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# The Ins and Outs of Prostitution: A Moral Analysis

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## The Ins and Outs of Prostitution: A Moral Analysis

The Ins and Outs of Prostitution: A Moral Analysis

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Master of Arts in Philosophy

By

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December 2011  
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## **ABSTRACT**

Prostitution is illegal in almost all parts of the United States. Regardless of whether one considers this to be positive or negative, prostitution is still a booming business and thrives despite the legal ramifications of the practice. The pervasiveness of prostitution despite its prohibition may lead one to question the point of the legislation if enforcement is so costly and ineffective. Is prostitution illegal because it harms the well being of society as a whole and the prostitute in particular? Or perhaps it is simply distasteful or worse, immoral and must be forbidden by the law. This, however, leads to several questions. Should the law be able to regulate the behavior of individuals in private moral matters, if so, under what conditions, and further, should prostitution be regulated by the government or even be considered immoral? By analyzing the arguments presented by various sexual ethical theories that condemn prostitution as morally impermissible and exposing their flaws, this thesis then turns to consent theories that accept some forms of prostitution as morally acceptable in order to show that prostitution, while illegal in the united states, is, in certain situations, morally acceptable, and should not be prohibited.

This thesis is approved for recommendation  
to the Graduate Council

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## INTRODUCTION

Prostitution is illegal in almost all parts of the United States. Regardless of whether one considers this to be positive or negative, prostitution is still a booming business and thrives despite the legal ramifications of the practice. The pervasiveness of prostitution despite its prohibition may lead one to question the point of the legislation if enforcement is so costly and ineffective. Is prostitution illegal because it harms the well being of society as a whole and the prostitute in particular? Or perhaps it is simply distasteful or worse, immoral and must be forbidden by the law. This, however, leads to several questions. Should the law be able to regulate the behavior of individuals in private moral matters, if so, under what conditions, and further, should prostitution be regulated by the government or even be considered immoral?

Chapter one will discuss prostitution in the context of morality and liberty. This chapter focuses on the legal issue of prostitution and when the law or government has the right to prevent an agent from performing some act and when it does not. The chapter first analyzes John Stuart Mill's argument in *On Liberty* as well as other influential and conservative moral principles before turning to the Hart/Devlin debate. The debate, which evaluates the British Wolfenden Report over prostitution and homosexuality, serves as a touchstone for a variety of ethical views on sexual morality. After analyzing the prostitution in regard to law and morality, it is not at all clear that, even if prostitution is immoral, as the report claims, that it should be illegal.

Chapter two looks to three popular and influential moral theories which condemn prostitution as immoral. The first theory, St. Thomas Aquinas' natural law theory, is influential not only in the church, but as a variation of a socio-biological account of sexual reproduction. This view ultimately analyzes the 'proper' or 'natural' function of sex to determine which sexual acts are acceptable or immoral. The second theory incorporates love as an essential and

necessary component of sexual interaction and focuses on Roger Scruton's text *Sexual Desire: A Moral Philosophy of the Erotic*. The third and final theory that is discussed in chapter two is the radical feminist view that all sexual acts between men and women are immoral because of the power differential between genders which results in an inequality between the sexes. This theory ultimately argues that any act of sex between men and women is immoral because it represents a subjugation of women and a dominance of men over them. Since these three theories are the most widespread and convincing of the moral views condemning prostitution, any analysis of the morality of prostitution must address their concerns. The chapter ultimately concludes that all of the arguments fail to provide an adequate defense of the immorality of prostitution.

However, while the three aforementioned popular sexual theories uphold the immorality of prostitution, chapter three analyses liberal theories of consent which rely upon ideas of autonomy to analyze sexual relationships in such a way that an entirely different conclusion is drawn, namely, that prostitution, as such, is not morally impermissible. By analyzing what exactly valid consent is, how it relates to sexual ethics, and prostitution specifically, the chapter concludes with the idea that prostitution, in certain forms, is not morally impermissible.

When discussing the topic of prostitution, it is important to distinguish prostitution, as such, from several practices that are generally linked to commercial sex or are confused for a necessary part of what is meant by prostitution. Oftentimes prostitution is linked with organized crime syndicates, pimps, madams, etc. who force women and children to become prostitutes against their will, as well as a means to perpetuate a drug addiction or as the sole available option for livelihood. These sometimes corollaries to prostitution are not what will be defended in the subsequent paper because while these practices can be linked with *some* instances of prostitution and are problematic for other morally reprehensible reasons, they do not define prostitution and

are beyond the defense of this paper. The definition of prostitution for the purpose of this paper is sexual interaction (whether sexual intercourse or other forms of sexual engagement, such as masturbation, etc.) between adults for compensation (whether monetary or some other exchange of valuables). This definition is strictly applicable to adults engaged in prostitution and does not defend the sadly common practice of child prostitution. Child prostitution, on this account, will always be impermissible due to the mental immaturity of those below the age of consent.

The gender of the prostitute and client is irrelevant for the purposes of this paper. A common assumption about prostitution is that women are prostitutes and men their clients. However, while this may represent the majority of prostitution, it is not a requirement. Both men and women can be prostitutes, as well as clients, and heterosexual and homosexual sex can be sought in a commercial sexual interaction. While the language of this paper may seem to focus on heterosexual prostitution between the female prostitute and male client, any successful theory should not exclude the other less statistically common types of prostitution. The appeal of the theory of consent in chapter three is that it forwards an argument that should apply to any sexual act, whether a form of prostitution, a 'normal' heterosexual or homosexual relationship, or any combination of sexual encounters. The argument ultimately rests on consent, what counts as consent, and whether the parties involved in any sexual encounter consent to the encounter. Ultimately, consent is both a necessary and sufficient component of sexual morality.

## **CHAPTER ONE: LIBERTY AND MORALITY**

Prostitution is a topic that sparks many ethical and legal debates. Should prostitution be legalized, regulated, banned, or left alone? The debates almost inevitably turn to a discussion of the “regulation of conduct by the law.”<sup>1</sup> To what degree should society and the government have legitimate power over the conduct of an individual? What are the rights of individuals and how are these rights incorporated into societal regulation of conduct? Much philosophical ink has been spilt on the topic; however, when writing on social issues that reference governmental restrictions that should or should not be placed on an individual, John Stuart Mill’s 1859 text, *On Liberty*, is generally considered the most important required reading for contemporary thinkers. Mill’s work offers significant prescriptive insight into societal control over the individual and when such control is legitimate or interferes with an individual’s rights.

### **John Stuart Mill’s *On Liberty***

Mill begins his essay by pointing out that there is a grave distinction between what people say about modern western governments and the reality of such governments. When, for example, in the United States, we talk about a “government of the people, for the people, and by the people,”<sup>2</sup> this does not mean that each person has a say in the governing of the country, it is often the case that “the ‘people’ who exercise the power are not always the same people with those over whom it is exercised.” Further, when we speak of the will of the people, it is

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<sup>1</sup> Richard A. Wasserstrom, ed. Introduction to *Morality and the Law* (Belmont, California: Wadsworth Publishing Company, 1971) 1.

