across state lines for noncommercial sex crimes cannot be validly subsumed under the Commerce Clause. The issue of federalism should be argued in all such prosecutions.

V. CONCLUSION

If the social scientists and other critics who view the illegality of prostitution as a failed social regulation are correct, the Mann Act as amended and state penal laws against consensual prostitution by adults should be repealed and replaced by comprehensive health regulation. The moral panic of 1910 when the Mann Act was enacted has long passed, and the modern era of sexual liberalism should lead to its repeal. The Mann Act was never needed

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[120] The current offense provisions are as follows:

§ 2421. Transportation generally

"Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

§ 2422. Coercion and enticement

"Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

§ 2423. Transportation of minors

"Whoever knowingly transports any individual under the age of 18 years in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than ten years, or both.

100 Stat. 3511.

as a supplement to state penal laws against pimps and procurers. The evidence indicates the futility of the laws against prostitution by willing adults. The onset of AIDS makes health regulation of prostitutes the primary concern. Now is the time for Congress to Repeal the Mann Act.