

## **Abstract**

*Prostitution in America is widespread and the harms associated with the sex trade are heartbreaking. Many moved by these harms have argued that there is nothing immoral about prostitution. Others have tried to show that a properly liberal government demands that we separate our moral and legal views. Despite persistent arguments by academics and reforms, little progress has been made in reforming prostitution laws and protecting vulnerable of women.*

*Arguments that prostitution is not immoral or the appropriate liberal role of government fail to respect deeply held moral intuitions and thus cannot garner the consensus for reform. This article argues that progress cannot be made so long as reform arguments are premised on particular or controversial philosophical arguments. Rather, it is critical to see that from a wide range of philosophical starting points, one can agree with the commonly held intuition that prostitution is immoral without advocating legally prohibiting it. The major insight here is to stop viewing prostitution as intractably controversial. Most importantly and in contrast with prior efforts advocating reform, this article shows that agreement is not limited to traditional liberal positions but that agreement is possible even for those committed to the idea that the purpose of law is to promote virtue.*

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*An (In)decent Proposition: Prostitution, Immorality and Decriminalization*<sup>†</sup>

*Ekow N. Yankah*<sup>‡</sup>

**Introduction**

Prostitution in America is widely spread the harms that are associated with the sex trade in America are nothing short of tragic. Violence against women is endemic. The threat of disease looms. Most tragically, a hidden number of women are victims of human trafficking, forced into a life of sex slavery. Many of these harms go unaddressed because victims feel as though they are outside the protection of the law. Despite the magnitude and gravity of this problem, efforts to address the problems of prostitution are rare outside the academy. Political actors are understandably hesitant take the political risks involved in changing the law to protect sex workers. It is because prostitution seems so controversial that it remains a third rail. Without a way to garner consensus in broader political conversation, there will be little progress regardless of the terrible toll on vulnerable women, whose lives are too often visited by fear, violence and death.

The problem is what appears to be deeply embedded disagreement about the moral status of prostitution. On the one hand there are those who argue that there is nothing morally suspicious about the exchange of money for sexual “services.” Our unease surrounding prostitution, they argue, is the remnant of antiquated thinking bordering on the superstitious, a sort of communal (or in my case, personal) hang-up left over from parochial school indoctrination. Allied with them are devoted liberals, who forcefully argue that the rightness or wrongness of prostitution is irrelevant to its legal status. These theorists argue state power should be restricted from interfering with certain individual liberties. Political liberals of this type do not condemn communal ethical views as outmoded but rather implore us to keep our sense of what is unethical separate from what ought to be illegal. Lastly, there is the subtle and important internecine debate in feminist scholarship, with the faction which favors

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<sup>‡</sup> Associate Professor, Cardozo School of Law. B.A. 1997, University of Michigan; J.D. 2000, Columbia University School of Law; B.C.L., 2002, Oxford University.

decriminalization forwarding arguments either grounded in autonomy and empowerment or asserting that laws prohibiting prostitution are grounded in patriarchal views of the sexual purity of women.

The anthology of academic works on prostitution is worth noticing for two remarkable features. The first is the breadth and the depth of the academic position advocating the decriminalization of prostitution. Important intellectuals since John Stuart Mill have persistently argued for the decriminalization of prostitution. That is not to ignore important voices raised in counterargument—particularly one facet of modern feminist jurisprudence. Still the bulk of scholarship highlights the harms of the legal prohibition of prostitution in America and advocates decriminalization.

The second striking feature is the complete lack of effect of this sustained argumentation. In America, less than a handful of jurisdictions legally permit prostitution. So despite the steady stream of urging, legislatures are unmoved. This is even more striking given the profound effect academic writing has had on other fields, the effect of the Law and Economics movement springs to mind. The natural conclusions are either that academics are wholly unheard or unpersuasive on this issue or arguments that prostitution is morally harmless or the commands of liberalism are missing something deep. This article attempts to find that missing piece, to find a way forward.

The problem with the arguments of reformers is that they run counter to the deeply held moral intuitions of many. What decriminalization arguments miss is that there are sound moral reasons to believe prostitution is wrong, reasons that speak to me deeply. At home and particularly when traveling to countries where prostitution is public and endemic, I have always deeply felt it would be flatly immoral to accept the solicitations of sex workers. Indeed, to lay my cards on the table, even in penning this piece, I am occasionally gripped by moments of doubt. Unlike those who seem to have total confidence that philosophical conclusions settle the matter, I continue to find it unsettling to write a piece on decriminalization of prostitution. In this case, the political is personal. The belief that prostitution is morally wrong is a considered and deeply held one. At best, the current arguments seeking to reform prostitution laws ask people to do the very difficult, set aside their sense of right and wrong or cabin them from the business of running of a society. At worst, such arguments treat deeply held moral criticism dismissively.

Arguments that seek to convince others to discard long held moral commitments are, of course, not only acceptable but often essential scholarly

projects. At the core of much academic work is pursuing and advocating the most powerful arguments to convince others of one's position. Nor could a complex and heterogeneous society last long without boundaries between each person's personal morality and the requirements of law. Still, to the extent that theories of decriminalization ask others to disregard core intuitions, one is unlikely to convince anyone who did not already agree with the position in the first place. This is especially true where the arguments are founded on nuanced and controversial moral claims. Such a theory faces the considerable task of convincing an audience that a particular complicated set of metaphysical arguments are right and, once that highly unlikely task is accomplished, that a particular application of that metaphysics is perfect.

This is not a promising method for generating legal reform in the real world. While such debates generate great philosophical heat, one even hopes advancement, they are unlikely to garner the consensus needed to result in changes to the law. The problems surrounding prostitution seem intractable precisely because it is controversial; the only certainty seems to be that our common moral intuitions are deeply divided. Because those intuitions seem deeply divided, any progress which requires people to ultimately be convinced of the correctness of a unique set of philosophical is unpromising, to say the least.

Let me be clear that this is not merely a matter of abstract concern, a neat philosophical puzzle to be solved. The power of the state finds its most visceral form in the police bursting through doors, the power of arrest and imprisonment. The controversy surrounding prostitution often results in incoherent punishment that interacts poorly with race and class and useless policies that divert much needed resources. That our criminal laws mete out unjustified pain and suffering to those arrested or abandoned by the criminal justice system is a grave concern. Many of the most vulnerable continue to be unprotected or worse, driven into lives of violence as the cost of our inability to find a just criminal law system. Put bluntly, our inability to find a way to make progress on prostitution banishes tens of thousands of women from the protection of the law, condemning them to beatings at the hands of pimps and leaving them defenseless in a shadow world of sex slavery.

Were this due to irreconcilable conflicts in our moral commitments, perhaps we could only shake our heads at the tragedy. But there is little reason to believe the search for agreement, and in turn progress, in the conflicting moral intuitions that undergird controversial legal prohibitions have been exhausted. Searching for agreement is often uninteresting for those engaged in philosophical inspection. The route to philosophical superstardom is the ability to find ever

more intricate hypotheticals which isolate distinctions between competing philosophical theories. It does not seem illuminating to focus on philosophical agreement. Figuring out that cold blooded murder violates the tenets of nearly all moral codes is boring.<sup>1</sup>

But there are times when agreement is important because it is surprising, subtle and counterintuitive - obscured by surface conflict. Agreement is all the more striking in areas usually assumed to be rife with intractable disagreement and deep moral controversy. There are times when one uncovers shared conclusions shared which have been overlooked; times when the best way forward is not to construct intricate points of disagreement but rather to note places in which powerful theories converge. Finding agreement is especially important when the stakes are the lives of thousands of poor women.

Careful inspection of the major philosophical systems that motivate our criminal theory reveal ways we can agree on “controversial” major reforms on prostitution. It is important, then, to see that neither shared premises or agreement with idiosyncratic theories are necessary to find agreement on legal reform. Just as importantly, contrary to intricate philosophical efforts that require many to reject their felt or considered moral intuitions, we can find philosophical agreement that is in perfect accord with commonly held moral beliefs. Put plainly, we can respect vastly different starting points while still finding common ground on the controversial project of decriminalizing prostitution. This piece will show how we can *agree* on prostitution reform.

If the nearly universal American prohibition on prostitution adds a level of difficulty in convincing the reader that we can all agree on decriminalization, it makes illuminating possible agreement vastly more important. The stakes are high. Sex workers often find themselves unprotected or, worse, sexually abused by the police, held hostage in foreign lands and at the mercy of violent pimps. If there is a way to find agreement which mitigates this tragedy, we cannot let it pass.

This article then represents a different project than prior conversations about reforming prostitution laws in America. I will not attack the problem of prostitution as one of deep moral controversy which can be settled by overthrowing commonly held moral intuitions and showing readers the persuasiveness of my particular nuanced moral theories. Like many, I have

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<sup>1</sup> Some readers will already start generating disagreement with the statement that murder violates the best moral system. This only proves my point. Finding exotic systems and fact patterns to generate disagreement is an occupational habit.

developed my own particular legal and philosophical theories. For the moment, I set them aside.

My claims are, at bottom, simple. Despite the efforts of reformers to persuade that there is nothing immoral about prostitution, many people find it morally repugnant. Indeed, not only do many Americans believe that prostitution represents some sort of moral harm but it is the immorality of prostitution more than anything else that commits most to keeping prostitution illegal. Part I will inspect the commonly offered arguments for the prohibition of prostitution, revealing what many already know; these arguments offer little support for a prohibition and, in some cases, actually undermine the current laws. This should lead us to suspect that something else is going on here. What people care about in prohibiting prostitution is that it is wrong or immoral. Arguments which impeach deeply held convictions based on very particular metaphysical frameworks end up being viewed as unconvincing at best or condescending at worst.

More importantly, Part II will argue that the commonly held view that prostitution is morally wrong is correct or at least plausible. Inspecting the three major philosophical frameworks of the Western world, Aristotelian virtue theory, Kantian deontology and Millian consequentialism, give good reasons to regard certain behaviors as morally harmful. It is particularly interesting to note that this agreement is not simply at a high level of abstraction, where it is perhaps too easy to agree, but on the concrete moral wrongness of prostitution. It is no small thing to notice that Aristotle, Kant and Mill agree on particulars. Regardless of what fancy modern philosophers may try to convince, the common sense intuition that prostitution is wrong is based on sound moral reasoning.

Without illustrating that one can support legal reform of our prostitution laws despite its immorality, reform efforts are a non-starter, leaving thousands of women abandoned by the law. Part III will propose that despite viewing prostitution as immoral, one can support the decriminalization and regulation of prostitution. Further, Part III will illustrate how we can reach this conclusion regardless of one's underlying philosophical commitments. Mill, for example, believed that certain acts could be morally crippling and yet his utilitarianism led him to libertarian values and an expansive view of individual freedom. Likewise, Kant was convinced that prostitution was a violation of one's deepest moral duties yet Kantian autonomy has long been the basis of the claim that one cannot be forced by the law to be morally upright. Some of these arguments have been made before. What is more surprising is that one need not adopt any liberal legal principle to support decriminalization of prostitution. Even virtue theorists, who

are committed to the idea that law fundamentally serves to guide and foster moral virtue in society, can take notice of the damage wrought by the current law and support reform. Again, from a wide range of moral starting points, one can support decriminalization of prostitution even while convinced that prostitution is immoral.

I have claimed that our deep moral commitments make sense of the idea that prostitution is immoral and yet support a model of decriminalization. It would be too much to claim that these conclusions can garner universal agreement. Some readers will be unconvinced by the first step and maintain that there is nothing immoral about prostitution. These readers, however, need not be persuaded for they may readily sign on to the project of reform (though some might think the project does not go far enough). Other readers may not share any of the philosophical starting points. For example, for those who subscribe to a divine will theory of law, a belief that God forbids prostitution forecloses further deliberation. Another glaring omission is the important internecine debate within the feminist literature.<sup>2</sup> While some feminists have long argued that the prohibition against prostitution is based on patriarchal views which prize women for their sexual purity, others are deeply committed to the view that prostitution cannot be separated from the broader power inequalities in society and the objectification of women as mere sexual instruments. If I am to respect the range of these views, I cannot manufacture agreement where there is none. Still if one cannot generate universal agreement, to note that consequentialists, deontologists and virtue theorists can agree on reforming what is thought to be a controversial area of criminal law is no small thing.

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<sup>2</sup> The debate between feminists is so rich that to even canvas it is to risk omitting an important contributor. For a sense of the opposing views on the subject: Laurie Shrage, *Should Feminists Oppose Prostitution?*, in *THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS*, (4<sup>th</sup> ed., ALAN SOBLE, ed., 2002); Joyce Outshorn, *The Political Debates on Prostitution and Trafficking of Women*, 12 *SOCIAL POLITICS* 141 (2005); *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY*, (Frederique Delacoste and Priscilla Alexander, eds., 1987); Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 *ETHICS* 748 (2002); Martha Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, *JOURNAL OF LEGAL STUDIES* (1998); *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION* (D.K. Weisberg, ed., 1996); Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 *YALE JL & FEMINISM* 109 (2006); KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1984); Andrea Dworkin, *Prostitution and Male Supremacy*, in *LIFE AND DEATH* (1997); Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 *MICH. J. GENDER & L.* 13, 13 (1993); Martha Minow, Comment, *Incomplete Correspondence: An Unsent Letter to Mary Joe Frug*, 105 *HARV. L. REV.* 1096 (1992).

What then should we take away from this accord; does philosophical agreement that prostitution should not be criminalized mean we ought to make prostitution legal? Unfortunately, philosophical conclusions rarely apply themselves in a straight-forward manner. Even where there is agreement, much depends on complex and difficult to gather facts. But this does not reduce our philosophical conclusions to academic fancy. Philosophical agreement can garner consensus from those with vastly different starting points, provide guidance and generate concrete points of reform. While there can be wide spread agreement on decriminalizing prostitution, there is also consensus on the limits of decriminalization. Part IV will outline a new model of criminal law regulating prostitution. This model, Proposition X, builds on the points of agreement between Millian consequentialism, Kantian deontology and Aristotelian virtue ethics. It proposes decriminalizing prostitution while, at the same time, combating the tragedy of human trafficking, carefully monitoring the health risks of commercial sex and restricting the exposure of the public, especially children, to highly sexualized images. Proposition X differs in important ways from current movements to completely decriminalize prostitution. But what stands out about Proposition X is not its novelty but that it is built on justifications that can garner broad support.

The fact that there can be wide philosophical agreement on a specific set of legal reforms about prostitution is important, that these reforms may allow us to save thousands of women from fear, violence and rape makes reform a moral requirement. The purpose of this piece is to arm lawmakers and norm entrepreneurs with the arguments needed to move reform forward; arguments that can respect the common intuition that prostitution is immoral but garner support for decriminalization among liberals and non-liberals alike.

None of this, however, gives us a reason to be blithely happy. Remember that we started with the claim that the common intuition that prostitution is immoral is correct. Even given agreement in decriminalization, we have good reason to be disturbed at the moral costs. This piece concludes by inspecting some of the weaknesses Proposition X must face. Some, of course, are practical and policy oriented. No less important is facing the moral cost of a world in which admittedly immoral behavior can be purchased. We must recognize the moral costs of having sin for sale. It is at bottom this moral cost which drives much of our legal stance on prostitution. It is to the idea that the prohibition of prostitution is driven by a sense of moral harm we first turn.