<sup>2</sup> Abraham Lincoln, “Gettysburg Address” Speech, November 19, 1863 in *Collected Works of Abraham Lincoln*, Roy P. Basler, ed. (New Brunswick, New Jersey: Rutgers University Press, 1953).

generally the will of the most numerous, and does not express the will of all.<sup>3</sup> Because the sentiments and opinions of the majority of people in a democracy are represented more fully than those of the minority, care must be taken to protect individuals from mob morality and suppression of individuality and ideas. Mill believes that

there is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism.<sup>4</sup>

The inherent problem with democracies is the ease with which the majority can interpose their views, customs, and moralities on those whose opinions dissent from their own, which, in turn, can interfere with the progress and evolution of humankind, claims Mill. When a majority in a state allows custom and morality to rule the government, it prevents the ability to create discourse and debate about particular dissenting views which, such views, oftentimes lead to progress and change due to the structure of intellectual interaction. This progress and change is important because morality and the opinions of the majority tend to be based in custom and are often only half truths not always based in reason, but intuition. That custom is not based in reason but intuition and emotion, leads Mill to claim that this is the same as basing legal and governmental operations on individual preferences and opinion, which are the basest form of understanding. When individuals are not protected against the tyranny of the majority, fear of persecution, abuse, or legal ramifications prevent expression of ideas, and this in turn leads to the stagnation of the state.<sup>5</sup> Whether a view is right or wrong should have no bearing on the individual's ability to foment discourse on the topic. If opinions are forwarded that are opposed

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<sup>3</sup> John Stuart Mill, *On Liberty*, (Indianapolis: Bobbs-Merrill Educational Publishing, 1956) I: 5; numbers refer to chapter numbers followed by paragraph numbers.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, I: 6.

to the prevailing moral views, it presents an opportunity to either change the prevailing view, if proven wrong, or solidify the view, if proven correct. Either way, opposition does not threaten society, it strengthens it. When one enacts legislation that prevents open discourse and dissent from the popular view, it is essentially a claim to infallibility. By not permitting any kind of criticism or difference of opinion, the state and the majority are claiming to have absolute and infallible truth, which is denying human error.<sup>6</sup> When a state, society, or government does this, Mill calls it “an assumption of infallibility” which “undertak[es] to decide ... *for others*, without allowing them to hear what can be said on the contrary side.”<sup>7</sup>

However, the tendency to inhibit discourse on dissenting ideas often carries over into the realm of action and human behavior. The idea that the will, opinion, or morality of the majority is infallible reflects the tendency to suppress any kind of behavior or action that goes against culture or custom. If they do not want an individual to discuss it, they certainly do not want an individual to do it. For Mill, this suppression is unwarranted and he develops a principle in his text that he believes can serve as a test to determine whether it is justifiable for the government to interfere, not with merely the beliefs or opinions of an individual but with a person’s actions. Mill’s principle states “that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty or action of any of their number is self-protection.”<sup>8</sup> In other words, to prevent harm to oneself or on behalf of others (in the case of the government) is the only time it is acceptable, according to Mill, for the government to interfere in the lives of individuals. Each individual has the right to express his/her opinion or to perform self-regarding actions (actions that affect only the individual in question) without interference. To claim that

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<sup>6</sup> *Ibid*, II: 4-6.

<sup>7</sup> *Ibid*, II: 11.

<sup>8</sup> *Ibid*, I: 9.

one is able to force another against his/her will to do something that is ‘for his/her own good,’ whether physical or moral, is simply not a legitimate claim. If the actions of an individual do in fact harm another, then others (i.e. the state) should and sometimes are “absolutely require[d]” to interfere.<sup>9</sup> This principle, often referred to in literature as the ‘harm principle,’ requires others to allow individuals to decide for him/herself without interference as long as no other is harmed or their rights infringed.

Mill asserts that in any case in which an individual does not affect the lives of others by his/her action, then “there should be perfect freedom, legal and social, to do the action and stand the consequences.”<sup>10</sup> Even in the case that the individual is in error, it is better for society, according to Mill, that he/she be left alone to act in whatever manner he/she sees fit. Those in society who are concerned for the moral well-being of the individual may offer advice or plead for a change, others who condemn the acts of the individual may choose to separate themselves from the individual, however, it is not the case that others are permitted to “make his life uncomfortable” or actively seek to control the actions of the individual.<sup>11</sup> If on the other hand, harm is likely to be caused to others, then it is acceptable for the individual to be prevented from performing the act.

Mill, nevertheless, admits that many may still disagree that the aspect of an individual’s life that both affect and do not affect others are indeed distinct. Critics may claim that there can be no actions that harm, affect, or involve only a single individual. The critic may claim that “it is impossible for a person to do anything seriously or permanently hurtful to himself without

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<sup>9</sup> *Ibid*, III: 1.

<sup>10</sup> *Ibid*, IV: 3.

<sup>11</sup> *Ibid*, IV: 7.

mischief reaching at least to his near connections, and often far beyond them.”<sup>12</sup> Any action performed by an individual, on this account, affects many others in various manners. For example, it could be the case that agent A decides to visit a prostitute. His visit to the prostitute affects not only himself and the prostitute (a willing, consenting, adult participant), but also perhaps his brother, child, friend, sister, mother, neighbor, etc.<sup>13</sup> in many cases, it is not direct harm of others but indirect harm that critics describe. Indirect harm caused to “near connections,” such as embarrassment, failure of a role model to behave accordingly, disgrace of a family, or even offense, are not enough to prevent a self-regarding action because it is not the case that the ‘harm’ caused in these cases is sufficient enough to infringe on an individual’s liberty. To do so would have negative repercussions for liberty and individual freedom. Mill replies that while the action of an individual may affect others through sentiment or interest, hurt feelings are not a sufficient reason to allow the individual to be forcibly or compulsorily subjected to the law.

If, on the other hand, through this self-regarding action, agent A inflicts direct harm on others, such as passing on aids to offspring or other sexual partners, use of funds that would prevent the care of dependants, physical harm to others, or the breaking of a vow, then his behavior may be subject to the law. For example, if agent A spends his child support money on visiting the prostitute, and is thus, unable to take care of his child, it may be the case that his behavior should be censured and he should be held liable. Or in the case of adultery or some other act that directly harms another, he should be censured. However, in this case, Mill stresses that it is not the act of visiting the prostitute that is reprehensible, but the failure to fulfill his parental or spousal duties is the problem with the act. So, again, it is not exactly clear that even

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<sup>12</sup> *Ibid*, IV: 8.

<sup>13</sup> *Ibid*, IV: 9.

in cases of direct harm to others due to an individual's acts that the act itself is morally unacceptable because it is often corollary behavior that makes the act wrong, not the act itself.<sup>14</sup>

When a society condemns certain acts, such as prostitution, then, it is often not based on the self-regarding action, but some other act that may be prohibited by law or morality.

Thus, Mill argues that many acts that are typically reviled are self-regarding actions that in themselves are not wrong, and the law or the state has no justification for prohibiting them simply because they flout custom or have the potential in some cases to lead to harmful acts. The tendency of the majority to cast a suspicious moral eye on those who express their individuality through dissent of custom or conventionality is generally due to the conformist inclination of the unthinking majority. According to Mill,

the general average of mankind are not only moderate in intellect, but also moderate in inclinations; they have no tastes or wishes strong enough to incline them to do anything unusual, and they consequently do not understand those who have, and they class all such with the wild and intemperate whom they are accustomed to look down upon.<sup>15</sup>

Thus, when one holds unorthodox views or acts on those views, it makes the majority uncomfortable, which causes a desire to purge the unease from their lives. Many arguments for the legislation of popular morality stem from this unease.