**Part I: A Moral Prohibition**

At first blush the idea that the legal status of prostitution turns on moral objections to commercial sex seems like a philosopher's conceit. After all, it is rare that arguments surrounding debates about prostitution are explicitly conducted in philosophical terms. Further, there is the constant difficulty of disentangling particular reasons that underlie any individual law. Given these difficulties, it is important to admit that one cannot conclusively prove that moral objections are central to our ban on prostitution.

If one cannot prove that moral objections motivate the current criminal prohibition, one can reveal the unconvincing nature of the ostensible empirical justifications. When one inspects the commonly offered rationales for the ban on prostitution what stands out is the difficulty of gathering precise empirical evidence given the illegality, secrecy and stigma that surrounds prostitution. There remains much about the economy of commercial sex which is unknown.<sup>3</sup> Prostitution affects our society in complex and interrelated ways that raise questions of class, race and privilege that are difficult to isolate. The problem is further complicated given the difficulty of disentangling the problems inherent in prostitution from those that arise because it is illegal.<sup>4</sup> The fact that sex workers are placed outside the legal system means that their work may be pushed into close proximity with other illegal acts and actors. While we are not without any facts, this does undermine the confidence in justifications premised on any particular controversial facts about prostitution. Indeed, if the known research is accurate, it is startling how many of the commonly offered justifications for the ban on prostitution fail.

Let us start from the gravest of issues surrounding prostitution. Across the world, numbers of young women and others are coerced into becoming sex slaves, threatened with beatings and torture and sometimes killed for not complying.<sup>5</sup> In America, where we too often imagine ourselves immune, numbers of illegal residents and underage girls are held against their will and forced into prostitution.<sup>6</sup> Anyone exposed to these heartbreaking stories of

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<sup>3</sup> Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 533-535 (2000).

<sup>4</sup> *Id.*; Michael Constant, *Federalism, The Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POL'Y 99, 103 (1999).

<sup>5</sup> Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access to a Group of Women in Need.*, 11 BERKELEY WOMEN'S L.J. 49, 52-53, 58.

<sup>6</sup> Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, *supra* note 3 at 532-535. Though the numbers are hard to access, COYOTE (Call Off Your Old Tired Ethics), the most visible organization advocating for the rights of prostitutes estimates that 15% of women are forced into

human suffering needs no academic musing to understand their tragedy. The point is so obvious it would seem to hardly bear explanation. Surely, no one could support lifting a ban on prostitution if it resulted in the exacerbation of women being forced into prostitution against their will.

As critical as this is, there is no clear reason to believe that making prostitution illegal reduces instances of human trafficking. It is certainly worrisome that decriminalization could increase prostitution and, in turn, human trafficking.<sup>7</sup> Yet, it is possible that the current model of American prohibition may itself contribute to human trafficking.<sup>8</sup> Indeed, one might believe it increases human trafficking by placing sex workers outside of normal legal channels.<sup>9</sup> This problem is made worse by the widespread sexual abuse of sex workers by police officers.<sup>10</sup> Studies have consistently found widespread physical and sexual abuse by police officers who were meant to be protecting them.<sup>11</sup> The isolation and frayed trust makes it even more difficult to garner information from sex workers on activities of vital importance, such as human trafficking.<sup>12</sup> Further, that prostitution is illegal may force sex workers into close proximity with other criminal behavior, particularly drug laden spaces.<sup>13</sup> Isolating sex workers from the police and legal protection also forces sex workers to find means of private enforcement, creating a vacuum for violent pimps. The point is not that human trafficking is not a grave concern. Rather it seems unlikely that if one's motivation is to reduce human trafficking, a legal prohibition which isolates sex workers, forces them into the arms of pimps and cuts them off from help of the police is a productive regime.<sup>14</sup>

A weaker version of the argument that prostitutes are forced into sex work focuses not on the total lack of consent seen in human trafficking but rather

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prostitution. VALERIE JENNESS, MAKING IT WORK: THE PROSTITUTES' RIGHTS MOVEMENT IN PERSPECTIVE 32 (1993).

<sup>7</sup> PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, 37 (2010).

<sup>8</sup> *Id.* at 37-38.

<sup>9</sup> Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, *supra* note 3, 581-585.

<sup>10</sup> See Mimi Silbert and Ayala Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. & BEHAV. 387 (1981); Nancy Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 L. & INEQ. 609, 618 (1984).

<sup>11</sup> *Revolving Door: An Analysis of Street-Based Prostitution in New York City*; The Urban Justice Center, Sex Workers Project 7, 11, 34-38 (2003).

<sup>12</sup> *Id.* at 47; Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, *supra* note 3, 581-585.

<sup>13</sup> DAVID A.J. RICHARDS, SEX, DRUGS, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 92 (1982);

<sup>14</sup> *Id.* at 584.

indicts the quality of the “consent” given by prostitutes.<sup>15</sup> The question is ultimately whether anyone ever rationally chooses to become a prostitute or whether one should always suspect there is something else at work. A small example of this can be seen in the recent spectacular fall of New York’s Governor, Eliot Spitzer. Spitzer, of course, resigned in shame from public office when it was discovered that he was the client of a high-end prostitution service which charged rates of thousands of dollars to spend an evening with women. I do not wish to draw too much from the Spitzer case, the atmospherics of the case – Spitzer’s tremendous ambition and hardnosed political style, the highly public nature of his office, his marriage and the fact that he had prosecuted similar cases as an Attorney General - make it difficult to isolate any single factor in the political fallout.

Nonetheless, one factor spoke volumes by its silence. The call girl who became the center of the Spitzer scandal, Ashley Rae Maika DiPietro redubbed Ashley Dupre, was reported to have charged approximately \$1000 an hour. There little evidence that she had suffered from a debilitating condition even if there is some conflict regarding the extent of any prior trauma she suffered.<sup>16</sup> There were reports that she had luxurious tastes.<sup>17</sup> Though clearly conflicted, Ms. Dupre compares prostitution to her views of the social expectations surrounding dating.<sup>18</sup> The totality of the picture presented was of a misguided young woman who willing chose to occasionally work as an escort, perhaps seeking emotional needs but certainly for financial gain. Yet, amid the fury and the storm, there was no public questioning of the legal offense underlying Spitzer’s fall. There was little thought given to whether this very public case, absent indicia of violence or coercion, was an appropriate use of criminal law. In the end, the fact that the young woman at the center of the scandal chose to become an escort carried little weight with the public.

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<sup>15</sup> *Id.* at 532; PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 5-7.

<sup>16</sup> <http://abcnews.go.com/2020/story?id=6302149&page=1>. Ms. Dupre claimed in a television interview that she was the victim of rape. Additionally, she has described a time in her life that included involvement with cocaine, marijuana, ecstasy and alcohol. She has not claimed that these impaired her in a way that made her fundamentally non responsible for her actions.

<sup>17</sup> <http://www.nytimes.com/2008/03/13/nyregion/12cnd-kristen.html>;  
[http://www.nypost.com/p/news/regional/item\\_igb0Dq4CgHMOYAMqRwvxfP;jsessionid=93E2D9BDB4D6C456C807ADCCC56CC98C](http://www.nypost.com/p/news/regional/item_igb0Dq4CgHMOYAMqRwvxfP;jsessionid=93E2D9BDB4D6C456C807ADCCC56CC98C)

<sup>18</sup> *Cf.* Alison Jagger, *Prostitution*, in THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS (2d ed., Alan Soble ed., 1991) 262.

I do not mean to assert that this case represents the run-of-mill prostitution case.<sup>19</sup> The point is that our aversion to allowing prostitution does not seem to center simply around the question of ensuring voluntary choice. Were the concern solely about consent, there would surely be other ways of ensuring voluntariness. It is worth noticing that the law routinely handles difficult issues of ensuring that agreements are voluntary in other contexts such as contract law. The silence surrounding the case of Ms. Dupre, tells us, if anything, that much of what makes such bargains “unconscionable” is that it is viewed as an impermissibly immoral.<sup>20</sup> One cannot help but to think that some portion of resistance comes from a visceral rejection of the idea that some women might willingly choose prostitution as a livelihood.<sup>21</sup> Put another way, I suspect our current laws on prostitution do not truly take consent seriously.

Some will view legal permission as a misguided attempt to permit choice. There are Marxist or Feminist critiques that deny that any choice to submit to prostitution can be considered authentic in light of the social power imbalance which (de)values women as merely sexual objects.<sup>22</sup> Others might think that given our knowledge that a disproportionate number of sex workers suffered sexual abuse in their youth, we should be skeptical of their “choices.”<sup>23</sup> Still others will be rightfully concerned of economic pressures that leave some women with few options thus undermining the voluntariness of their decision.

These are serious concerns which deserve more attention than can be afforded here. While I take quite seriously the point that structural inequalities inevitably inform the character of our choices, I am skeptical of the most extreme

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<sup>19</sup> I am mindful of the feminist critique that reformers too often invoke the image of the “happy hooker.” See Alexandra Bongard Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 J. LAW & PUB. POL’Y 189 (1995).

<sup>20</sup> One might argue that Spitzer’s being married points out that the harm caused was not purely self-regarding. But surely the legal traction of the case cannot be pinned on this. Had Spitzer had an affair where he spent the same rumored \$80,000 on dinners and jewelry, there would be no criminal law violation.

<sup>21</sup> To see a typical and powerful form of this argument, see Laurie Shrage, *Should Feminists Oppose Prostitution?*, *supra* note 2, 437.

<sup>22</sup> Alison Jagger, *Prostitution*, *supra* note 18, 259, 265-269; Laurie Shrage, *Should Feminists Oppose Prostitution*, *supra* note 2, 442. I am also indebted to clarify treatment on this point in Barbara Havelková, *European Gender Equality Under and After State Socialism: Legal Treatment of Prostitution in the Czech Republic*, (M.St. Thesis, Manuscript on file with the author).

<sup>23</sup> Rochelle L. Dalla, *Exposing the ‘Pretty Woman’ Myth: A qualitative Examination of the Lives of Female Streetwalking Prostitutes*, JOURNAL OF SEX RESEARCH 31, NO. 4, 344, 348 (2000); ROGER MATTHEWS, PROSTITUTION, POLITICS AND POLICY, 53-54 (2007); PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 98.

of Marxist and Feminist views which would eviscerate the possibility of authentic choice.<sup>24</sup> Indeed, there are powerful arguments that a view which makes women unable to choose what to do with their bodies borders on condescension. I do not attempt to settle this debate here. However, besides doubting the plausibility of the most extreme version of this critique, it is worth noticing that fundamental structures of our law, to say nothing of our views of personal agency, would have to undergo significant change to incorporate a view of structural inequality so deeply into legal consent. In no other field does the law hold that structural inequality is so severe in our society that, for example, women should not be able to sign contracts. As we shall see, there are ways to take into account that certain choices may be so restrained as to be the appropriate object of concern without disabling voluntariness entirely.

Similarly, while prior sexual abuse may rightfully concern one about the soundness and healthiness of a person's choice, it is harder to describe the choice as inauthentic. To do so is to construct some ideal and counter-historical person whose choices stand as proxy. The law certainly does not look to disable the many unsound choices people make as a result of their inner demons and broken pasts. Put simply, extreme cases aside, childhood sexual abuse falls below the legal standard for diminished capacity. Nor is the law normally willing to disable consent to engage in less than ideal work on the basis of economic circumstances.<sup>25</sup> These contentions are not sufficient for most to give up on the idea of voluntariness and are certainly insufficient to rebut the legal presumption of voluntariness.

A couple other contentions often used to support the current legal prohibition on prostitution should be addressed briefly. The first issue is the public health dimension of prostitution. Those of us who came of age during the AIDS epidemic (and perhaps we all came of age during that fraught time) will not lightly shake the feeling of gravity that accompanies the public health dimension of sexually transmitted diseases. Though it is unclear, indeed doubtful, the extent to which sexually transmitted diseases are as a problem disproportionately linked to prostitution in America, it would clearly be

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<sup>24</sup> Alison Jagger, *Prostitution*, in *THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS*, *supra* note 18, 265-277.

<sup>25</sup> That is not to say that there can be no legally disabling or coercive circumstance, *e.g.* unconscionable bargains struck under duress. Indeed, I have argued elsewhere that in certain circumstances, some offers may be considered coercive. Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1229 (2008); David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 144-45 (1981).

irresponsible for any government to ignore the serious concern.<sup>26</sup> Yet here again, it is hard to believe that a legal prohibition which submerges the immense sex trade in the country tackles rather than exacerbates the problem. Indeed, successes in controlling STDs in the domestic pornography industry and the few American jurisdictions which have decriminalized prostitution are attributable to the rigorous health monitoring of an open industry.<sup>27</sup>

The last issue to which we need attend is the “public nuisance” aspects of prostitution. The moral status of these behaviors is not without controversy. In particular, there is a question of whether behavior which simply offends others, take suggestive dress, is properly considered harmful. Additionally, there is the added complication previously mentioned; the extent to which certain public nuisances that attend prostitution are a result of, rather than the basis, of its legal prohibition. Nonetheless, when one takes the complete picture of the intrinsic characteristics of prostitution, it is plausible, if not incontestable, to view its public aspects as imposing harm. Particularly, the inability to control certain aspects of sexual education for children is at least problematic. Given the universal understanding that children are not fully autonomous, a total inability to control the confrontation of young persons with sexualized information (or choices) is undesirable.

Further, uncontrolled “shopping” for sexual services has unappealing aspects. At the risk of offending the delicate reader and contra the most ambitious claims of feminists, there is reason to believe that prostitution is at least in part about sexual desire and desirability.<sup>28</sup> In cities where prostitution is legal, take Amsterdam or Hamburg, young men, much too charged with testosterone, pack the small streets of red light districts at night, ogling the women on display. In major American cities, scantily dressed women populate street sides while men “cruise” the road. Sexually explicit “advertising,” ogling, shopping for women, catcalls and the like, all represent impositions on the public which can, at the very least, be seen as public nuisances. Here again, it is hard to imagine that the current legal prohibition contributes to solving this problem. The current ban on prostitution only regularly shifts the location of prostitution while preventing direct and more rational regulation. More to the point, if the

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<sup>26</sup> Law, *Commercial Sex: Beyond Decriminalization*, *supra* note 3, 545-552; CENTER FOR DISEASE CONTROL, 10 HIV/AIDS SURVEILLANCE REPORT 1 (DEC. 1998); Carole A. Campbell, *Prostitution, AIDS, and Preventive Health Behavior*, 32 SOC. SCI. MED. 1367 (1991).

<sup>27</sup> Christina Jordan, Note, *The XXX-Files: CAL/OSHA’s Regulatory Response to HIV in the Adult Film Industry*, 12 CARDOZO J.L. & GENDER 421 (2005).

<sup>28</sup> This is not to deny that the exercise of power may be essential to prostitution or that sexual attraction may not be mediated in important ways by the wish to express dominance over another.

goal of our criminal law is to curtail the public nuisance aspects of prostitution, direct regulation seems far more effective as well far less costly.