So, according to Mill, the argument that prostitution should be regulated for the moral well-being of the prostitutes or their clients is not a legitimate claim as it stands. Yet, if, according to Mill's principle, the argument can be made that prostitution causes direct harm to others, then perhaps an argument could be made that prostitution should be legislated. Until then, however, it is not clear that one can compel others to cease such a vocation. Mill, in fact, makes the claim that "over himself [or herself], over his [or her] own body and mind, the

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<sup>14</sup> *Ibid*, IV: 10.

<sup>15</sup> *Ibid*, III: 15.

individual is sovereign.”<sup>16</sup> Further, the collective society has no right to control “that portion of a person’s life and conduct which affects only himself or, if it also affects others, only with their free, voluntary and undeceived consent and participation,” which seems to support the view that one cannot legislate prostitution.<sup>17</sup> It is important to note that when Mill refers to others’ “free, voluntary and undeceived consent and participation,” he is referring not to children, or those with mental defects, but those with “mental maturity” who are “past the age of being taken care of by others.”<sup>18</sup> Prostitution among consenting adults does not appear to interfere with the liberty of others.

Nevertheless, it is important to briefly consider the concept of consent in this context, as many critics of Mill tend to do (though it will be discussed in greater length as the subject of chapter three). Mill claims that an adult can voluntarily offer undeceived consent to another without either of the participants being censured by law. The two individuals are freely engaging in the activity without force. However, can consent be allowed as a means to allow another to engage in a morally reprehensible act? If consent is allowed unreservedly, many claim that the legal system would be abused and ignored. For example, if a person consents to become a slave, be beaten with a hammer, to be killed, or in some other manner to things that are typically disallowed in the legal system, consent in these cases are often seen as not enough to justify the harmful acts inflicted on the other. However, there is a distinction between consent to physical harm and consent to perceived moral harm. In reference to sexual activities, the assertion of harm is difficult, if not impossible to prove. Even in the cases where physical abuse occurs in conjunction with a sexual act, it is not the sexual act that is necessarily wrong, but the violence

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<sup>16</sup> *Ibid*, I: 9.

<sup>17</sup> *Ibid*, I: 12.

<sup>18</sup> *Ibid*, I: 10.

and physical harm. In other words, it would not be impermissible because it is sex, but because there is physical harm. The examples of physical harm involve actual provable harm, whereas the harm of being morally offended, of being psychologically affected, or of performing a perceived immoral act is almost impossible to prove.<sup>19</sup> Because of this, consent in performing a sex act, for example, is not analogous to consent to being killed. There is a lack of evidence of social harm in certain acts, such as prostitution, that represent a divergence from physical harms.<sup>20</sup> The primary difference, however, between an act such as prostitution and killing, or even stealing, is that prostitution is an offense against moral sensibilities, whereas killing or property theft are offenses against a person's physical well-being. Nevertheless, this concept of harm will be explored in greater detail below in an attempt to clarify the distinction between prostitution and other acts in which harm is used as an indication of permissibility.

### **Harm and Offense Principles**

The various ways in which moral sensibilities affect and alter society are analyzed by Joel Feinberg in his text *Social Philosophy*.<sup>21</sup> Feinberg argues, as this essay previously addressed, that Mill advocates and accepts what is referred to as the 'private harm principle,' which, simply stated, is the permission of "society to restrict the liberty of some persons in order to prevent harm to others."<sup>22</sup> This seems to be the only occasion in which the state is allowed to coerce an individual against his/her will, according to Mill, and seems to be widely accepted by most people as a permissible case of coercion by the state. However, Feinberg argues that Mill must also hold some form of the 'public harm principle' because if not, he would have accepted

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<sup>19</sup> A.R. Louch, "Sins and Crimes," in *Morality and the Law*. Ed. Richard Wasserstrom. (Belmont, California: Wadsworth Publishing Company, 1971) 73-6.

<sup>20</sup> This concept will be explored in greater detail in chapter 3.

<sup>21</sup> Joel Feinberg, *Social Philosophy*, (Englewood Cliffs, New Jersey: Prentice-Hall Inc, 1973).

<sup>22</sup> *Ibid*, 25.

certain acts such as “tax evasion, smuggling, and contempt of court.”<sup>23</sup> To Feinberg, acceptance of these acts by Mill is unlikely, and thus, Mill must, on his assumption, accept the public harm principle which “justif[ies] coercion on the distinct ground that it is necessary to prevent impairment of institutional practices and regulatory systems that are in the public interest.”<sup>24</sup> Accepting this assumption by Feinberg for the sake of argument, he goes on to claim that while the private and public harm principles seem to be acceptable, it is not at all clear to what degree they actually are acceptable because the meaning of ‘harm’ must first be analyzed in order to uncover the various uses of it and related words, such as hurt and offense.

Harm, most typically, when discussed in legal terms relates to an interest a person has; however, ‘interest’ is often a vague term at best. Interest can be based on a desire a person has or on something this person does not desire, but is in ‘his/her best interest’ or well-being. Therefore, when referring to a person’s interest being harmed, Feinberg turns to legal writing to clarify its meaning. He claims that there are various classifications of interest that depict differing degrees of harm, nevertheless,

A humanly inflicted harm is conceived as the violation of one of a person’s interests, an injury to something in which he has a genuine stake. . . . An interest is something a person always possesses in some condition, something that can grow and flourish or diminish and decay, but which can rarely be totally lost.<sup>25</sup>

This idea of interest allows an analysis of those things that should or should not be regulated by the law. When an individual’s interests have been compromised, this person has been harmed.

A distinction, however, must be made between harm and hurt because oftentimes, they are used interchangeably and it is not at all clear that they should. For example, when one hears the statement “A was harmed by X,” often this is interpreted as “X hurt A” or “A was hurt by

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid*, 26.

X.” The example that Feinberg uses to distinguish between the two is the popular phrase, “What a person doesn’t know can’t *hurt* him.” He then looks to the sentence with the word harm replacing hurt. He claims that while it is the case that if a person does not know something there is no way for that person to be hurt, it is not the case that if a person does not have the knowledge of being harmed that the harm has not occurred. In other words, part of being hurt requires the knowledge of being hurt, whether physical or emotional (both of which are types of hurt). So, the example that Feinberg uses of the “cuckolded husband” requires the husband to have knowledge of the infidelity of his wife for him to be hurt emotionally. Without the knowledge there is no hurt. However, it is not the case that the husband must know that his wife cheated to be harmed. This is because his interests are harmed whether he knows this or not. A clearer example of the relationship between harm and knowledge is Feinberg’s example of the rich robbery victim. Even in the case that the victim has no idea of or does not discover the robbery for some time, he is still harmed by it because his interests are compromised. The thief cannot use “He will never miss it” as an acceptable defense, it is a species of harm whether the robbed man knows it or not. However, one thing that links harm and hurt is that anytime one is hurt, they are also harmed because when one is hurt, his interests are also compromised, and he is thus harmed. This means that hurt is a type of harm, though not all harms are hurts.<sup>26</sup>

Having shown the difference between hurt and harm, the question remains whether it is acceptable to coerce individuals in cases where they induce emotional distress “when the distress is not likely to be followed by hurt or harm of any other kind.”<sup>27</sup> According to Feinberg, certain emotional distresses, such as “hurt feelings” are not sufficient grounds for coercion because

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<sup>26</sup> *Ibid*, 27.

<sup>27</sup> *Ibid*.

“they are too minor or trivial to warrant interference.”<sup>28</sup> Yet, this is not to discount those emotional distresses that can lead to significant mental breakdowns; “however, it is the consequential harm to mental health and not the mere fact of distress” that initiates mental distress to harm that in turn necessitates coercion.<sup>29</sup> However, there also seems to be an additional component to mental distress that neither leads to mental breakdown, nor “hurt feelings.” This emotional component is often referred to as offense and many legal questions surround the regulation of those acts, prostitution included, that offend others.<sup>30</sup> Before analyzing the regulation of offensive behavior, it is important to compare harm and offense in order to determine the relation between the two.

Interestingly, a similar relation exists between harm and offense that exists with harm and hurt. According to Feinberg they share six things in common:

1. Some harms do not offend (as some do not hurt).
2. All offenses (like all hurts) are harms, inasmuch as all men have an interest in not being offended or hurt.
3. Some offenses (like some hurts) are symptoms or consequences of prior or concurrent harms.
4. Some offenses (like some hurts) are causes of subsequent harms: in the case of extreme hurt, harm to health; in the case of extreme offense, harm from provoked ill will or violence. These subsequent harms are harms of a different order, i.e., violations of interests other than the interest in not being hurt or offended.
5. Some offense, like some hurts, are “harmless,” i.e., do not lead to any *further* harm (violations of any interests other than the interest in not being hurt or offended).
6. Although offense and hurt are in themselves harms, they are harms of a relatively trivial kind (unless they are of sufficient magnitude to violate interest in health and peace).<sup>31</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, 28.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

This interpretation of offense and its relation to the harm principle seems to conclude that offense is not a significant enough reason to prevent an individual from performing a certain act. It must be noted that these offenses are not equivalent to hurts such as sorrow or distress. Offenses are similar in that they are unpleasant or disliked. However, many reports on “harmless offences” have been conducted (such as the British Wolfenden Report which will be discussed below) that seem to concur that in certain circumstances it is acceptable to regulate such offenses, even when they are “harmless” while, the analogous hurting another’s feelings, by calling them a name or ending a relationship for example, cannot be regulated. For this reason, there is often a separate principle that deals with offense, known simply as the offense principle, which grants as acceptable the right of a state to prevent individuals from performing certain acts based on its moral offensiveness.<sup>32</sup>

The offense principle is often used in conjunction with other social ideas, such as paternalism and legal moralism, which attempt to regulate actions based on moral ideals. These two social concepts are exactly the type of enforcement which Mill condemns as unacceptable, coercive control over individual liberty. Paternalism is a “liberty-limiting principle” which “justifies state coercion to protect individuals from self-inflicted harm, or, in its extreme version, to guide them, whether they like it or not, toward their own good.”<sup>33</sup> The idea that the state should control an individual for his/her own good or because it understands what citizens need better than the citizens themselves, seems to suggest that citizens are like children who do not know any better. However, paternalism has always been a part of our legal system. For example, it does not defy reason, as Feinberg suggests, that certain drugs should be regulated by the government or made illegal (both prescription drugs and drugs such as heroin or cocaine)

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<sup>32</sup> *Ibid*, 28-9.

<sup>33</sup> *Ibid*, 45.

because of the risks associated with them. However, this should not be allowed to be applied to every action in such a way that popular morality becomes endorsed by the state as “for your own good.” Just as it sometimes seems to be acceptable for the state to regulate certain things, it also seems unacceptable for the state to control other things based on this paternalistic principle. When Mill was criticizing paternalism, he was claiming that the “fully voluntary choice or consent (to another’s doing) of a mature and rational human being concerns matters that directly affect only his own interest is so precious that no one else (especially the state) has a right to interfere with it simply for the person’s ‘own good.’”<sup>34</sup> A person’s liberty should not be taken away if an action has the potential to cause harm to that individual. Potential for harm or concern for an individual’s own good, are not sufficient reasons for a state to interfere because it has the potential to “create serious risks of governmental tyranny” when the state has ultimate authority on what is or is not for the public good.<sup>35</sup>

The second liberty-limiting principle that is similar to paternalism is legal moralism, which is the idea that morality should be governed by the state. So, on this view, when an individual sins against morality, that individual should be punished by the law for offending the public and going against popular morality. Legal moralism is thus an attempt to legally enforce morality. Most of the “morals offenses” that legal moralism attempts to criminalize have to do with sexuality, such as prostitution, homosexuality, and incest, among others; however, other issues such as animal abuse and desecration of the flag are also seen as morals offenses.<sup>36</sup> Legal moralism is what Mill was referencing when he said that oftentimes the custom or morality of the majority was forced upon those with a dissenting view. Under legal moralism, which is

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<sup>34</sup> *Ibid*, 48.

<sup>35</sup> *Ibid*, 52.

<sup>36</sup> *Ibid*, 36-7.

typically associated with the view of Patrick Devlin on the Wolfenden Report, the majority morality is legally enforced at the expense of private (self-regarding) acts of liberty.<sup>37</sup> This view, espoused by Devlin, began the start of the Hart/Devlin debate, in which Patrick Devlin and HLA Hart analyze the decision of the British Wolfenden Report on the legal regulation of homosexuality and prostitution.

### **Wolfenden Report and the Hart/Devlin Debate**

In considering the Hart/Devlin debate, one must look to the Report with which it began. The Wolfenden Report was commissioned in Britain in 1954 to analyze the law and its prosecution of homosexuality and prostitution. The questions the committee was attempting to resolve were the legality of the acts and whether the current laws were sufficient or whether they needed to be amended.

The scope of the report is not to look at the morality or immorality of the act, but rather the effects it has on law and order. The report claims that they “recognize that we are here, again, on the difficult borderland between law and morals, and that this is debatable ground.”<sup>38</sup> They further claim that they “are concerned not with prostitution itself, but with the manner in which the activities of prostitutes and those associated with them offend against public order and decency, expose the ordinary citizen to what is offensive or injurious, or involve the exploitation of others.”<sup>39</sup> While the purpose of the report is not to look into the morality of prostitution, it is evident that the committee views prostitution as a social evil that is immoral, going so far as to describe their purpose as looking into prostitution and “solicitation for *immoral* purposes.”<sup>40</sup>

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<sup>37</sup> *Ibid*, 37.

<sup>38</sup> Great Britain, *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution*, (New York: Stein and Day, 1963) 132.

<sup>39</sup> *Ibid*, 133.

<sup>40</sup> *Ibid*, 131.

(Italics mine). The negative language against the prostitute is obvious. When referring to the pimp, the report claims (based on what evidence, it does not state) that the man may be the “one humanizing element in the life of the woman,”<sup>41</sup> thus implying that the prostitute or the life of the prostitute is inhuman.