To summarize, there are clearly good reasons to worry about the problems that accompany prostitution but the certainty that legal prohibition is the answer is undermined by the difficulty of ascertaining an accurate picture of the sex trade. Human trafficking is clearly tragic legal and moral problem. Yet it is hard to know if legal prohibition of prostitution makes the problem better or worse. There is reason to believe that the legal isolation of sex workers and the distrust and abuse it breeds between sex workers and the police exacerbates the problem. Further, many commentators are willing to deny the voluntariness of the choice to become a prostitute in situations which fall far short of that which would otherwise constitute involuntariness either in law or common moral thinking. Public health concerns surrounding commercial sex are real but a regime which makes prostitution illegal, drives it underground and makes it more difficult to regulate is nearly the antithesis of a successful public health program. Lastly, regulating the public nuisance aspects of prostitution could be done far more effectively and with much less social cost by a tailored regime than a blanket prohibition.

Of course there are other reasons one might worry about a regime of decriminalized prostitution. Perhaps the availability of commercial sex threatens the integrity of marriages and families. Surely there are other unlisted concerns. However, it is hard to believe that many of these concerns are truly greater dangers in a world of decriminalized commercial sex than in our present world where commercial sex is equally widely available but legally prohibited. Nor has the experience of other jurisdictions which have legalized prostitution, Rhode Island, parts of Nevada, the Netherlands, etc..., borne out our most extreme collective anxieties. Thus we have reason to be skeptical that it is merely the social problems attendant to prostitution have lead to legal prohibition. Myriad alternatives would be more finely tailored to meet these challenges. What then explains the deeply held antipathy towards decriminalization of prostitution?

Whenever one encounters deeply held convictions, the strength of which vastly outrun the underlying empirical claims, it is well to search for principle or prejudice. The proffered reasons to prohibit prostitution are unconvincing. That they are insufficiently supported by the sketchy empirical data leads to the not surprising conclusion that there is something else at work. Specifically, the criminalization of prostitution seems based in large part on a social conclusion that prostitution is a morally repugnant choice.

## Part II: Moral Harm

I am not the first to notice that the legal prohibition against prostitution leans heavily on the underlying moral aversion to commercializing sex.<sup>29</sup> Important authors have described the immoral nature of prostitution, often based in natural law or feminist frameworks.<sup>30</sup> Others who have drawn attention to the fact that social norms underlie the current legal regime quickly dismiss the moral indictment of prostitution as misplaced, antiquated or parochial. In contrast, I believe the commonly held intuition that prostitution is morally wrong is based on sound moral reasoning. Further, unlike past authors, I will argue that one can understand the immorality from a wide range of moral positions; one need not be committed to any particular exotic moral framework to believe prostitution is morally wrong. Indeed, an inspection of the major philosophical systems undergirding the American legal system show that each conceive of prostitution as a moral wrong. Our philosophical traditions make sense of common place moral intuitions. The immoral aspect of prostitution does not simply supervene on the extrinsic problems that surround prostitution. Rather, it is in the very nature of the act itself. The common underlying sentiment that prostitution inflicts an objective moral harm on both the buyer and seller of sex is eminently sound and, more importantly for our purposes, supportable from nearly any philosophical tradition.

While the idea of an objective moral harm is not alien, at first blush it may strike some as perplexing. The intuition behind this puzzlement is this: if someone wants to do something which hurts no one else, they enjoy doing it and, at least in some cases, do not regret it, how can this have harmed them? This section argues that some actions constitute objective morally cognizable harm. Certainly there are cases the moral harm stems from another more obvious harm such as serious physical injury. Other times, the claim goes, the injury will be recognizable only by viewing it as a setback to one's moral well-being. Though it may be impossible in this brief section to convince those deeply committed to a purely relativist or skeptical view of moral wrongs, I hope the picture will be plausible enough for progress. In constructing this picture, we can take heart in

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<sup>29</sup> *United States v. Bitty*, 208 U.S. 393, 401 (1908); RICHARDS, SEX, DRUGS, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION, *supra* note 13, 85-86, 94-112; Igor Primoratz, *What's Wrong with Prostitution?*, 451-453 in THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS (4<sup>th</sup> ed.) *supra* note 2.

<sup>30</sup> Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, *supra* note 2; KATHLEEN BARRY, FEMALE SEXUAL SLAVERY, *supra* note 2; Andrea Dworkin, *Prostitution and Male Supremacy*, *supra* note 2; Catherine A. MacKinnon, *Prostitution and Civil Rights*, *supra* note 2.

knowing that the three great philosophical traditions, in sometimes unexpected ways, viewed certain actions as constituting a moral harm.

A moment for a bit of intramural clarification. In current philosophical discourse, a distinction is often made between moral duties, which govern the duties owe to each other, and ethical duties, which are often self-regarding standards governing the construction of a good and valuable life. Roughly speaking, one has a moral duty not to unjustifiably kill others. One has an ethical duty to not waste one's life away only watching television.<sup>31</sup> While I often find this distinction valuable, I will not make use of it here. Because the philosophical systems at issue here take varying position on being able to distinguish these two realms of morality, it is useful to not be distracted. Indeed, it is important to note that the idea of committing an immoral act need not be connected to a straight forward idea of "harm" at all rather than failing a moral duty.<sup>32</sup> Throughout this piece, I will use the term moral harm to describe failing a wide range of what may be considered moral or ethical duties.

#### A. Utilitarianism – Mill and Moral Good

Those with only a passing acquaintance with the brand of utilitarianism championed by Mill will find it surprising that he could conceptualize a vision of morally self-inflicted harm. Mill, after all, was not merely a consequentialist but advanced a largely hedonistic form of utilitarianism. He was suspicious of intangible metaphysical moral duties.<sup>33</sup> He argued that the only thing that was good for a person was pursuing that which gave them utility in the form of pleasure and absence from pain.<sup>34</sup> Further, for epistemic, practical and developmental reasons, people were best suited to determine for themselves what brings them the greatest utility.<sup>35</sup> For Mill, self-measured pleasure was the moral good.<sup>36</sup>

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<sup>31</sup> There are, of course, complications to this rough and ready divide. Kant, for example, conceived of some duties as self-regarding duties. See *infra* text accompanying notes 45-54; See also IMMANUEL KANT, THE METAPHYSICS OF MORALS, 149-152 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797).

<sup>32</sup> I am grateful to Micheal Moore for pressing this clarification.

<sup>33</sup> J.S. Mill, *Utilitarianism* in JOHN STUART MILL AND JEREMY BENTHAM, UTILITARIANISM AND OTHER ESSAYS, 272-276, 301-303 (Alan Ryan ed., 1987) (1861).

<sup>34</sup> *Id.* at 278.

<sup>35</sup> J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 51, 66-68, 92, 99-100 (R.B. McCallum, ed. 1946) (1859).

<sup>36</sup> J.S. Mill, *Utilitarianism*, *supra* note 33, 278; J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, *supra* note 35, 9-10.

If this is true, then one can imagine a self-inflicted moral harm due to miscalculation. Economists, psychologists and even wise grandparents inform us that these are common and predictable. Barbara thinks the new car, house or sexual encounter will make her happy but none of them do. Indeed, it may make Barbara unhappy or not be worth what she invested to get it; she may come to regret it. But the objective type of moral harm we have been discussing is harder to conceptualize in this framework. If Barbara's self measured utility is all there is to morality and Barbara does not regret her actions, how can those actions constitute a self-inflicted moral harm?

It is a misunderstanding, however, to view Millian utilitarianism as purely hedonistic. Mill did not think that any and all pleasures were to be weighed equally.<sup>37</sup> And this, he argued, was also true from the point of the agent as well. A person well acquainted with different pleasures, Mill believed, would naturally prefer pleasures which engaged their higher capacities rather than lower pleasures.<sup>38</sup> Indeed, the deeper point is what counts as pleasure at all depends on our human capacities.<sup>39</sup> Chess, reading, movies and conversations with friends are all pleasurable in different degrees because of the various human capacities which find exercise and delight in them. Thus it is not surprising that human beings, with their higher capacities, have a broader and deeper range of pleasures than a cat, which may wish for little more than a lifetime of food and a warm spot. As Mill famously put it, "It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied."<sup>40</sup> This preference is a natural one and connected with one's own view of their sense of dignity and humanity.

Mill was of course aware that people sometimes opt for base pleasures; most of us occasionally watch bad T.V. instead of catching up on Marquez or figuring out that tricky variation of the Sicilian Defense. In fact, Mill worried

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<sup>37</sup> *Id.* at 278-279.

<sup>38</sup> *Id.* Mill writes "It is quite compatible with the principle of utility to recognize the fact, that some *kinds* of pleasure are more desirable and more valuable than others. It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone." Mill also believed that training and the internalization of conceptions of justice were critical in the development of higher capacities. *Id.* at 56.

<sup>39</sup> *Id.* For example, while swimming might be enjoyable, adult human beings do not revel in endlessly running through puddles in the way your dog might. While a bit of catch is enjoyable, normal functioning adults do not chase after tennis balls for its own sake for hours. Playing tennis doesn't count. You know it doesn't!

<sup>40</sup> *Id.* at 281.

that habitual indulgence in base pleasures or continually starving one's higher capacities could make one incapable of enjoying higher pleasures.<sup>41</sup> But surely Mill is right in noting both that our human capacities define what counts as pleasure and that we value higher pleasures over lower ones. To use his powerful example, almost no person would consent to become an animal (or be lobotomized) even if assured that the animal was very happy. They say ignorance is bliss but few, outside cases of the most extreme unhappiness, would choose to become cripplingly even if blissfully dumber. If this is right, then one need only note the same distinction in less dramatic cases.

Regarding prostitution, it may seem prudish to think of sex as a base pleasure. But surely there is nothing strange about the contention that prostitution commonly takes away from the lives of those engaged in both sides of the practice. Moreover, the point here is deeper than that prostitution is often deeply unpleasant for sex workers, for most people engage in work they don't find immediately pleasurable in exchange for money to pursue their other pleasures. The deeper point is that sex in prostitution itself can be a base pleasure which undermines one's ability to enjoy other deeper pleasures. In particular, working as a prostitute commonly undermines psychological fitness and healthy character.<sup>42</sup> Particularly important from Mill's point of view, the emotional damage often associated with prostitution makes it more difficult to form deep friendships, intimate and supportive romantic relationships.<sup>43</sup>

"Johns" buying sex from prostitutes suffer the same danger. At first blush, it is indisputable that sex brings people great pleasure. Yet it is a common experience to realize that the pleasures of sex in isolation are fleeting. One need not be a prude to see that disconnected from love, caring or at least friendship, most come to realize that sex is less fulfilling. Even the indisputable thrill some receive from novelty begins to wane, especially when compared to sex embedded in relationships of caring and intimacy. More to the point, to the extent indulging in the easy pleasure of prostitution distances buyers from the greater pleasures of full blooded intimacy, it harms them.

If sex disconnected from deeper meaning involves less of our human capacity than sex embedded in meaningful relationships, then it is in some measure a baser pleasure. Further, combined with Mill's concern that indulgence in baser pleasures can stunt our capacity to enjoy higher pleasures, it is easy to

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<sup>41</sup> *Id.* at 281-282, 285.

<sup>42</sup> PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 13-15, 22-26. WENDY CHAPKIS, LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR, 1, 78 (1997).

<sup>43</sup> *Id.*

see how even on the utilitarian model, one can suffer a self-inflicted moral injury.<sup>44</sup> It is impossible to deny that many of our deepest pleasures over the course of our lives come from the most important friendships and romantic relationships in our lives. It is not a coincidence that many spend so much time and energy seeking out these relationships around which to build their lives. When stymied by personal demons, people often seek, at great expense of time, energy and money, ways to overcome their emotional hurdles. Prostitution makes harder the ability of those engaged in it, both Johns and sex workers, to access those great pleasures. Thus, prostitution represents exactly the kind of threat to one's moral well-being that concerned Mill.

### **B. Kantian Duties to Self**

For Kant the possibility of inflicting a moral harm on oneself is easy to recognize. In some of Kant's most accessible language, the great philosopher instructs of our various ethical duties, including duties we owe to ourselves. Now this is not the place to begin a full exploration of the Kant's sophisticated and rich moral theory of duties. The upshot is that for Kant moral duties were grounded in reason and existed *a priori*, that is, these reasons generated moral duties which were metaphysically true and made demands on persons.<sup>45</sup> These duties were based on the fact that human beings had autonomous wills able to recognize reasons in the world.<sup>46</sup> These moral duties could be distilled into three formulations - categorical imperatives - Kant assures us are equivalent, only the second of which attracts our attention at the moment. The second formulation of the categorical imperative is, roughly, people must be treated as ends in and of themselves and never as a means. If an easy example is needed, making someone a slave is to treat them as a means – an instrument for your purposes – and not as a person with unique ends.<sup>47</sup> Thus, for Kant, human beings had an innate and inviolable dignity.

With that on the table, Kant argues that moral duties are not only owed to others but they are owed, indeed especially so, to ourselves.<sup>48</sup> Kant had multiple reasons for viewing our moral duties to self as holding primacy of place. First, consistently violating our moral duties to ourselves threatens our ability to fulfill

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<sup>44</sup> *Id.*

<sup>45</sup> IMMANUEL KANT, THE METAPHYSICS OF MORALS, *supra* note 31, 9-18.

<sup>46</sup> *Id.* at 17-19.

<sup>47</sup> IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, 36-38 (Mary Gregor trans., Cambridge Univ. Press 1998) (1785).

<sup>48</sup> IMMANUEL KANT, LECTURES ON ETHICS, 117-118 (Louis Infield trans., Harpers & Row 1963) (1930)

our moral duties to others (and of others to count on our fulfilling our moral duties).<sup>49</sup> More importantly however, violations of our self regarding moral duties robbed us of our inherent moral dignity.<sup>50</sup> Even if we performed our moral duties to others badly, begrudgingly, at least we have preformed them.<sup>51</sup> But where we fail to pay ourselves the inherent dignity we deserve, we lose our self worth and make ourselves the object of scorn and contempt.<sup>52</sup>

If it required a bit of subtlety to see Mill's view on prostitution, Kant left no such doubts. Kant is unsparing in his criticism of prostitution as a moral wrong. In fact, for Kant, it is fair to say that the whole topic of sex is challenging. Remember that the second formulation of the categorical imperative forbids using another as a means rather than as an end in themselves. Kant of course recognizes that people in some sense play instrumental roles in our life; for most the relationship with your plumber centers entirely on his instrumental value in sorting out your sink.<sup>53</sup> Unlike the slave, however, your hiring the plumber does not prevent him from planning a life, building a career and aiming that life at the ends he finds valuable.

So why is sex is different? Kant argues that sexual appetite is qualitatively different from other instrumental desires. When you purely desire someone sexually you do so apart from any of the other things about their personhood, you objectify them, you desire them only as a thing.<sup>54</sup> I do not wish to make Kant sound overly cynical; Kant of course understands that sex can be mixed with love and other deep emotions.<sup>55</sup> But we should be adult enough to admit Kant is on to something. Kant, like all sexually mature persons, recognized that in sex and sexual desire, at least sometimes there are moments of

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<sup>49</sup> *Id.* at 118,123.

<sup>50</sup> *Id.* at 118, 124.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 163-168.