While the Report presupposes the immorality of prostitution, it recognizes the unforced choice that many women make in leading a life of prostitution claiming the reason many women choose the life of prostitution is that it is “easier, freer, and more profitable than would be provided by any other occupation.”<sup>42</sup> However, while the women may freely choose the life of prostitution, the prostitute’s rights are not the priority of the committee. They claim that “the right of the normal, decent citizen to go about the streets without affront to his or her sense of decency should be the prime consideration and should take precedence over the interests of the prostitute and her customers.”<sup>43</sup> The primary question is whether prostitution offends society, and if so, how the law should be used to protect those citizens. In discussing how the law should be enacted, the Wolfenden report recognizes the argument that prostitution would cease to exist if there were no customers and thus analyzes who should be punished in cases of solicitation. Since, they argue, the purpose of the law is to protect the citizens from indecency and “annoyance,” the party that offends should be the one punished. In the case of prostitution, the prostitutes offend the public, so the prostitute should be punished. The answer the committee states in the report is that “the simple fact is that prostitutes do parade themselves more

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<sup>41</sup> *Ibid*, 162.

<sup>42</sup> *Ibid*, 131.

<sup>43</sup> *Ibid*, 140.

habitually and openly than their prospective customers” and thus offend where the customer/solicitor does not, therefore they should be punished more fully than the customer.<sup>44</sup>

While the report discusses various options and solutions to how the law should relate to prostitution and homosexuality. The primary problem that Lord Patrick Devlin has with the report is the committee’s opinion that immorality within the private sphere is not a matter for the law. The report recognizes that in Britain prostitution as such, is not illegal, only the affront to decency and “annoyance” that it has on society or third parties.<sup>45</sup> Devlin, in fact, argues that it does not make sense to refer to a private sphere of morality and a public sphere as being separate, and thus untouchable for the law. He claims that it is nonsense to “talk sensibly of a public and private morality any more than one can of a public or private highway. Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two.”<sup>46</sup> On this issue, Devlin takes a view very much opposed to the Report, namely that it is not a matter for the law to determine private and public immorality in order to create laws, but rather, the lawmakers have the responsibility to create laws which preserve morality and as such there is no division between the public and the private.

Part of Devlin’s argument stems from his conception of society and what determines society. Devlin believes that society is “a community of ideas” and “without shared ideas on politics, morals and ethics, no society can exist.”<sup>47</sup> He argues that ‘public morality’ is such that it is inseparable from the law. By public morality, Devlin means what every “right-minded” person would believe about a specific issue. However, the “right-minded” person is the

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<sup>44</sup> *Ibid*, 143.

<sup>45</sup> In Britain during this time, solicitation was illegal but prostitution was not. In the United States, prostitution and solicitation both were and are illegal.

<sup>46</sup> Patrick Devlin, “Morals and the Criminal Law,” in *Morality and the Law*. Ed. Richard Wasserstrom. (Belmont, California: Wadsworth Publishing Company, 1971) 39.

<sup>47</sup> *Ibid*, 33.

“reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgments may be largely a matter of feeling.”<sup>48</sup> So in the case of prostitution, if it offends the right-minded person, it goes against the public morality and should be prosecutable because public morality is the basis for society’s cohesion. If there was not a public morality, then there would not be a society, so the preservation of this morality should be regulated by the law. If this is the case, as Devlin believes, then it makes no sense to discuss private and public morality because what happens within the confines of the society affects its cohesion, private or not.<sup>49</sup>

Devlin draws a parallel between homosexuality (which could easily be substituted with prostitution) and treason. He argues that subversion is a threat to society and goes against the cohesion of society. Even if a single individual is subverting society, it affects the whole. In a similar manner he claims homosexuality and prostitution threaten society. He claims that the act of homosexuality, even if it be between two consenting adults, is immoral, and as such, affects the whole of society. He claims that “the law exists for the protection of society,” not the individual as the Wolfenden report claims. Since the law exists to protect society,

it does not discharge its function by protecting the individual from injury, annoyance, corruption and exploitation; the law must protect also the institution and community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.<sup>50</sup>

This parallel rests solely on the assumption that homosexuality and prostitution are immoral.

There is no argument presented, just as there is no argument present in the Wolfenden report as to why these activities are or are not moral. However, if Devlin is correct that no distinction can

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<sup>48</sup> *Ibid*, 38.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*, 45.

be made between public and private morality, it is the necessary place of the law to step in and regulate any act that is deemed immoral, not by reason, but common sense morality that is found in any right-minded (though not rational) individual.

In response to Devlin's article, HLA Hart claims that Devlin makes several key mistakes in his understanding of society, which leads him to the faulty conclusions he makes. Hart claims that morality, for the most part was thought to have been derived from either a divine nature or through reason. If, however, as Devlin states, that morality does not come from reason, as, remember, the reasonable man is not to be mistaken with the rational man, then they come from the divine, in which case the previous methods in which he discussed morals are problematic.<sup>51</sup> This problem arises from points that Devlin himself makes in his article.<sup>52</sup> Hart points out that in Devlin's article he lists three things that the right-minded man must feel toward a specific act in order for it to be a part of the moral law. These three feelings, intolerance, indignation, and disgust, are the requirements that must be had by the reasonable man in order to make the act immoral according to moral law. This argument, for Hart, is untenable, because as Devlin himself points out, the required feelings against a particular act may subside and widespread toleration may take its place in society. In which case, does that make the act less of a threat to society?<sup>53</sup> It seems as though the argument that Devlin presents, namely, that if these three feelings are present, an act is against moral law, but the levels of toleration in society towards the acts often shift, so then it ceases to be against moral law. It seems odd that an act changes in moral propriety when feelings change because if the acts are not based in reason as Devlin claims they are not, then it stands to reason as Hart claims they would be divine, and if divine,

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<sup>51</sup> Devlin, "Morals and the Criminal Law," 38.

<sup>52</sup> HLA Hart, "Immorality and Treason," in *Morality and the Law*, Ed. Richard Wasserstrom. (Belmont, California: Wadsworth Publishing Company, 1971) 49.

<sup>53</sup> *Ibid*, 50

they would not change as public sentiment changed, they would remain moral law no matter public sentiments.

For Hart, the argument that Devlin presents is misleading. Hart believes that Devlin is taking the position of Mill in *On Liberty* and changing it to suit his needs without necessarily applying it as presented by Mill.<sup>54</sup> The liberal argument as stated by Mill is that any act that causes harm to another should be legally prohibited. Devlin takes this and draws the parallel between physical harm and harm to the moral code. This parallel, however, is deceptive. It is not the case, argues Hart, that if one performs an immoral act which goes against the moral code that society as a whole will fall apart. This is Devlin's argument for the relation between treason and homosexuality. However, the analogy that Devlin creates here is meant to show how the act of an individual has the ability to harm the moral code, and thus society as a whole, despite the "private" nature of the homosexual act. However, the parallel only works, Hart argues if a treasonous act can be performed privately. This, Hart argues is "absurd." Treason is undermining the government, which by its very nature cannot be done in private, but must be public, since the government is public. Homosexuality and prostitution, however, are private. He claims that "we must listen to the promptings of common sense and of logic, and say that though there could not logically be a sphere of private treason there is a sphere of private morality and immorality."<sup>55</sup>

So, Hart believes that Devlin's premise that society is determined by the moral code as intuited by the right-minded man who feels intolerance, indignation, and disgust toward immoral acts is based on a misunderstanding of what society is. He further believes that the analogy drawn between treason and homosexuality does not stand. These two arguments are important

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<sup>54</sup> *Ibid*, 51.

<sup>55</sup> *Ibid*, 53.

for Devlin's argument. However, as Hart points out, the survival of the society is not dependant on these three feelings of the reasonable man to remain intact and whole.

Ronald Dworkin, in analyzing Devlin's position, argues that Devlin performs "an intellectual sleight of hand."<sup>56</sup> Dworkin claims that Devlin makes "public outrage ... a threshold criterion, merely placing the [perceived immoral] practice in a category which the law is not forbidden to regulate. ... [and] this threshold criterion becomes itself a dispositive affirmative reason for action" by the law.<sup>57</sup> Here Devlin does not offer any supporting claims that homosexuality or prostitution does in fact pose a threat to society, only that deviation from the moral code does. He merely assumes that these acts are immoral.<sup>58</sup> Another issue that Dworkin has with Devlin's argument is that he does not provide an adequate distinction between prejudice and the feelings of outrage that members of society may feel toward a certain act. In fact, many of the examples that Devlin presents rely on feelings and specifically exclude reason. However, looking to the reasons why one has specific feelings about an act is important in distinguishing between a moral law and plain prejudice. The example that Dworkin uses is how one's views would be perceived in a court of law. In other words, would the reason be seen as prejudicial or based on some legitimate cause. If the latter proves to be the case, then Devlin is misleading in his argument.<sup>59</sup>

The Wolfenden Report, in looking into the link between morality and the law, a subject that the committee itself recognized as "debatable ground,"<sup>60</sup> provided a platform for the

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<sup>56</sup> Ronald Dworkin, "Lord Devlin and the Enforcement of Morals," in *Morality and the Law*, ed. Richard Wasserstrom. (Belmont, California: Wadsworth Publishing Company, 1971) 58.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, 58-9.

<sup>59</sup> *Ibid.* 66.

<sup>60</sup> Wolfenden Report, 132.

renewed debate as to the acceptability of the state to regulate morality. Lord Patrick Devlin and HLA Hart both believe in the immorality of prostitution and homosexuality that is stated in the Wolfenden Report, however, both men derive very different interpretations of society and the permissibility of the law in interfering in acts between consenting adults. Part of this stems from the misconception that Devlin has about society and the role of the law. However, a key point that neither men discusses is whether the two topics, namely prostitution and homosexuality, are in fact immoral. This question, whether prostitution and homosexuality are immoral, requires further investigation as opposed to the assumed position is has among the immoral.

### **Conclusion**

Prostitution is often discussed in the law as “harmless wrongdoing” or a “victimless crime.” In other words, the act is wrong but there are no victims or harm caused to others. This type of discussion is problematic because the central idea behind the argument does not question the moral permissibility or impermissibility of prostitution, because both sides tend to grant that it is wrong without argument. From here there are discussions and arguments as presented in the Wolfenden report that then look to whether the law is responsible or should enact laws to prosecute the offenders. The issue then turns to the effects of prosecuting such acts, and concludes, on a utilitarian position, that prostitution is difficult and costly to prosecute because it tends to occur in private, and thus should not be illegal on a practical basis.

Those who argue against prostitution being made legal are arguing from some moral principle that is taken for granted as being valid and correct. They accept the idea of legal paternalism or legal moralism that what is wrong should be illegal and that the law should regulate morality for the citizen’s ‘own good.’ However, these arguments need to be explored and explained before they can be simply granted. There needs to be a reason to accept or reject

the claim that prostitution is immoral, and the remainder of this work will analyze the moral positions of various theories to determine the morality of prostitution instead of granting that prostitution is immoral and proceeding from there. Chapter two will explore three popular moral theories that claim prostitution is immoral to see if the theories stand up as acceptable moral theories.

However, as this chapter analyzed with Mill, it is not at all clear that if an action is morally impermissible that it should be made illegal. As Socrates discussed in the *Crito*, what is legal and what is morally right do not always coincide. Simply because something is made legal or illegal does not necessarily have any moral bearing on the act. As Mill rightly states, the government should not be able to regulate self-concerning acts or acts between freely consenting adults that do not harm the interests (in the sense discussed by Feinberg) of third parties. To restate the point, simply because the act is immoral should have no bearing on the issue of legality. The only considerations the law should take into account are the protection of the rights of its citizens from physical harm and harm of their interests. Unless some provable harm is being caused, as can be seen in the examples of theft and murder, acts of individuals should not be infringed upon or legislated. Further, in the case of prostitution, where there is no provable harm when performed between two consenting adults, it should not be legislated, even if immoral.

The argument in chapter three will turn to liberal theories of consent which argue that prostitution is morally acceptable. I will argue for the even stronger position that not only should prostitution not be illegal even if it is immoral, but rather it is in fact morally permissible and not wrong at all if performed under certain parameters between consenting adults.

## **CHAPTER TWO: PROSTITUTION AS MORALLY IMPERMISSIBLE**

Many sexual acts, such as prostitution, are assumed immoral *ipso facto*. Chapter one analyzed the arguments presented in the Wolfenden Report as to whether prostitution should or should not be legalized. The arguments on both sides granted that prostitution and homosexuality were morally wrong but provided different reasons as to why it should or should not be allowed. However, all arguments not only failed to provide an adequate explanation for why prostitution is morally impermissible, they failed to provide an explanation at all. People tend to have strong feelings about the morality of certain sexual acts; however, when pressed, have a difficult time explaining why they believe they are morally impermissible. If given a list of sexual practices, many people will easily label the morally acceptable and unacceptable. However, certain acts, such as prostitution and homosexuality, are often sources of contention. What is it about prostitution, as such, that would make it morally impermissible? This chapter explores three commonly defended sexual ethical views that uphold the immorality of prostitution: 1. “naturalistic theories” which are typically espoused by the Catholic Church, specifically Thomas Aquinas in discussing natural law, though others hold a variation of the view that look to the science of sex without harboring the religious implications; 2. the “sex with love view” which bases the morality of a sexual act on the expression of love within a heterosexual marriage; and 3. the “radical feminist view” which argues that inherent in society and thus, all heterosexual sexual acts, is a subjugation of women, and therefore, any act of heterosexual sex is morally impermissible. While all three theories argue that prostitution is immoral, they use very different vehicles to arrive at their points. An understanding and analysis of the three views is thus crucial to determine if the assumed stance, that prostitution is immoral, taken in the Wolfenden Report is at all founded.

## Naturalistic Theories of Sexual Ethics

One of the most common defenses of conventional sexual morality, which has a variety of secular formulations, nevertheless, stems from natural law theory which is generally attributed to Saint Thomas Aquinas and upheld by the Catholic Church. In order to fully understand the ethical implications of natural law theory on sexual acts, it is important to understand the umbrella theory under which this sexual ethical view rests. The concept of natural law, typical in the religious tradition, considers the nature of human beings and their proper end or function. This notion of ‘proper ends’ is borrowed from the *Nicomachean Ethics* in which Aristotle claims there is a proper end or function for human beings and all other natural objects. According to Aristotle, the natural function of humans is reason, which contributes to flourishing or well-being (which is the highest human good) in the human soul. This leads to the argument that all human actions and behaviors must be conducive to the proper end of humans which then contributes to a person either leading a flourishing human life or failing to flourish.<sup>61</sup> However, while natural law, as formulated by Aquinas, stems from Aristotelian teleology, the best place to begin the analysis of naturalistic sexual ethics is with the concepts Aquinas himself develops.<sup>62</sup>

According to Aquinas, there are several laws to which humans must adhere; they are eternal law, natural law, human law, and divine law.<sup>63</sup> Aquinas claims that “a law is nothing else but a dictate of practical reason” which comes from “the ruler” of a “community” and in the case of this world, the ruler is “Divine Providence,” or God, which in turn means the world is

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<sup>61</sup> Aristotle, *Nicomachean Ethics* in *The Basic Works of Aristotle*, trans. Richard McKeon (New York: Modern Library, 2001) book I.