<sup>54</sup> *Id.* Here Kant uses some of his prettiest language

Human love is good-will, affection, promoting the happiness of others and finding joy in their happiness. But it is clear that, when a person loves another purely from sexual desire, none of these factors enter into the love. Far from there being any concern for the happiness of the loved one, the lover, in order to satisfy his desire and still his appetite, may even plunge the loved on into the depths of misery. Sexual love makes of the loved person an Object of appetite; as soon as that appetite has been stilled, the person is cast aside as one casts away a lemon which has been sucked dry. Sexual love can, of course, be combined with human love and so carry with it the characteristics of the latter, but taken by itself and for itself, it is nothing more than appetite.

<sup>55</sup> *Id.* at 166-167.

sheer and lustful physicality; moments when are partners are very much bodies we simply want – to hold, to press, well you get the idea... And to desire someone only as a body is to use them as a thing and ignore their inherent human dignity.<sup>56</sup>

The deeply skeptical will find all of this suspicious or old fashioned. After all, this thinking turns on the antiquated notion that sex is, as mentioned before, different. If the contention is that sex is ultimately no different than any other service, then it settles nothing to assume from the beginning that sex is different. This is the argument forwarded in a thoughtful article by Martha Nussbaum.<sup>57</sup> Nussbaum argues that in using some aspect of their body and intimate resources for pay, the prostitute is indistinguishable from a range of other workers, say a philosophy professor or a masseuse.<sup>58</sup> Once these similarities are seen, she argues, there is little left of our stigmatization of prostitution other than long standing class prejudices against working for money and cultural anxieties surrounding the female body now fashionably repackaged as commodification.<sup>59</sup> Nussbaum is attendant to other dangers that surround prostitution, coercion and human trafficking, child prostitution and especially a lack of employment choices that force women into undesirable jobs.<sup>60</sup> But those dangers, she argues, would be intolerable across a wide range of occupations and should not, by themselves, make us think the exchange of sex for money different.

There is no point tiptoeing around it. Kant's argument is of course based on the idea that sex is fundamentally different. It is undeniable that sex and sexuality play a large role in human development. One's sexuality is among the core features of one's identity. Physical assault is traumatic but rape is a particular horror exactly because we intuitively perceive the centrality of sexual integrity. Further, sexual desire is complex and can bring in a range of emotions (or not, it is hard to know which is worse), baggage and risks. Sexual desire, like few other desires, runs the risk of objectifying its object. This very point is noticed by none other than Nussbaum herself in an earlier piece.<sup>61</sup> In this

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<sup>56</sup> See also, BERTRAND RUSSELL, MARRIAGE AND MORALS, 121-122 (1958).

<sup>57</sup> Martha Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, *supra* note 2, 693-696, 700-707.

<sup>58</sup> *Id.* at 700-707.

<sup>59</sup> *Id.* at 696-700.

<sup>60</sup> *Id.* at 721-723.

<sup>61</sup> Martha C. Nussbaum, *Objectification*, PHILOSOPHY AND PUBLIC AFFAIRS 24:4 (1998) reprinted in THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS, 4<sup>TH</sup> EDITION (ED. ALAN SOBLE) (2002); Igor Primoratz, *What's Wrong with Prostitution?*, *supra* note 29.

sophisticated piece, Nussbaum carefully teases out the many subtle ways in which sex and sexuality can lead to objectification. Nussbaum wonderfully illustrates that not every instance of objectification represents a loss, some in fact reaffirm our physicality.<sup>62</sup> Some forms of objectification, however, can be deeply damaging, ignore our full person and do damage to ones sense of self.<sup>63</sup>

What Nussbaum notices in her earlier piece is that sexuality and sexual desire is susceptible to objectifying persons in a way that is, if not unique, then rare in other areas.<sup>64</sup> One may of course only think of your lawyer or your plumber in their instrumental role in your life but it is extremely rare to fixate on them or treat them in ways that erode their humanity.<sup>65</sup> Just as importantly, sexuality is central to our identity in a way comparable to few other things. Work and career, success and family are all critical to successful lives and development. But few things are as potent a mixture of friendship, romance, attraction, self esteem, love, desire and friendship as captured in sex and sexuality. Thus, sexual practices are peculiarly sensitive and near uniquely important. When sexual desire goes wrong, the damage to a person is unique. It is not comparable to the feeling of only being valued as a good masseuse. It is exactly the susceptibility to objectification and the moral importance of valuing one's sexual integrity that is the foundation of the common moral perception that both prostitutes and Johns debase themselves. It is this insight that is at the heart of the Kant's critical appraisal of sexual desire.<sup>66</sup>

So would Kant have us be celibate our whole lives? From where will all the little Kantians come? Of course not. Kant proposes that in order to assure that sexual appetites lack the pure objectification of another, one must assure that their sexual desire is attached to a concern for the person as a whole and theirs in turn for us. The only way to ensure this, he argues, is marriage.<sup>67</sup> Quite romantic, in its way. Sadly how to get desire exactly right is not the topic on which we are currently focused. For our purposes the important point is that there are moral duties in the world including those owed to oneself and they

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<sup>62</sup> *Id.* at 398-404.

<sup>63</sup> *Id.* at 404-405.

<sup>64</sup> *Id.* at 393-394.

<sup>65</sup> This is not to deny that the over zealous task master might not objectify their employee in ways that are also damaging. Any young associate who has felt as though a partner causally dismissed her other personal obligations can attest to this. Nonetheless, lacking the passion and motivation of sexual desire makes such objectification much less likely and damaging. IMMANUEL KANT, LECTURES ON ETHICS, *supra* note 48, 162-163.

<sup>66</sup> *Id.* at 118-119, 162-164.

<sup>67</sup> *Id.* at 166-167.

include never treating another or allow oneself to be treated as a means or a thing. This aspect of sexuality which, while objectionable in any relationship, is brought into starkest relief in the typical case of prostitution - where a client need not exhibit any care for the prostitute's sexual needs, desires, pleasures or indeed her safety and well-being.<sup>68</sup>

This is not some abstract idea. Take an example reported by a woman who worked briefly as a sex worker in Amsterdam. When a client's condom broke and she expressed concern to him about contracting AIDS, he simply laughed at her. "The worst part of it was that the guy was so fucking unconcerned – he just laughed and said I was a good fuck."<sup>69</sup> Sexual desire stripped of aspects of other-regarding love or concern can quickly and intensely obliterate our concerns for others. And the very passionate intensity that makes sexual desire an important facet of human life heightens the danger that concern for the other's well-being is swept away. To submit to another whose passion is empty of regard for your pleasures, well-being and humanity is to violate Kant's duties to self, allowing oneself to be used as a means rather than an end and thus constitutes a moral harm to self. It is happily clear to all who have had happy and fulfilling sexual experiences, this need not be the case. Kant notes that the very power of sexual desire makes ever more important that it be tied to concern for one's full humanity, through marriage he argues. The important thing, just for the moment, is not that sexual desire can be done right but that one can get it wrong.

### C. Aristotle and Aretaic Theories on Moral Wrongs

Of the three major philosophical traditions, the aretaic theory exemplified by Aristotle is a natural one in which to locate a view of moral wrongs to oneself. Unlike Millian consequentialist or Kantian deontological theories which focus on a specific conception of right action, Aristotle begins by asking what are the highest achievable human goods; what ends are the most worthy choices.<sup>70</sup> Aristotle concludes that this highest good is *eudaimonia*, uncomfortably translated as "happiness", which more precisely translates to a life

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<sup>68</sup> Martha C. Nussbaum, *Objectification*, *supra* note 61, 394-396; BERTRAND RUSSELL, MARRIAGE AND MORALS, *supra* note 56. But see Igor Primoratz, *What's Wrong with Prostitution?*, *supra* note 29, 462-466.

<sup>69</sup> WENDY CHAPKIS, LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR, *supra* note 42, 116; PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 20.

<sup>70</sup> Aristotle, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed., W.D. Ross trans., 1941) at Bk. I, Chp. VII.

well-lived or a life of human flourishing.<sup>71</sup> Starting with the claim that human beings are unique in being rational, for Aristotle, *eudaimonia* consists of reasoning well in accordance with the human excellences over the course of a full life.<sup>72</sup> Such theories are also described as aretaic theories, stemming from the Greek word for good or excellence.<sup>73</sup>

In this framework moral virtues are many and typically are exemplified as a moral mean between two vices.<sup>74</sup> Thus, to be paralyzed by fear when lightly threatened is to be cowardly. To ignore appropriate fear or be insufficiently cognizant of danger is to be rash. To be courageous is to act in accordance with the appropriate mean between these vices.<sup>75</sup> Because vices impede one's ability to live an excellent life and fulfill human capacity they are morally harmful. The claim here is not meant to be overly abstract. People who explode in anger at the smallest provocation (or never get angry no matter how poorly they are treated) rarely do well over all in life. The same is true for those who are relentlessly miserly or unchecked spendthrifts.

It is easy to see how this model produces a coherent view of committing a moral wrong onto oneself. The rash mountain climber who embarked on a trip certain to result in grave injuries that prevent her from other productive human pursuits may fail to properly respect the place physical integrity has in fulfilling

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<sup>71</sup> I set aside for the moment the long-running intramural debate surrounding Aristotle's shift to contemplation as the ultimate end of persons in Book X of the *Nicomachean Ethics*.

<sup>72</sup> *Id.* at Bk. I, Chp. VII-X.

<sup>73</sup> An Aristotelian view need not be aretaic. Such a view could conceivably be eudaimonistic or a non-eudaimonistic virtue theory. I am grateful to Larry Solum for raising this point.

<sup>74</sup> *Id.* Bk. II, Chp. VII-Chp. IX.

<sup>75</sup> *Id.* Bk. II, Chp. VII, 1107a27- 1107b3. Note that on this picture the virtues are dispositions rather than defined states. To be virtuous is the disposition to act appropriately in certain situations, whether that be bravely, generously or prudently. *Id.* at Bk. II., Chp. 6, 1106b17-1106b23. Because the virtuous agent has the morally appropriate disposition, she does not have to force herself to behave in the right way. *Id.* at Bk. I, Chp. 8; Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. R. 97, 98, 105 (2002); Kyron Huigens, *Aristotelian Criminal Law – A Reply to Duff*, 18 N.D. J.L. ETHICS & PUB. POL'Y 465, 468 (2004). She does the right thing for the right reason. Further, because being virtuous is a disposition, it cannot be captured by a set of rules. The important conclusion, in contrast to Kant's famous categorical imperative, is that for virtue ethics there is no decision-making procedure to determine right action. *Id.* at Bk. II., Chp. 6, 1106b17-1106b23; Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 73 (2006); Huigens, *Homicide in Aretaic Terms*, 105; G. E. M. Anscombe, *Modern Moral Philosophy in ETHICS* 205 (Judith J. Thompson & Gerald Dworkin eds. 1968); Kyron Huigens, *Law and Morality: The Jurisprudence of Punishment*, 48 WM. AND MARY L. REV. 1793, 1821 (2007).

other human capacities. Likewise, the irresponsible gambler is less capable of using his wealth for more meritorious pursuits in the future.<sup>76</sup>

Given its affinity with natural law doctrines, one might think that Aristotelian virtue based theories would easily align with viewing prostitution as a moral wrong. Yet there is reason to think Aristotle himself would not have found prostitution greatly objectionable. Various forms of prostitution, from the streetwalkers who occupied the bottom of the hierarchy to young boys of poorer families and higher status courtesans, were well known in ancient Athens.<sup>77</sup> To Aristotle, that some poorer people were slated to live as prostitutes was reconcilable with his moral views about the development of human capacities because he believed that many were incapable of developing to the same level as the Athenian upper class.<sup>78</sup> There is a sense in which the *Nicomachean Ethics* was written for upper class Athenians, for whom a life of prostitution would have been undoubtedly considered deeply unethical. To the extent those from the class of prostitutes could not have developed higher level capacities, they lost nothing in living a life of prostitution.

Obviously, this will not do. Without argument, I will set aside the position that the prostitution of poor women is harmless because the poor lack the natural capacity for better lives. What we need is to rescue the insights of Aristotle, unabashedly updated for our time.<sup>79</sup> Luckily, this is not difficult. We need only inspect Aristotle's ideas for those he believed possessed full human capacity. What then did Aristotle believe of the moral consequences of prostitution for the addressees of the *Nicomachean Ethics*?

On the subject of prostitution Aristotle is, well, demure. Aristotle notes that pleasures of the flesh, in which he includes eating, drinking and sex, are worthwhile in themselves but must be pursued in moderation.<sup>80</sup> Thus, if one's appetite for any particular pleasure is over much, it becomes a vice; the vice of

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<sup>76</sup> Aristotle, *Nicomachean Ethics*, *supra* note 70, Bk. IV 1119b20 – 1120a20.

<sup>77</sup> Aristotle, *Politica*, *supra* note 70, Bk. II, 1272a22-24. HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX*, 218-254 (1910); VERN L. BOLLOUGH, *THE HISTORY OF PROSTITUTION*, 9-15 (1964); RICHARDS, *SEX, DRUGS, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION*, *supra* note 13, 88-89.

<sup>78</sup> Aristotle, *Politica*, *supra* note 70, Bk. I, Ch. IV-VIII, Bk. III, Ch. IV.

<sup>79</sup> There are those, of course, who will reject such updating or see it as a squeamish inability to accept Aristotle's true theory. I have never found such arguments persuasive. Theories need not be frozen in the past and ideas grow. One can be attendant to the historical nuances of a theory without being saddled with its mistakes.

<sup>80</sup> Aristotle, *Nicomachean Ethics*, *supra* note 70, Bk. III, Ch. X-XI.

self-indulgence or licentiousness.<sup>81</sup> Assuming, however, that licentiousness is not the only reason one would hire a prostitute - say a man who enjoys the use services of a prostitute once in a great while - one hardly shows the sort of incontinence Aristotle argues is a moral vice.

As we noted before, romantic relationships and sex play a deep role in human development. Sex, embedded in deep and meaningful relationships, is an expression of love, caring, sacredness, playfulness and sheer physicality in ways that are missing in other sexual relationships. You need not believe that such sexual relationships are the *only* ones with *any* value to believe that sex with those characteristics fulfills greater parts of human lives. Sex reduced to commercial exchange takes away, distracts or lacks that deeper value. It does not engage in the deepest human capacities and thus does not contribute to the richest life of human flourishing.

Worse yet, if repeatedly (or perhaps even once) engaging in prostitution, corrupts one's proper understanding of the value that sex can have, then this too would detract from the fullest form of flourishing.<sup>82</sup> As we noticed earlier, there is nothing strange about the contention that prostitution commonly takes away from the lives of those engaged in both sides of the practice. Particularly, working as a prostitute commonly injures the formation of psychological fitness and healthy character in just the ways that those concerned with the promotion of virtue fear.<sup>83</sup> By its nature, prostitution associates sex with feigning emotions for gain and inculcates emotional manipulation and pretense. Worse, by doing so, prostitutes make more difficult the development of their capacities to engage in other virtues critical to human development - the formation of deep friendships, intimate and supportive relationships.<sup>84</sup> Lastly, though complicated by the legal regime, engaging in prostitution often derails sex workers from paths in which one normally develops their capacities through discipline, such as schooling.<sup>85</sup> Similarly, those who purchase sex from prostitutes learn to relate to sex as something to be purchased and enjoyed for their pleasure only. In doing so, "Johns" equally risk harming their ability to properly appreciate the proper role

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<sup>81</sup> *Id.*

<sup>82</sup> This need not be reduced to an extreme picture - one encounter with prostitution leaves one permanently unable to experience genuine romantic well-being. Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, *supra* note 2, 713-714. We need only note that prostitution may distract or corrupt one's views of the value that sex can play in the richest of lives.