<sup>62</sup> Much of Aquinas’ discussion calls on ‘the Philosopher,’ or Aristotle, as authority on this subject and frequently references pages from the works of Aristotle.

<sup>63</sup> Thomas Aquinas, *Summa Theologica*, volume 6, Fathers of the English Dominican Province, eds. (London: R&T Washbourne, LTD, 1915) 91:1-6; all numbers reference the question number followed by the article number in the text.

governed by divine reason. And because God is eternal, this law would be eternal law.<sup>64</sup>

According to Aquinas, “since all things subject to Divine Providence are ruled and measured by the eternal law, ... it is evident that all things partake somewhat of the eternal law... [and it is through eternal law that] they derive their respective inclinations to their proper acts and ends.”<sup>65</sup>

Because of this, and since humans are rational, they partake in eternal reason more so than the other animals. When humans do so, they derive their proper end and acts from eternal reason and for Thomas, “it is therefore evident that the natural law is nothing else then the rational creature’s participation of the eternal law.”<sup>66</sup> So, when humans act in a manner that is consistent with reason, they act in partial fulfillment of their end because participation in the eternal law through reason is the function or end of humans. Aquinas claims that

Every act of reason and will in us is based on that which is according to nature:...for every act of reasoning is based on principles that are known naturally, and every act of appetite in respect of the means is derived from the natural appetite in respect of the last end. Accordingly the first direction of our acts to their end must needs be in virtue of the natural law.<sup>67</sup>

Natural law, then, is the mechanism through which humans understand the proper manner in which they should act.

Natural law is action-guiding and arises in humans as a ‘natural’ almost instinctual inclination. For Aquinas, the proper inclination for humans is to act according to reason.<sup>68</sup> So, when humans act in accordance with their nature, Thomas claims they are acting in a manner that is “good.” This

good is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of

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<sup>64</sup> *Ibid*, 91:1.

<sup>65</sup> *Ibid*, 91:2.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid*, 94:4.

good. Consequently the first principle in the practical reason is one founded on the notion of good, viz., that good is that which all things seek after.<sup>69</sup>

Thus, for Aquinas, the general idea behind law, natural and otherwise, is that the “good is to be done and ensued, and evil is to be avoided.”<sup>70</sup> When one does this, one is acting properly towards natural law, because “all other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.”<sup>71</sup>

However, while natural law is instinctual, many of the acts governed by natural law are not something a human can know with his/her limited faculty for reasoning. Some things are beyond human reason because while humans participate in eternal reason, this eternal reason stems from divine reason, which cannot be completely knowable to humans with their limited faculties. Thus, divine law is necessary to enable humans to fully realize their proper good because divine law introduces certain elements to the individual that are necessary for the individual to fulfill not only the natural function of the body, but the soul as well. So, in one sense, natural law is a species of divine law. Thomas claims that “since man is ordained to an end of eternal happiness which is inproportionate to man's natural faculty... it was necessary that besides the natural and the human law man should be directed to his end by a law given by God [i.e. divine law].”<sup>72</sup> Since divine law is thus unknowable to humans but influences human actions through reason, when reason is ignored it prevents one from flourishing. Thomas believes “any law that is rightly established promotes virtue. Now, virtue consists in this: that both the inner feelings and the use of corporeal things be regulated by reason. So, this is

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<sup>69</sup> *Ibid*, 94:2.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid*, 91:4.

something to be provided for by divine law.”<sup>73</sup> So, natural law is a subset of divine law and since they stem from the same source, they ultimately seek the same thing: human good.

Thomas utilizes this understanding of divine law to claim that if an act prevents one from using reason, then it is forbidden because “only those things that are opposed to reason are prohibited by divine law.”<sup>74</sup> However, natural law also prohibits those things that are opposed to reason.

Aquinas claims

As man’s mind is subordinated to God, so is the body subordinated to the soul, and the lower powers to reason. ... Therefore, man must be so ordered by divine law that his lower powers may be subject to reason, and his body to his soul, and so that external things may subserve the needs of man.<sup>75</sup>

In other words, natural law is provided to humans in such a way by divine law that the actions one performs under the dictates of natural law are consistent with and ordered by divine law. So, the actions that one performs with one’s body either help or hinder the soul since “it is good for each person to attain his end, whereas it is bad for him to swerve away from his proper end.”<sup>76</sup>

When one allows the desires of the body, which is a lower power, to overrule reason, then a human is acting contrary to his/her nature which in turn, means acting against his/her end.

Aquinas further argues that this concept “should be considered applicable to the parts, just as it is to the whole being; for instance, each and every part of man, and every one of his acts, should attain the proper end.”<sup>77</sup> If a part of an agent does not function properly, it affects the entire agent. For example, if a person decides to cut off his/her perfectly healthy and functioning leg, it affects the overall life of the agent since the body no longer functions as it

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<sup>73</sup> Aquinas, *Summa Contra Gentiles*, Book III, “Providence,” Part II, trans. Vernon J. Bourke (New York: Doubleday, 1956) 121:3. (References refer to chapter then paragraph)

<sup>74</sup> *Ibid*, 126:1.

<sup>75</sup> *Ibid*, 121:2.

<sup>76</sup> *Ibid*, 122:4.

<sup>77</sup> *Ibid*, 122:4.

should and this act does not promote the good of the agent. Just as if an agent's goal is to graduate from school, the act of not going to class affects the overall outcome of the goal. So, each act and decision that the agent makes impacts the overall achievement of his/her proper end. Aquinas ultimately argues that "Actions are morally appropriate insofar as they accord with our nature and end as human beings and morally inappropriate insofar as they fail to accord with our nature and end as human beings."<sup>78</sup>

Since humans are naturally inclined to act in a manner that promotes their good, they share certain things "which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth."<sup>79</sup> All actions that a human performs are supposed to be aimed toward his/her good. Aquinas, then, depends upon natural law to understand what is natural and unnatural for a human to do to determine whether such acts are a fulfillment of the human good. So, when Aquinas turns his analysis to sexual ethics, he concludes that the sex act must be guided by reason and performed only when it fulfills its proper human function. To understand the proper function of sex, he investigates the male body and semen specifically looking for how it contributes to the good of men and claims that

though the male semen is superfluous in regard to the preservation of the individual, it is nevertheless necessary in regard to the propagation of the species. Other superfluous things, such as excrement, urine, sweat, and such things, are not at all necessary; hence, their emission contributes to man's good. Now, this is not what is sought in the case of semen, but, rather, to emit it for the purpose of generation, to which purpose the sexual act is directed.<sup>80</sup>

Since Aquinas concludes that preservation of the species is a natural inclination in humans that is governed by natural law, he argues that the purpose of emitting semen is for propagation of the

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<sup>78</sup> Thomas A. Mappes and Jane S. Zembaty, "Sexual Morality" in *Social Ethics: Morality and Social Policy*, 5<sup>th</sup> ed. (New York: The McGraw Hill Companies, 1997) 151.