<sup>83</sup> PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 13-15.

<sup>84</sup> *Id.* at 13-15, 22-26, 120-122.

<sup>85</sup> *Id.*

of sex and sexual intimacy and risk retarding or undermining their ability to form intimate relationships.<sup>86</sup>

It is hard to argue how important a healthy sense of one's sexuality is to the formation of character. Equally, it would be a strange view which did not instantly see that the ability to form important, intimate and loving relationships is essential to a flourishing life. This is true regardless of one's final decisions on the particular form of those relationships in one's life. It is one thing to decide to remain single, it is another thing to suffer such emotional damage as to be unable to find or sustain a relationship. The retardation of these virtues and excellences of character and the way they detract from a life of flourishing are both intuitively and for Aristotle the crux of self-inflicted moral harm.

Of course, such corruption is not necessarily limited to prostitution. The libertine who comes to regard sex and sexual partners as merely shallow and interchangeable pleasures surely risks similar injury.<sup>87</sup> Still, it is not peculiar to imagine that the archetype of this devaluation, this moral injury, finds purest expression in prostitution; even the playboy must charm his affairs, engage with them and treat them as more than mere commodities.<sup>88</sup> The buyer of sexual services almost entirely dispenses with even that necessity and thus disconnects sex from any other values (flirtation, friendship, mutual caring or love) it might play in human development and the landscape of a flourishing life. Thus, when viewed in conjunction with Aristotle's views regarding the values of friendship, one can plausibly conclude that prostitution would constitute a moral harm-to-self.<sup>89</sup>

A moment to summarize may be profitable. I have explored how, viewed from a number of different philosophical facets, it is possible to commit an objective moral harm-to-self; a harm that does not depend simply on whether one believes their action is bad for themselves. Some ways of viewing the moral harm of prostitution were very straight-forward. Others required some interpretation. Though each of the philosophical views explored expressed the harm of prostitution differently, they were all related in important ways by the

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<sup>86</sup> *Id.* at 120-122.

<sup>87</sup> *Id.* at 48.

<sup>88</sup> *Id.*

<sup>89</sup> One could resist this conclusion by arguing that sex with prostitutes did not in any way detract from the value of sex in deeper kinds of relationships. First this seems implausible in light of the surrounding social science. In any case, my goal here is to construct a plausible view of why prostitution would be a moral harm-to-self in an aretaic system.

role sexuality plays in a person's life. This, of course, should not be surprising for it is the critical feature in prostitution which bears examining.

I do not expect to have convinced all of the unassailability of objective moral claims. I have not explored all the possible philosophical views – skepticism, relativism and others. Nor have I even explored all the possible permutations of the views represented here. Each of these philosophical branches have developed in myriad (and sometimes conflicting) ways that could be the sole object of attention. But in each of the foundations of the three major moral philosophical systems explored, one could recognize that prostitution constitutes an objective moral harm-to-self. While the agreement is not dispositive, for Mill, Kant and Aristotle on much we would no longer wish to affirm, the arguments above do, I hope, make the concept of an objective harm-to-self plausible.

### III. Moral Wrongs and the Law

The next step in our argument is a crucial one. Notwithstanding that Millian consequentialism, Kantian deontology and Aristotelian virtue-based theories consider prostitution a moral harm, it does not immediately follow that the law ought to prohibit it.<sup>90</sup> Plainly, I am not the first to argue for a separation between immoral acts and legal prohibition; many take this to constitute one of the foundation tenets of liberalism.<sup>91</sup> Still, even among liberals, there are some interesting distinctions the conversation highlights. Most notably, the conversation frames the debate differently than much of the mainstream justification for liberal tolerance, which turns on uncertainty and pluralism about forms of the good life. Rather, the conversation above presupposes the

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<sup>90</sup> Clearly prostitution may not only create a harm-to-self. The complications of creating harms to others will be explored below.

<sup>91</sup> Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. R. 321, 321-322, 338-339 (2002); Markus Dubber, *A Political Theory of Punishment - Autonomy and the Legitimacy of State Punishment*, 2, 12, (March 15, 2004). Available at SSRN: <http://ssrn.com/abstract=529522>; R.A. Duff, *Virtue, Vice and Criminal Liability: Do We want an Aristotelian Criminal Law?*, 148-150, 165-167; Leo Katz, *Villainy and Felony*, 6 BUFF. CRIM. L. R. 451, 455-461 (2002); Douglas Husak, *Twenty-Five Years of George P. Fletcher's Rethinking the Criminal Law: Crimes Outside the Core*, 39 TULSA L. REV. 755, 773 (2004); Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 89 (1995); Gerald Dworkin, *Devlin was Right – Law and the Enforcement of Morality*, 40 WM. AND MARY L. REV. 927, 928 (1999); Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. AND MARY L. REV. 1523, 1528 (2007); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1020, 1057-1058, 1062-1067.

immorality of prostitution. The claim explored here is in many ways a deeper claim than that which grounds much of modern liberal theory.<sup>92</sup>

More importantly unlike prior efforts, this claim is not limited to liberal justifications of decriminalization. One may oppose the legal prohibition of prostitution even though it is a moral wrong, whether one is a Kantian liberal, utilitarian libertarian or, rejecting liberalism entirely, is committed to law's role in promoting virtue. This bears underscoring; it is not only liberals who can agree on the reform of this controversial area of criminal law. Though each of the three major philosophical traditions viewed prostitution as a moral self-injury, there remain good reasons to be cautious of legal prohibitions.

It is important to notice the wide spread agreement among philosophers who recognize that prostitution is wrong and yet distinguish the reasons for legal prohibition. But for some this argument proves much too little. Instead, many reformers argue that the underlying perception that prostitution is immoral is mistaken or antiquated folk superstition. Alternatively, the mainstream of liberal political theory asserts that liberal neutrality requires the separation of many deep moral commitments from law. If only people could be made to see the correctness of Liberalism, laws regarding prostitution would only need to note tangentially that many find prostitution moral objectionable. Why should anyone

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<sup>92</sup> The tenet commonly described as liberal neutrality, *i.e.* state neutrality among competing visions of the good, often trades on a sense of fallibility. Fallibility is simply the idea that despite one's most heartfelt convictions and deeply considered reflection on the subject of a moral good, one may be wrong about what acts and lives may be of moral value. It is a form of modesty about moral epistemology. While I believe awareness of one's fallibility is important to liberal tolerance and recognition of the plurality of goods, that is not what is at stake here. Here the claim is not one of uncertainty but rather how to treat that which we know is a moral wrong. (I know this knowing is in some sense what fallibility denies. Put another way, regardless of whether one may be wrong, one must eventually take some action and those actions can only be based on one's best considered moral views including accounting for, but not being paralyzed by, the fact that one may be wrong.)

A less common rationale for legal toleration of moral wrongs focuses on an interesting mix of instrumental goods protected by the securing of legal space. On this view, we have reason to forgo legal prohibition of purely self-regarding moral wrongs (or ethical wrongs depending on the language you prefer) because of the effects of creating such space. It may be that allowing such space creates a social ethic of toleration which will solidify our tolerance towards genuinely good forms of live. Wall, *The Structure of Perfectionist Toleration*, 242. It may be that "people must live by their own lights" in order to be happy. Ronald Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479, 486 (1989); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 81 (1995). JEREMY WALDRON, *A Right to Do Wrong in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991* (1993). Though these "instrumental autonomy" views are certainly closer even they do not fully capture the justification I want to explore.

be attracted to my admittedly accommodationist argument that seeks agreement over metaphysical truth or comprehensive political theory?

There are two reasons to prefer the accommodationist model, one, itself, ironically accommodationist in flavor. First, those interested in addressing the failures of the current criminal law regime need not agree that we have reasons to reform the prostitution laws despite the its being immoral. For those who still believe that prostitution is morally innocuous, it will be enough to agree that we have reasons to reform the current failed legal regime.<sup>93</sup> The same will be true for those who accept that prostitution is immoral but are committed to a strong form of liberalism or libertarianism which cabins personal moral reasoning from public and legal standing. From the liberal's view it is besides the point that there are wholly separate reasons why non-liberals who believe law must cultivate virtue can agree on prostitution reform. Even without agreement on *why* such reforms are justified, the liberal can be satisfied with agreement on that such reforms *are* justified.<sup>94</sup> Ultimately, on a range of sensible regulations, there can be rational agreement.<sup>95</sup>

The second reason is more meaningful and reverberates in both practical and philosophical reasoning. The practical rationale is quite straight-forward. Much ink has been spilled by liberal reform minded theorists attempting to persuade that prostitution is morally non-problematic. Despite occasional reform movements and a small number of jurisdictions in the United States that have decriminalized prostitution, it is unlikely that much progress on reform will be made by convincing large numbers of those who deeply believe that prostitution is immoral to change their minds and hearts in the short term. And why should they? As we have explored, by most philosophical lights, it is morally sound to believe prostitution is immoral. Requiring others to give up their deeply held and well thought out convictions in favor of a very particular philosophical framework makes great philosophical and political discourse; it does not, however, make for a promising path to political action.

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<sup>93</sup> Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); Cass Sunstein, *Incompletely Theorized Agreements*, HARV. L. REV. 1733 (1995); Cf. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985).

<sup>94</sup> *Id.*

<sup>95</sup> It is important to note that this range of agreement can be found in scholars who are dispersed on the underlying question of the moral harm of prostitution. PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 40-41, 68-69, 122-123; Martha Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, JOURNAL OF LEGAL STUDIES, *supra* note 2, 701, 711; RICHARDS, SEX, DRUGS, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION, *supra* note 13, 121-125.

But if this seems like just a practical problem – a matter of opinion polling and playing to prejudice - it belies a deeper philosophical claim. The fact that the body politic contains a wide range of philosophical and political commitments is not a mere inconvenience. That very fact is the morally relevant landscape with which theories of governance must contend. As Rawls and Waldron, among others, have explored in different ways, a diverse range of fundamental philosophical commitments *is* the problem of politics.<sup>96</sup> Theories that begin with the presumption that all must be committed to particular philosophical starting points may be remarkable and enlightening political philosophy but they are not theories of governance.

Let me be clear, I am not decrying the important project of pure philosophical debate. In different moods, I too attempt to marshal arguments to persuade others of my particular metaphysics.<sup>97</sup> I believe in philosophical debate and philosophical advancement. Many of our social advances - numerous facets of the American civil rights movements come immediately to mind – owe some part to relentless pressing of claims of equality and rigorous inspection and discarding of unsupportable ideas. Nonetheless, any theory of governance, as opposed to a theory of pure political philosophy, that does not make space for reasonable disagreement, itself borders on being unreasonable and is certainly doomed to failure.<sup>98</sup> The inability to notice fundamental areas of philosophical consensus when seeking to govern is all too often unreasonableness masquerading as high-minded rigor.

With this in mind we are in a position to inspect the core argument. Despite the fact that utilitarians, deontologists and virtue theorists all have ample reason to view prostitution as immoral, it is remarkable that each theory gives reasons to pause before translating the moral conclusion into law. We will begin with the straight-forward in Mill's libertarian utilitarianism. From there we will proceed to Kant's thinking on legal duties. Since Kantian liberalism has long served as the foundation of arguments for freedom from state interference, one might be surprised to find that in his brief writings on the matter, Kant suggested prohibiting prostitution. Deeper inspection will reveal reasons to set aside the thin conclusion Kant forwarded in deference to the deeper commitments of his legal theory. From the surprising we will turn to the counterintuitive and most

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<sup>96</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

<sup>97</sup> For a contrast to this effort, see Ekow N. Yankah, *Virtue's Domain*, 2009 U. ILL. REV. 1167 (2009) arguing for a rigorous commitment to Kantian and Hegelian deontological theories in law.

<sup>98</sup> John Rawls, *Justice as Fairness: Political not Metaphysical*, *supra* note 93.

important conclusion. We will explore an Aristotelian theory of law which has as its center the law's role in promoting a virtuous society. We will see how even for those who reject the fundamental liberal premise that law and personal morality ought to be kept separate, there is ample reason to reconsider our current ban on prostitution. In contrast to the universe of legal theory surrounding reform efforts at prostitution, it is critical to notice that one need not be a liberal at all to support prostitution reform. The startling observation is that nearly all of us, starting from a wide range of fundamental moral theories, can agree on fundamental reform.

**A. Mill and the Utilitarian Law**

One needn't spend too much time reviewing the utilitarian approach to our question. Recall that Mill believed there could be higher and lower pleasures and in particular that one could over-indulge in base pleasures. Nonetheless, Mill argued that because a person was responsible only to themselves and not society as a whole, one should not be prevented by law from engaging in behavior that harmed only oneself – Mill's famous harm principle.<sup>99</sup> For Mill, the harm principle described the bounds of state action, securing a sphere of liberty for each individual. Ultimately, this sphere was justified by Mill's commitment to utilitarianism.<sup>100</sup> Because each person was best suited to determine what gave them the greatest utility, liberty to make their own choices was crucial. Ultimately, such liberty increased the total utility of society. Thus, while others may try to make you see the error of your ways in making (self-regarding) harmful choices, society was disabled from using legal prohibitions for your own good.<sup>101</sup> Despite that some might succumb to lower pleasures, thus morally harming themselves, restricting individual liberty would be to treat the citizenry with condescension and lower the utility of society.<sup>102</sup>

Thus, for Mill, a society would be unjustified in prohibiting prostitution (and other harms-to-self).<sup>103</sup> That does not entail that society cannot regulate of such activity. Mill argues that laws prohibiting public indecency and requiring that prostitution parlors be discreetly located protect the public from having offensive acts imposed upon them without curtailing the liberty of those who seek their

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<sup>99</sup> J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, *supra* note 35, 8-9, 11, 84.

<sup>100</sup> *Id.* at 66-68.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 66-68, 91.

<sup>103</sup> *Id.* at 88-89.

services.<sup>104</sup> Further, while Mill's utilitarianism would not allow self-regarding immoral behavior to be the object of a "sin tax," he does note that a government may properly consider what behaviors are most easily dispensable when making revenue decisions.<sup>105</sup> So while Mill supposes that prostitution may be taxed before other activities, he argues that taxing prostitution for the sole purpose of eliminating it is illegitimate.<sup>106</sup>

Most importantly for our purposes, Mill consistently reiterates that this liberty exists only where the harm is self-regarding; a harm to which a competent adult consents.<sup>107</sup> It follows that if a social practice is habitually linked with the commission of crimes or acts that harmed others, violating their rights, it could be properly prohibited.<sup>108</sup> Lastly, Mill is deeply ambivalent about the role of pimps and solicitors.<sup>109</sup> Mill realized that where others have a personal financial interest, there would be an incentive to encourage, lure and otherwise circumvent or corrupt another's considered judgments. We will revisit these limitations later.

#### **B. Kant, Criminal Law and Freedom**

For Kant the moral worth of an action turned not only on whether one obeyed the moral duties but that one did so with a pure will.<sup>110</sup> Thus, being forced to comply with your moral duties, indeed, doing so out of any prudential reasons robbed an action of moral worth.

For the unfamiliar, the distinctions between Kant's moral and legal theory may seem sharp. As mentioned earlier, for Kant moral duties could be recognized by reasoning from *a priori* truths. Thus to truly fulfill your moral duty was to act only in light of recognizing the reasons that grounded your duty. If you acted for other reasons, for example, to avoid punishment, you were not acting purely in light of the moral value of your duty. In Kantian language, to act for moral reasons alone was act autonomously whereas to act from prudential reason was to act heteronomously.

The nuances between Kantian autonomy and heteronomy could provide a career's worth of exploration. Only the basic distinction is necessary for this

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<sup>104</sup> *Id.* at 88-90.

<sup>105</sup> *Id.* at 90-91.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 9, 69-74.

<sup>108</sup> *Id.* at 86, 91.

<sup>109</sup> *Id.* at 86, 88-90.

<sup>110</sup> IMMANUEL KANT, THE METAPHYSICS OF MORALS, *supra* note 31, 13-14.

project. If one sees that moral duties depend on acting with a pureness of will for moral reasons alone then it is clear that law, which for Kant is constituted by coercive sanctions, is not the stuff of moral duty.

In Kant's framework law was not a matter of moral duty but concerned itself with violations of the external freedom of others; in Kantian language, law was not a matter of morality but of justice.<sup>111</sup> Criminal conduct was not founded in the purity of will that determined the moral worth of one's acts but rather was centered on external action.<sup>112</sup> The nature and justification of state law is to enforce perfect duties to others, the duties of external performance that interfere with the rights of others.<sup>113</sup> In this way criminal law belongs to the realm of justice which differs from Kantian duties of morality.<sup>114</sup>

Even, as Kant highlights the significance of our self-regarding moral duties, he repeatedly reminds that moral duties, especially those owed to oneself, are not a matter of justice and cannot be proscribed by law.<sup>115</sup> Kant explains, "My duty to myself cannot be treated juridically; the law touches only our relations with other men; and whatever I do to myself I do to a consenting party; I cannot commit an act of injustice to against myself."<sup>116</sup> He repeats elsewhere, "[j]urisprudence should concern itself only with man's duties to his neighbour, with what is lawful and unlawful, but not with duties towards oneself..."<sup>117</sup>

It is this separation between legal and moral rights in Kant which has led a generation of legal theorists to build their model of liberal legal rights of autonomy on Kantian foundations.<sup>118</sup> So it is surprising that Kant causally

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<sup>111</sup> *Id.* at 13-14, 19-21, 139 (1797); IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 231 (J. Ladd tran., Bobbs-Merrill Co. 1965) (1797); GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW, 208 (2007).

<sup>112</sup> IMMANUEL KANT, LECTURES ON ETHICS, *supra* note 48, 116-117, 157; IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 111; IMMANUEL KANT, THE METAPHYSICS OF MORALS, *supra* note 31, 13-14. George Fletcher attempted to capture this important distinction as one between the Wille and the Willkür. George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987), GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW, *supra* note 111, 208.

<sup>113</sup> *Id.*, Jeffrie G. Murphy, *Does Kant have a Theory of Punishment?*, 87 COLUM. L. REV. 507, 519 (1987); Binder, *Punishment Theory: Moral or Political*, *supra* note 91, 353.

<sup>114</sup> Binder, *Punishment Theory: Moral or Political?*, *supra* note 91, 355-356.

<sup>115</sup> IMMANUEL KANT, LECTURES ON ETHICS, *supra* note 48, 116-117, 157.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See, e.g. DAVID A.J. RICHARDS, SEX, DRUGS, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION, *supra* note 13, 84-127. Here the word autonomy is used in its lay rather than purely Kantian sense.

concludes that prostitution, a violation of a duty to oneself, is appropriately outlawed.<sup>119</sup> How can so many Kantian liberals in the academy been led so wrong? A closer look at Kant's brief reasoning leaves room to doubt that Kant's dedication to prohibiting prostitution was based on any deep commitments. In discussing the state's police power Kant argues, "[i]t is important to provide for public decency, for if the feeling for decency (*sensus decori*) – considered as negative taste – is not benumbed by the prevalence of beggars, excessive street noises, offensive odors, and public prostitution, all of which violate the moral sensibilities, then the business of ruling the people through laws is made considerably easier for the government."<sup>120</sup>

Only two things need be noticed to make the point regarding the separation between law and morality. The first is that prostitution is placed in a list including beggars, excessive noise and offensive odors. This hardly speaks of a deep moral violation. Rather, the list focuses the public nuisance aspects of various crimes, that would be familiar to modern scholars who advocate the legalization of vice crimes with a focus on harm reduction. Second and related, the only justifying feature Kant cites is that maintaining public moral allows the government to police more effectively. (Similarly, Kant encourages state support of churches not for instilling religious faith but for the public goods it generates.<sup>121</sup>) If these are the only reasons, legal prohibition is obviously not the singular solution; other regulatory regimes that control public nuisance aspects of prostitution would meet Kant's burden. In any case, it is clear that Kant's argument for the prohibition of prostitution is not deeply founded on a view of moral harmful. Given that the public nuisance of prostitution can be more effectively handled by regulation, we have good reason to mind Kant's contention that the realm of law should concern violations of other's rights and not our self-regarding duties.

### C. An Aristotelian Theory of Law

Though it would seem that Aristotle's claim that law ought promote virtuous behavior and human flourishing would be easy to translate into a prohibition against prostitution, it once again turns out to have important nuances. Legal philosopher Lawrence Solum, has recently explored the shape of a legal system built on Aristotle's virtue of justice.<sup>122</sup> Though Aristotle viewed law as having a

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<sup>119</sup> IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 111, 92.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 94-95.

<sup>122</sup> Lawrence B. Solum, *Natural Justice*, *supra* note 75. There are, of course, other strategies one might take to build an aretaic theory. Kyron Huigens, for example, has developed an aretaic theory

role in inculcating virtue in citizens, he also took into account the special role law serves in securing a flourishing human society. Given this goal, it may seem lawmakers and judges ought to aim at promoting ethical lives. The problem, of course, is that there is persistent and deeply held disagreement about what constitutes an ethical life. Thus, if each lawmaker were to act on her own conception of the good, it would lead to an endless clash, ironically undermining the conditions for human flourishing and the goods that law uniquely secures.

An aretaic system of law then ought not allow lawmakers to render legal decisions based on their first-order views of what is moral.<sup>123</sup> Rather, Solum proposes that the virtue of justice in an aretaic theory is governed by Aristotle's virtue of lawfulness – a judge's recognition and internalization of the publicly-reached decisions on public controversies.<sup>124</sup> These public conclusions need not be only law but may include the widely-held stable norms and customs of the society as well. Lawmakers in such a model have deeply internalized the shared norms of the community; in Aristotle's language they are *nomimos*. Further, laws on this model are only truly laws if they comport with the society's norms, the *nomoi*.

For Solum, the aretaic justification is integrated in two ways into his model. First, though controversial among Aristotelians, the *nomos* must themselves be aimed at promoting human flourishing. Thus, to the extent that social norms are directly opposed to human flourishing, they may not qualify as true *nomos*.<sup>125</sup> Moreover, the virtue of justice is only one part of human flourishing. To the extent lawfulness conflicts with human flourishing, the aretaic lawmaker must re-examine the value of lawfulness in her society. The aretaic lawmaker must, above all, be sensitive to the conditions that allow for human excellence. In Aristotle's language, a virtuous law-giver must display practical wisdom or *phronesis*, he must be *phronimos* as well as *nomimos*.<sup>126</sup>

While the details are complex, the upshot is intuitive. The ultimate question on this picture is not whether each law requires virtuous behavior. Rather, it is to

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of punishment over many years which, while originally Aristotelian, parts from Aristotle in many ways. See Kyron Huigins, *Virtue and Inculcation; Homicide in Aretaic Terms*, *supra* note 75; *The Jurisprudence of Punishment*, *supra* note 75. I have criticized aretaic theories of law on Kantian grounds elsewhere. Ekow N. Yankah, *Virtue's Domain*, *supra* note 97; Ekow N. Yankah, *The Law of Duty and the Virtue of Justice*, 27 CRIM. JUST. ETHICS 67 (2008).

<sup>123</sup> Lawrence B. Solum, *Natural Justice*, *supra* note 75, 87.

<sup>124</sup> *Id.* at 89-91.

<sup>125</sup> *Id.* at 97-98.

<sup>126</sup> *Id.*

what extent does a legal regime nurture virtue and a flourishing society. Say alcohol is viewed as detracting from a life of virtue, a claim which if not universally true certainly applies to a significant range of cases. If prohibition leads to generalized disrespect for the law among the public, millions of dollars for criminal syndicates and a reign of widespread violence and terror then surely the law of prohibition cannot be considered robustly supported by a virtue centered theory of law. A view that focuses only on the prohibited acts and ignores all other effects of a law on the health, virtue and flourishing of a society is too narrow to be a plausible view of virtue centered governing.

The question for an aretaic system of law is not simply whether prostitution is a moral wrong that retards virtue in a person – we have reasons to believe it is. The question is whether outlawing prostitution will contribute on the whole to a flourishing society. I have already canvassed some reasons that would give pause in prohibiting prostitution if we are thinking of a flourishing society. First, it is possible that criminalizing prostitution prevents people from making important decisions about the role of work and sexuality in their lives, something which is necessary to develop into a successful person.<sup>127</sup> Perhaps sound practical reasoning requires the ability on occasion to exercise poor reasoning.<sup>128</sup> While this position is plausible they strike me as inconvenient from Aristotle's point of view. Aristotle, after all, made front and center the role of law in shaping the ability of citizens to learn virtuous behavior.<sup>129</sup>

More plausibly, the intrusive methods necessary to criminalize and enforce prostitution laws may be too damaging to human society. Similarly, the effects of criminalization on the success of a society must be taken into account. For example, the illegalization of prostitution marginalizes commercial sex workers. This marginalization forces prostitutes into proximity with other illegal behavior,

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<sup>127</sup> PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 32-35.

<sup>128</sup> *Id.*; JEREMY WALDRON, *A Right to Do Wrong*, *supra* note 91.

<sup>129</sup> Aristotle, *Nicomachean Ethics*, *supra* note 70, Bk. X, Chp. IX, 1179b32-1180a4. Aristotle describes this role thus:

...[I]t is difficult to get from youth up a right training for virtue if one has not been brought up under right laws; for to live temperately and hardily is not pleasant to most people, especially when they are young. For this reason their nurture and occupations should be fixed by law; for they will not be painful when they have become customary. But it is surely not enough that when they are young they should get the right nurture and attention; since they must, even when they are grown up, practice and be habituated to them, we shall need laws for this as well, and generally speaking to cover the whole of life; for most people obey necessity rather than argument, and punishments rather than the sense of what is noble.

particularly drug dealing, thus increasing the risk to the workers themselves.<sup>130</sup> Further, because deals for sex are illegal, prostitutes must secure private enforcement mechanisms, in a word, pimps.<sup>131</sup> This means that the legal regime greatly contributes to the violence visited on sex workers. Adding not just insult but injury to injury, the legal marginalization of prostitutes leaves them not just feeling outside of the protection of the law but perversely the victim of police violence. Prostitutes often feel they cannot report instances of sexual violence to the police and believe this with good reason. Prostitutes report widespread sexual and physical abuse by a police officer.<sup>132</sup> Surely the fact that both prostitutes and police perceive sex workers as criminals contributes to this high rate of victimization.<sup>133</sup> Just as tragically, the marginalization and distrust between sex workers and police surely makes the ability of the police to gather information and combat the tragedy of human trafficking more difficult.<sup>134</sup>

There are less dramatic effects of the legal prohibition on prostitution which nonetheless undermine a flourishing society. The prohibition on prostitution makes the health monitoring of paid sexual activity much more difficult, posing a public health risk. Further, because prostitution can neither be regulated nor eradicated, the current regime makes it difficult to control public exposure of sexual solicitations. Those living in major metropolitan areas are familiar with the “bulge” effect of prostitution; increased policing in one area does little to stamp out prostitution but rather shifts streetworkers work more and move to different neighborhoods.<sup>135</sup>

Lastly, it is worth noting that the illegality of prostitution commits us to a callous social hypocrisy. With no chance that prostitution will come to an end and some doubt as to whether we are willing to dedicate more than a symbolic (yet costly) effort to enforcement, the current legal regime turns a blind eye to the widespread law breaking and inculcates a casual disregard for the law in much of the public. Prostitution is readily and effortlessly available in any barely sizable city, yet so long as the violence and suffering of the legal prohibition is borne by poor and minority women, we turn a blind eye to the practice while congratulating ourselves on our moral commitment.

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<sup>130</sup> PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 8, 35; DAVID A.J. RICHARDS, SEX, DRUGS, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION, *supra* note 13, 92.

<sup>131</sup> *Id.* at 41.

<sup>132</sup> Revolving Door: An Analysis of Street-Based Prostitution in New York City, *supra* note 11.

<sup>133</sup> *Id.* at 10, 13, 35-36.

<sup>134</sup> PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 35, 37-38.

<sup>135</sup> *Id.* at 31.

To put it much too lightly, even given that prostitution is immoral, it is not obvious that the current legal regime contributes to a virtuous society.<sup>136</sup> Thus, there is no need to assume that an aretaic theory would necessarily outlaw prostitution – at least not in our current form.<sup>137</sup> Even those who believe it is the duty of law to nurture virtue, those who reject liberalism, can agree that the current prohibition of prostitution fails to promote a flourishing society.

I have no wish to pretend to have found a way to universal agreement. For those who are committed to a divine theory of law, a belief that God has forbidden prostitution may foreclose any agreement on the grounds above. I have serious doubts that at least Christians, whose example in Christ personified unbounded care for the weak and disenfranchised, including the harlots of his time, can turn their back on the suffering inflicted by the current regime. But beyond my own religious upbringing, I am unqualified to pursue this topic in full. Further, as I have mentioned, there is an important debate among feminists about the status of prostitution, with some feminist contending that the ban against prostitution infantilizes women and reflects male ideals of purity.<sup>138</sup> Other feminists powerfully argue that in a society dominated by male power, prostitution is an extension of male domination, a form of violence against women or an inauthentic choice. Those deeply committed to this latter view may be unconvinced by the arguments above.

Still, the arguments above have shown that the idea that prostitution could be legalized is not as controversial as one might initially assume. We started by noticing that despite their very different commitments, Millian utilitarians, Kantian deontological thinkers and Aristotelian virtue theorists all have a concept of self-inflicted moral harm. It is of course important to remember that each system conceives of this harm in different ways; Mill focused on the baseness of lower pleasures which decrease one's ability to derive greater utility, Kant on the

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<sup>136</sup> Julie Pearl, Note, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS L.J. 769 (1987); Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, *supra* note 3, 527, 532-535, 584-585.

<sup>137</sup> As far as I am aware the only time Aristotle seems to allude to prostitution is a quite oblique reference to dancing girls for a festival, implying that the guards should ensure they are paid no more than their contracted salaries. Whether is best understood as a toleration of a certain unavoidable level of prostitution or an attempt to make sure it does not occur is not entirely clear (though it seems to intimate sexual services as a part of the contract). ARISTOTLE, *THE ATHENIAN CONSTITUTION*, XX.

<sup>138</sup> Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, *supra* note 3, 542-545; Martha Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, *supra* note 2, 708.

moral duties owed to oneself in light of human dignity and Aristotle on the ethical demands of living a good life and engaging the human capacities. Nonetheless, the core idea of an objective moral harm-to-self can be located in each system.

Despite agreeing that prostitution resulted in self-inflicted moral harms, each philosophical system is cautious about translating this moral wrong into a legal prohibition. For Mill, impositions on the liberty of the individual were impermissible where that person did not threaten harm-to-others. Ultimately prohibiting people from pursuing their happiness would reduce utility for all. Kant actually encouraged the prohibition of prostitution but, as we noted, grouped this prohibition along with public noise and odor. Prostitution was viewed as a public nuisance contributing to disorder. Outside of that concern, Kant reminds us that moral duties owed to oneself were immune from legal enforcement. Lastly, for Aristotle, the ultimate value of law was the role it played in sustaining a flourishing community. That there is agreement between these vastly different philosophical systems, so often used as foils for each other, is remarkable. Nor should one easily dismiss the separation of law and morality as an old liberal trope. The reason this accord is so remarkable is because it is across the range of philosophical systems. It is not strictly limited to liberalism; even those who reject liberalism can support the reform of the current prostitution laws.

If one is philosophically inclined and finds the preceding arguments convincing, surprise may quickly turn into disappointment. How can the three major philosophical systems be in agreement regarding the legal permissibility of prostitution and yet the law be nearly universally opposed? Does no one listen to philosophers?!? Can these philosophical conclusions inform and guide our political system or are there special problems in translating to real laws that make application impossible? It is to the problem of translating philosophical commitment to law we now turn.

#### **Part IV: An (In)decent Proposition**

What are we to do in light of these conclusions drawn from some of history's great minds? Put another way, were I king, would I snap my fingers and legalize prostitution? Of course not. Does that make me disingenuous? Well, no. Philosophical conclusions, even if true, do not, apply themselves. Though theory necessarily takes facts into account, one of the great benefits in submitting a question to philosophical examination is the ability to stipulate facts in order to arrive at important conclusions. (I mean, has any one ever seen a veil of

ignorance?) Once reached however, philosophical tenets must be applied to the unruly world, where facts and complications spill one over one another, refusing to behave. Much more would have to be known about the facts of prostitution on the ground before a wise statesman would decide to legalize prostitution. To borrow a phrase, philosophy does not get us all the way down. Or there are more things in heaven and earth than are dreamt of in philosophy if you prefer. This does not mean, however, the preceding is academic fancy. Even if the gravity of the issues combined with the poverty of information counsel the wise to move deliberately, it is important to realize how our philosophical conclusions can guide us.

What then can we learn from the philosophical agreement we have discovered? Each of the major philosophical systems we examined gave good reasons to be wary of criminalizing prostitution even given that it is immoral. Just as striking, reviewing the major concerns commonly cited in support of the ban on prostitution reveals that we can find remarkable accord regarding the shape and limits of a policy of decriminalization.

The gravest issue we explored surrounding prostitution is the tragedy of human trafficking. No one could support lifting a ban on prostitution that resulted in the exacerbating of people being forced into prostitution against their will. Not surprisingly, no one we have examined does. The very reason Mill argued for broad individual liberties was because it was only by allowing people to choose that we would increase the utility of individual and, in turn, society. Clearly, to the extent consent to sex is inauthentic, either because it is coerced or the actors are too young to make properly informed decisions, permissiveness under any legal regime is unjustified. Likewise, unjust coercion is paradigmatic of the violation of external freedom that grounded law in Kant's legal model. Lastly, the Aristotelian justification for law was its special role in securing the conditions for human flourishing. No one could argue that a legal regime which abetted in people being forced into sexual slavery was a form of flourishing.

Another issue that related to prostitution is its public health dimension. Once again, there is a plausible philosophical accord on this issue. Mill's utilitarianism liberty is based on the harm principle, that is, society cannot interfere with purely self-regarding harms. Where otherwise permissible acts risks harm to others, in particular due to lack of information, misleading or surreptitious behavior inherent in the practices surrounding the acts, Mill argues that we had ample

reason to prohibit it.<sup>139</sup> Equally, a Kantian will view the spreading of disease as an invasion of another's external freedom. This is because the public health threat is in large part that a disease will pass beyond those who knowingly subject themselves to the risk or will be so destructive as to seriously fray the health of society as a whole.<sup>140</sup> Lastly, aretaic theories of law, focused on the flourishing of society, will be especially concerned with the unregulated spreading of dangerous and debilitating disease among the population. It takes little argument to understand that serious illness can uniquely harm the ability of persons to live a life of excellence and fulfill their human capacities.

The last issue we need to address is the "public nuisance" aspects attendant to prostitution. As I mentioned earlier, the moral status of these behaviors is not without controversy. There are questions of whether behavior which simply offends others, take suggestive dress, is properly considered harmful and the extent to which many of the public nuisances surrounding prostitution are a result of rather than a reason for legal prohibition. Nonetheless, there are reasons to believe that the public aspects of prostitution can threaten important social values.

Here too we see the philosophical positions explored above are in harmony. Mill, for example, noted that even where people have the liberty to engage in prostitution, curtailing explicit behavior and regulating certain offenses to public decency are appropriate to avoid imposing harms unto others.<sup>141</sup> Kant is explicit in his concern for the public nuisance facets of prostitution. As earlier explored, Kant placed prostitution with excessive noise and odor, focusing on its public

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<sup>139</sup> J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, *supra* note 35, 9-11, 84-87.

<sup>140</sup> A couple responses deserve attention. The first is a claim that in a world conscious of sexually transmitted diseases, any sexual interaction is to subject oneself to risk. Thus, barring rape, there is no violation of one's freedom from STDs. While this has an air of plausibility to it, I think it overstates the case. Surely we can recognize a different level of risk assumed by a person who has multiple sexual partners, including prostitutes, and a person who has a single long term partner who, unbeknown to them, has had a sexual liaison with a prostitute. The deceptive partner, through fraud, does violate the right of the duped.

Secondly, it is worth noticing that Kant recognized that where respecting the rights of citizens could threaten the well-being of an entire society, a government may responsibly ignore or curtail the right. Kant's analogy was to the granting of pardons where the appropriately called upon punishment would so deplete or brutalize the citizenry as to make governance impossible. A very serious public health threat which is unclear in its toll – the beginning of the AIDS epidemic comes to mind - may be analogous. IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 111, 107.

<sup>141</sup> J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, *supra* note 35, 88.

nuisance aspects.<sup>142</sup> It is the extent to which the public nuisance of prostitution made society harder to govern that justified legal regulation. Likewise, aretaic law focused on the flourishing of society cannot ignore the unregulated confrontation of sexual information on children who may not be yet ready to understand and contextualize it. Indeed, the molding of the young so that they could independently choose virtuous behavior was of particular importance to Aristotle.<sup>143</sup> Additionally, allowing avoidably unruly exchanges surrounding sexual services to create a public nuisance is in tension with an orderly and flourishing community.<sup>144</sup>

To sum up: under a wide range of plausible philosophical views it is possible to commit a self-inflicted moral harm. This harm is an objective one and does not entirely depend on whether the actor regrets the act. Despite believing in the possibility of objective moral harms-to-self, each philosophical view point forwards good reasons to display caution before translating that moral wrong into a legal prohibition. Importantly, this caution does not turn on mainstream liberal concern that one may be uncertain if an action constitutes a moral harm or, related, that there are many versions of a good life; *i.e.* fallibility or pluralism about the good. Indeed, the distinction between moral and legal harms in self-regarding duties need not turn on being committed to liberalism at all.

Nonetheless, restraining the translation of moral harms-to-self to legal harms does not mean complete absence of regulations. Again, vastly different philosophical systems recognize that there are justifiable grounds for legal regulations of a self-regarding harm such as prostitution. If prostitution, for example, is inextricably linked with violations of the rights of others, such as in human trafficking and other coercive sexual violence, there is surely reason to regulate it. To the extent prostitution poses a public health risk, the government may act. Where aspects of commercialized sex result in behavior which cause a harmful public nuisance, regulation is appropriate.

The philosophical agreement we have noticed does not counsel a society to completely forgo regulation of the moral harm caused by prostitution rather it provides guidance as to the kind of regulation that is justified. It is striking that despite the philosophical accord on the basic shape of such regulation, our current legal regime adopts little of this guidance. I fear it is because the legal regime produced, though legitimate and wiser, is initially unattractive in

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<sup>142</sup> IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 111, 92.

<sup>143</sup> Aristotle, NICOMACHEAN ETHICS, *supra* note 70, Bk. X, Chp. 9, 1179b32-1180a4.

<sup>144</sup> I do not wish to imply that everything that is unruly is opposed to a flourishing community. Some things may be unavoidably unruly by way of being attached to other important goods.

permitting admittedly immoral behavior. It is, put pithily, an indecent proposition.

So far, the focus of this piece has been on the broad philosophical underpinnings of our criminal regime. It is beyond the scope of this article to offer a comprehensive statutory regime regarding prostitution and I suspect the details of any new regime are best worked out by local municipalities and experts.<sup>145</sup> Still, even the brief policy sketch above is based on broad consensus gives rough shape to a program of reform and is a useful starting point for our examination.

What is needed is a plan that attacks the evils of violence and human trafficking, the public health risks and the public nuisance of prostitution while respecting the reasons we had to be cautious of translating every moral concern directly into legal action. It seems to me the current debate is stuck between two extremes, both of which are unsatisfying. Proponents of the current system of criminalization fail to take seriously the costs of criminalization. At the same time, the advocates of decriminalization too often do not fully measure facets of prostitution on which all can agree regulation is wise.

Without further ado, I present Proposition X. Proposition X would decriminalize the core offense of prostitution – that is, the consensual exchange of money for sexual services among adults would no longer be a criminal offense. Where Proposition X differs from similar decriminalization statutes, for example the recently defeated Proposition K in San Francisco, is that soliciting or purchasing sexual services on the street or perhaps in any notoriously public environment, would remain a punishable crime. Given the goals of Proposition X, the prohibition on street workers may require alternative enforcement mechanisms; for example, in Sweden, prostitution has recently been reconceived as a crime of violence against women. Thus, men who solicit prostitutes are eligible for punishment while the women are not.<sup>146</sup> While prostitution would be

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<sup>145</sup> Daniel McDonald, Comment, *Regulating Sexually Oriented Business: The Regulatory Uncertainties of a "Regime of Prohibition by Indirection" and the Obscenity Doctrine's Communal Solution*, 1997 B.Y.U. L. REV. 339 (1997); Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69 (1998).

<sup>146</sup> Swedish Code of Statutes, SFS 1998 408 (June 4, 1998): A person who obtains casual sexual relations in exchange for payment shall be sentenced – unless the act is punishable under the Swedish Penal Code – for the purchase of sexual services to a fine or imprisonment for at most six months. Attempt to purchase sexual services is punishable under Chapter 23 of the Swedish Penal Code. [http://www.bayswan.org/swed/swed\\_law.html](http://www.bayswan.org/swed/swed_law.html)

This proposal (and others) may require some further exploration but at first blush seems to avoid Constitutional equal protection censure. If there are such disabling reasons for the law to avoid

legal, sex workers would be required to be registered and licensed. The registration would include a certain amount of sensible public health regulation (regular health inspections, etc.). My strong inclination would be to make promotion of prostitution, *i.e.* pimping, illegal, perhaps subject to a phase out period as police forces and sex workers established more certain protective interactions and more trusting relationships (not least of all focused on preventing police sexual abuse of the sex workers they are meant to be protecting). Those who are familiar with the way legal regimes treat prostitution in jurisdictions like the United Kingdom and much of Western Europe will recognize this proposition. Proposition X could also be wisely combined with significant tax burdens to offset any cost associated with increased policing and regulation. The not unintended result of the combined regime would be to drive up significantly the price of prostitution.

Why Proposition X? Let me the first to admit that Prop. X does not solve all the problems of prostitution and may well introduce new ones. Still, no thoughtful observer can deny that the way our legal regime currently treats prostitution is deeply flawed.<sup>147</sup> There is no serious belief that the world's oldest profession will disappear anytime soon. Further, violence is endemic to the field.<sup>148</sup> Criminalizing prostitution means that prostitutes must seek both protection from violence and the ability to enforce payment elsewhere, thus increasing the value of pimps. Tragically, this is all too often an out of the pan and into the fire strategy.<sup>149</sup> We have already mentioned the intolerable problem of underage women being lured into sex work and others becoming the victims of human trafficking.<sup>150</sup> If you add our public health concerns and the small but significant minority of sex workers that must expose themselves to danger and impose on our public sensibilities as street workers, there are good reasons to reconsider the current regime. Proposition X alleviates some of these harms contributing to the good of a society.

#### **A. Choosing Moral Harm**

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being so drafted, there may be reasons to use prosecutorial discretion to the extent possible without the violation of Constitutional rights.

<sup>147</sup> Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, *supra* note 3, 609; Julie Pearl, Note, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, *supra* note 136.

<sup>148</sup> Revolving Door: An Analysis of Street-Based Prostitution in New York City, *supra* note 11, 8,

<sup>149</sup> PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 41.

<sup>150</sup> Cite Kennan.

As opposed to our current regime of criminalization, Proposition X takes consent seriously. Its principal legal distinction is that it permits consenting adults to exchange sexual service for money. It does so despite the firm conviction that doing so is a self-inflicted moral harm. Nonetheless, because the methods and results of criminalization are grave and the dangers of prohibiting people from making their own choices are high, Proposition X counsels decriminalization. For multiple reasons we have explored, people have the right to choose wrong.<sup>151</sup> Proposition X preserves the choice of a person despite our view that they commit a self-regarding wrong.

It is important to see how this Proposition differs from the current run of decriminalization proposals and more fully addresses broader concerns of virtue theories. Because Proposition X is not based solely on liberal autonomy, it must remain sensitive to the need to secure the conditions of a flourishing society as represented here by Aristotle.

Recent decriminalization attempts such as Proposition K in San Francisco proposed the universal decriminalization of prostitution in hopes of addressing the widespread violence against women sex workers. Advocates of Proposition K similarly argued that decriminalization would encourage sex workers to report violent acts committed against them, thereby reducing violence among committed against them. Advocates also hoped to decrease the ability of human traffickers to maintain the fear and secrecy needed to hold women captive.

Yet current decriminalization efforts, without increased regulation and police presence, do not go far enough to strike at human trafficking and violence. Further, current proposals do not address the public health or public nuisance aspects of prostitution.

The proposed Proposition X does better on each issue. By decriminalizing the bulk of sex work in the United States, Proposition X captures much of the benefits garnered from encouraging sex workers to report violent assaults. The addition of programs which focus on decreasing police sexual abuse and increasing reporting and trust between sex workers and authorities increases the ability of the police to track and destroy human trafficking rings. Secondly, it is important to note that unlike current proposals, Proposition X prohibits “street walking.”

It is estimated that 10-20% of all sex workers in the United States work on the streets, a distinct but significant minority. Street workers face a unique set of

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<sup>151</sup> JEREMY WALDRON, *A Right to Do Wrong*, *supra* note 91.

problems among sex workers. They are in many ways the most vulnerable of all sex workers, often less able to control their environment and, as a result, may feel a higher need to turn to pimps for protection and enforcement. Additionally, that streetworkers often command the lowest fees which may expose them to a population more prone to violence. Lastly, the inherent mobility of street workers may make them harder to regulate than other sex workers. By prohibiting street walking, Proposition X attempts to decrease the violence aimed at sex workers, give greater control over their environment, reduce the need for association with violent pimps and increase the ability of authorities to monitor and regulate prostitution. Banning street walking, in addition to addressing the concerns earlier explored, may also serve to raise the price of prostitution, with the hope, speculative though it may be, that higher prices will somewhat alter the demographics of purchasers and lead to a lower risk of violence.

To be sure, some of this is speculative; there is much we do not know about the sex industry. Moreover, it is important to note that the proposed solution has real dangers of its own. Two immediately come to mind. First, by attempting to make prostitution less public and more “discreet,” one runs the risk of making prostitution harder, not easier, to regulate. Secret brothels do not exactly sound like a model for openness. Hopefully, a regime of decriminalization and licensing will lessen the perceived need for secrecy, at least for businesses if not individuals. After all, while there are bars which are discreet, there is no evidence of overwhelming and wide spread violations of liquor licenses and certainly not on the level of the wide-spread persistence of prostitution.

Secondly, there is the very real danger that sex workers, to the extent they will have to see clients at the client’s home or place of the client’s choosing would be in even greater danger. This strikes me as an important concern. But it is hard to see this as more of a danger than getting into a strange man’s car by the side of a street.<sup>152</sup> The mere fact that a client realizes that he has given (and potentially had recorded) an address and other identifying marks may serve as a measure of protection.<sup>153</sup>

Lastly is the natural assumption that it will be impossible to completely eliminate street prostitution. There are few desired legal commodities or services where no grey market exists. There will be sex workers who, for myriad reasons,

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<sup>152</sup> Revolving Door: An Analysis of Street-Based Prostitution in New York City, *supra* note 11, 49-50, 53.

<sup>153</sup> Julie Pearl, Note, *The Highest Paying Customers: America’s Cities and the Costs of Prostitution Control*, *supra* note 136, 775.

will be “willing” to work on the streets. The important comparison, however, is not to the ideal world but rather the possible alternatives we face. By creating a legal and relatively safer market, many more sex workers will opt to work in that market.<sup>154</sup> If we cannot have a perfect world, Proposition X serves our greatest concerns by decreasing the violence against sex workers and focusing the fight against the evil of human trafficking.

The other two concerns we have explored are addressed relatively straightforwardly by Proposition X. Proposition X addresses the public health risks associated with prostitution through licensing and rigorous health monitoring. While there may be some enforcement difficulties, the success of other industries and jurisdictions – pornography and the few jurisdiction that permit prostitution – illustrate that these are not insurmountable.

Another distinctive wrinkle in Proposition X is the prohibition of streetwalking. Streetwalkers are the lowest paid and most vulnerable of all sexworkers. Reducing inherently mobile street prostitution will allow more orderly health monitoring and other regulation of sex work. Lastly, because streetwalking can be a particularly public and unpredictable incarnation of prostitution, this partial ban addresses the uncontrolled imposition of sexualized information to the public.

Achieving the balance between the ban on streetwalking and the decriminalization of prostitution will require localities to achieve a delicate balance to protect society and protecting sex workers. Some foreign jurisdictions have responded with zoning laws that concentrate sex work into red light districts, which undeniably have serious disadvantages. Because heavy clustering of ostentatious sex related businesses can drive out other uses and undermine viable living and working conditions, one might favor a policy which left such business discreet and discrete. On the other hand, it goes without saying that there will be areas such as school zones where such business would be inappropriate. Different jurisdictions must wrestle with other thoughtful and appropriate steps, such as ensuring a suitable (and perhaps conservative) age at which one could legally enter such work. In any case, these particular issues are almost certainly best left to local decision makers and experts.

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<sup>154</sup> It is also worth noticing that a possible stigma might evolve around the patronage of illegal prostitutes where legal prostitution exists. Though anecdotal, this seems to occur in many European jurisdictions in part driven by the desire of clients of prostitutes to see themselves as engaged in a consensual and fair transaction.

There remains one concern which until now has been discussed only elliptically. The current ban on prostitution, I have argued, turns in large part on the fact that significant numbers rightfully think it is immoral. By the same token, the decriminalization of prostitution is difficult because politicians and other political actors would face the wrath of those same people as voters were they to advocate such a policy.<sup>155</sup> Individual political actors have much to lose and little to gain for protecting prostitutes, even if such a policy were the right thing to do. There is a high political cost and, tragically, no political gain in attempting to spare tens of thousands of women from rape, violence and fear.

To some extent, this article is an attempt to address that political cost. By illustrating that there can be broad overlapping consensus from wide ranging fundamental philosophical starting points, it is hoped that the conventional assumption that prostitution is simply too controversial to address is exposed as untrue. One cannot claim universal assent – I have had to set aside important positions in feminism and divine will theories of law that cannot be brought into agreement. Yet we have seen that the major foundational philosophical positions undergirding our law do agree with the common sense intuition that prostitution is immoral, yet caution against prohibition while converging on sensible regulations of sex work. Highlighting this agreement dissolves the assumption that the tension between various camps, particularly liberals and those who reject the most stringent forms of liberalism, is intractable. Hopefully, recognizing and respecting the common moral intuition that prostitution is immoral while illustrating the tragic dimensions of prostitution arms political actors with the arguments needed to address this grim industry which hides in plain sight.

## V. Part V. Some Reasons I Might be Wrong

I fear a reader may have a long list of reasons why Proposition X is misguided but it seems to me that three related counterarguments require immediate attention. The first is that Proposition X changes little (nothing?) of our current enforcement practices. The second is that, put plainly, it will not work or will make things worse. Third is that Proposition X may work, much to our chagrin. Though I cannot treat these fully, some thoughts are appropriate.

The first critique of Proposition X argues not that it is too radical but that it in fact changes little. In every metropolitan center, various publications advertize “escort services,” “erotic massages” and other thinly veiled solicitations for sexual services. Internet classified ads have long been under fire for providing unfettered access to prostitution services shielded from police view. In New

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<sup>155</sup> PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION, *supra* note 7, 43.

York, one cable channel features exceedingly sexually explicit advertisements throughout the night, offering to provide escorts to the client's door, anytime, 24hrs a day. There is only so much research I am willing to do, but it takes no imagination to understand that customers are not being "escorted" anywhere in the dead of night. There are, of course, occasional police raids of massage parlors and escort rings, as the Spitzer example shows. But it may seem to many that we have already reached an uneasy détente, wherein policing focuses child prostitution, human trafficking and on low level street prostitution, to some extent, while ignoring the open secret of "escort" services.

While there is surely some truth to this concern, I do not think it counts against Proposition X. If we, as a nation, have adopted the stance of "open secret" towards prostitution then formal decriminalization, as outlined in Proposition X, risks limited downside while striving to secure safer conditions for sex workers, important public health regulation and controlling both the imposition of sexually explicit imagery and public nuisance aspects associated with our current regime. Because decriminalization generates a culture of lawfulness where sex workers understand that they can rely on police protection - reducing police abuse of sex workers and fostering cooperation on reducing human trafficking - then much is gained. If the argument that Proposition X changes little is correct, then allowing tens of thousands of women to be legally marginalized, physically and sexually abused and shutting off our ability to pursue human traffickers is too high a price to pay for merely symbolic shunning.

The related concern, which I take quite seriously, is that Proposition X will simply not work or will make things worse. Of course, there are several versions of this argument but they might point out a couple features most prominently. First, the decriminalization of sex work may result in a large increase in the overall number of sex workers, especially over time as the stigma of prostitution fell away. Besides whatever purely moral harm this might do to a society, the increase in the harms associated with prostitution might well increase if the rise in total numbers was great enough. (This would include any demonstrable links between the decriminalization of prostitution and violence against women generally.)

Secondly, one might reasonably believe that a large market for sexual services will unavoidably bred an increase in human trafficking as organized crime elements attempted to extract money from both legal and grey markets. In conversations with two friends in Amsterdam, one a police prosecutor and the other the deputy mayor, both bemoan the intractability of human trafficking in Amsterdam. The combination of a flourishing sex trade and valued currencies

have made Western Europe a target market for human traffickers, who lure women from Eastern European and other poorer nations and press them into the equivalent of sexual slavery. It is an important caution that a few European countries have recently abandoned similar regulations of prostitution even while others are considering doing so.

In some ways, I have tried to meet this critique by pointing out ways in which increased cooperation between police and sex workers might curtail these problems. But it is important to own up to the full brunt of the critique. I have not argued that there is a right to be a sex worker. That is all to say, if Proposition X fails to curtail the important problems that each philosophical system held as disabling, the project should be abandoned. My goal here is not to promote prostitution – indeed, I have held that it is a morally poor thing to do to oneself. If Proposition X cannot reduce the amount of harm that stems from prostitution by decriminalizing it, then the same philosophical agreement which led us to adopt it should lead us to abandon it.

One last concern deserves some attention. Even if Proposition X succeeds, it is worth asking if the moral costs to a society are too high. Prostitution is a moral wrong and decriminalizing may have the moral cost of legitimizing it as a plausible way of life quite outside of any increase in harms to other people. Secondly, Proposition X, if successful, would change the way prostitution currently occurs. In particular, Proposition X is unabashed in having as an ancillary goal the rise in price of sexual services. This would create a society with a particular unattractive feature; a society where the wealthier are free to purchase the sexual services of another and indulge in expensive immoral behavior others cannot afford. There is a way in which Proposition X makes sin a luxury item.<sup>156</sup>

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<sup>156</sup> There are numerous other problems which cannot be fully addressed here. Some have argued that legalizing sex work would force people to engage in prostitution as a condition of receiving social welfare benefits. I find this unpersuasive. There are ways of making money that are properly considered too personal to condition welfare payments, take for example selling blood or plasma. There is no reason to believe that the decriminalization of prostitution means we ought to lose our sense of all distinctions.

It has also been suggested that this proposal would make it difficult for those who most “need” access to prostitutes, those who may not be attractive enough and have fewer options, to procure sex. Pat Califia, *Whoring in Utopia*, in *THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS*, *supra* note 2, 478-479. A great deal depends on how this need is viewed. PETER DE MARNEFFE, *LIBERALISM AND PROSTITUTION*, *supra* note 7, 120-122. Further, others plausibly worry that wide spread decriminalization of prostitution would threaten the monogamous marriage. While this is not far-fetched, much more evidence would have to be gathered to show that marriages are more

I admit to not having a knock down answer for these charges. All things considered, I suppose it comes down to a matter of choosing between suboptimal conditions. Our choice is not prostitution or no prostitution but rather more or less and, most of all, what form of prostitution. On the one hand is a world in which prostitution is an openly acknowledged and regulated field, sparing tens of thousands of vulnerable women from violence, rape and death. On the other, our current world in which it is equally acknowledged but commercial sex is winked at while violence is looked away from. I may shake my head in sadness but I chose the first.

### Conclusion

Having spent some time imagining how Proposition X would affect behavior on the ground, let me conclude by returning to the philosophical project. In concluding, it is as important to point out what I am not arguing as it is to be persuasive for what I am proposing. Let us begin with what I am not arguing.

I have, like many liberals, argued elsewhere that people have a right to commit certain wrong acts, acts that do not harm others. Prior work has focused on the intersection of analytical jurisprudence and criminal theory, arguing that the shape of law and its inherent coerciveness places certain political restraints on the state.<sup>157</sup> That set of arguments concluded that for reasons grounded in the relationship between autonomy, moral agency and identity, virtue is inappropriate as a basis of legal duty.<sup>158</sup> In this article, however, I have steadfastly avoided basing the argument on decriminalizing prostitution on any deep commitments to unique philosophical premises. I have not argued, as much of mainstream liberalism currently argues, that decriminalization of vice should be based on the notion that there are plural forms of the good life which citizens should be free to pursue. Similarly, I have not taken the related and familiar tack of arguing that moral uncertainty means the law cannot appropriately legislate.

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threatened by a decriminalization regime than the current “open secret” that exists today. Indeed, it is worth noticing that none other than Aquinas thought prostitution, which he regarded as vile and sinful, helped to stabilize family life by allowing unmarried men sexual recreation and thus averting their targeting all their sexual energy at married women. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, 2a2ae, q. 10, art. 11; Vincent M. Dever, *Aquinas on the Practice of Prostitution*, in *ESSAYS IN MEDIEVAL STUDIES, PROCEEDS FROM THE ILLINOIS MEDIEVAL SOCIETY* 39 (1996).

<sup>157</sup> Ekow N. Yankah, *Virtue's Domain*, *supra* note 97; Ekow N. Yankah, *The Law of Duty and the Virtue of Justice*, *supra* note 122; Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, *supra* note 25.

<sup>158</sup> *Id.* at 1208-1211; Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, *supra* note 25, 1254-1255.

Here instead I have adopted an approach which takes exactly the opposite view on two levels. First, eschewing deep commitments to any particular theory, I have argued that the three most dominant philosophical traditions in the Western world, traditions typically used as foils to test our moral intuitions, have a surprising degree of agreement on what is often considered a deeply controversial topic – self-inflicted moral harm. The foundational thinkers of each tradition had no problem conceptualizing certain actions as a purely moral harm. Perhaps others will wish to argue that the moral status of trading sex for money is indeterminate or non harmful but that is not my position.

Nor are my arguments based on any particular liberal view of the bounds of the state's legitimate actions. Indeed, the very point argued is that the agreement exists regardless of whether one holds a liberal view of the state or not. I do not wish to overstate this, the reasons each philosopher suggests for restraint are importantly different. Yet it is striking how much accord can be found and differences which can be soundly extrapolated even to details. It is remarkable on how much those who take starkly different starting points as to first principles can agree. It is also worth noting that while prostitution has been the focus here, there are other places where philosophical accord can provide powerful guidance to the law. There will surely not be agreement on every problem, even on everything that represents a moral harm-to-self. But rather than consistently prosecuting a body of law rooted in one controversial philosophical view progress may be made by seeing where there is overlap.

This would seem too obvious to say if it were not so painfully far from our actual circumstance. What is remarkable is that this great accord seems to have so little effect on the actual shape of either our criminal law regime or, in most places, our public discourse. Prostitution, in an uncritical response to a collective moral “ick,” results in our continued prohibition and isolation of tens of thousands of vulnerable women. Given that there is so much to agree on, that we too easily ignore sensible accord and condemn untold numbers to a life of violence and legal banishment is tragic.