<sup>79</sup> Aquinas, *Summa Theologica*, 94:2.

<sup>80</sup> Aquinas, *Summa Contra Gentiles*, Book III, "Providence," Part II, 122:4.

species, and thus the natural end of that action. Since the natural end of the action is to produce offspring, and performing this act for any other reason would be going against this natural end, sexual intercourse for any other purpose would be bad or unnatural.<sup>81</sup> However, this seems to be begging the question. Aquinas is essentially arguing that everything has a function and emitting semen produces offspring and thus propagates the species, therefore the sex act in which semen is emitted should only and always be done to propagate the species. However, simply because semen is essential in the propagation of the species, does not necessarily mean that it is the only function of sex. Sex is and can be done for other reasons. Additionally, there is no reason to suppose each act only has one function. The function of the nose can be said to breathe, but it is also used to smell and aids in taste. So, which is the ‘proper’ function of the nose and if one uses the nose to smell, is the agent using the nose immorally or badly? It seems unlikely.

Aquinas further argues that since the purpose of sex is for the generation of offspring, the offspring must be taken care of as well. If they were not, he claims, the function would be thwarted; “therefore, the emission of semen ought to be so ordered that it will result in both the production of the proper offspring and in the upbringing of this offspring.”<sup>82</sup> Here, he links the sex act with the raising of children in a way that does not seem necessary. The “union of male and female” during the sex act and reproduction alone is not enough to fulfill the proper function of sex, the “union of male and female” socially is also a requirement because, as he argues

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<sup>81</sup> While Aquinas does not discuss the female in this section, it could easily be argued that since the emission of semen alone cannot produce offspring, and a woman’s egg and uterus are necessary features of the propagation of the species (almost as though woman is the receptacle for the semen), that a woman should only have heterosexual intercourse with a man in an effort to produce offspring. If a woman has homosexual sex, then she is not fulfilling the proper function of sex and would thus be doing something immoral since such sex can never produce offspring.

<sup>82</sup> Aquinas, *Summa Contra Gentiles*, Book III, “Providence,” Part II, 122:4.

since among all animals it is necessary for male and female to remain together as long as the work of the father is needed by the offspring, it is natural to the human being for the man to establish a lasting association with a designated woman, over no short period of time. Now, we call this society matrimony. Therefore, matrimony is natural for man, and promiscuous performance of the sexual act, outside matrimony, is contrary to man's good. For this reason, it must be a sin.<sup>83</sup>

Aquinas comes to this conclusion about man after reasoning that any animal, not only man, requires the father to be present so long as he is needed by the offspring. So, for instance, in the case of dogs, the father is not a necessary part of the upbringing of offspring, and thus, dogs do not require monogamous relationships and thus, such relationships are unnatural for dogs. For Thomas, humans, however, in general, require both parents to raise the offspring, and thus, monogamy is natural for humans. Here, he argues that he is not referring to specific individual cases, where, for instance a woman has the means to independently support a child. He is speaking of the general species of humans, which do in fact, he claims, require the presence of both parties.<sup>84</sup> So, not only is the natural function of sex procreation, it is only acceptable within the bounds of matrimony because it is the social institution that best promotes the raising of children, any other form becomes a sin, and thus immoral. Even sexual acts within marriage are limited to vaginal intercourse because this is the only form of marital sex that leads to offspring. By arguing thus, Aquinas attempts to instill marriage and monogamy with positive moral value.<sup>85</sup>

Aquinas states that if one deliberately has sex for any other reason, it is a sin and “sins of this type are called contrary to nature.”<sup>86</sup> He does, however, qualify this and claims that he is “speaking of a way from which, in itself, generation could not result: such would be any

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<sup>83</sup> *Ibid*, 122:8.

<sup>84</sup> *Ibid*, 122:8.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid*, 122:5.

emission of semen apart from the natural union of male and female. ... But, if by accident generation cannot result from the emission of semen, then this is not a reason for it being against nature, or a sin; as for instance, if the woman happens to be sterile.”<sup>87</sup> There are some instances, like the previous example Aquinas provides that seem to counter his argument. It appears as though, according to his argument, the sex act between infertile partners cannot be permissible if there is no possible way for offspring to result, if indeed the only proper function is reproduction. Significantly, if a person is sterile, they cannot fulfill the function and would be going against the proper end in engaging in intercourse. An argument can be made that Aquinas himself claims he is speaking of humans in general. So, individual cases should not be taken into consideration, only what is the human good and proper function of humans. For instance, in the above example he provides about individual cases in which a woman can independently raise a child being immoral, despite the ability to raise the child independently, seems to apply to individual cases of infertility which should also not be an exception. If an exception cannot be made for single motherhood, which fulfills the function of sex by both producing offspring and raising the offspring, why can an exception be made for an infertile couple who can in no way fulfill either function? It does not seem as though it should if one is considering the good and function of humans as a group.

Consider, however, ‘prostitution’ within marriage, or an exchange of money (or some other good) for sex within the confines of marriage. It could be the case that a woman agrees to have sex with her husband *for the purpose of procreation* but only insofar as he pays her to do so or takes her to dinner, or buys her a car, shoes, desk, etc. The morality of this situation does not seem to be clearly understood under Aquinas’ argument. The action is performed in accordance

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<sup>87</sup> *Ibid.*

with its proper function, within the proper context of marriage and the offspring are tended to; however, it is only performed on the condition of an exchange. This example seems to fulfill the requirements for morality and the extra element does not clearly void the act of its morality. So, it seems that the requirement of payment has no moral bearings on the act in question on Thomas' account. However, prostitution, in its usual form is performed outside of marriage for a reason other than procreation.

Aquinas condemns all sex outside of heterosexual marriage not performed for reproduction. Prostitution, which, one can argue, can be performed for the purpose of procreation, does not involve marriage, and therefore would be immoral because it is a species of what he refers to as "simple sex," i.e. all sex acts outside of marriage for a reason other than procreation. Aquinas acknowledges that many people believed that what he refers to as "simple sex," does not seem to be immoral. He admits that there are critics who argue if there is a woman, who is not married or "under the control of any man, either her father or another man" (today, while this statement may raise eyebrows, it can be understood to mean an independent, single, adult female) and

if a man performs the sexual act with her, and she is willing, he does not injure her, because she favors the action and she has control over her own body. Nor does he injure any other person, because she is understood to be under no other person's control. So, this does not seem to be a sin.<sup>88</sup>

However, this argument is, in his opinion, defeated when he makes the claim that humans are harmed when they do something that is against their end/function. Aquinas' argument seems to rely on the idea that what is contrary to a human's good is immoral. However, simply because something is contrary to man's good does not necessarily make it immoral, merely bad for that person and not everything that is bad is immoral. Eating fast food is bad for a person and would

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<sup>88</sup> Aquinas, *Summa Contra Gentiles*, Book III, "Providence," Part II, 122:1.

perhaps harm his/her overall well-being, but it would not be considered immoral. Sex outside of marriage may be bad for a person or not conducive to a person's happiness, but this does not and should not make it immoral. Aquinas does not seem to make a distinction between acts that have a moral bearing on the agent and acts that do not, such as, for instance when someone does something for pleasure (eating fast food, engaging in prostitution, playing tennis). Just because something does not fulfill its function, does not mean it is morally wrong as Aquinas seems to insist. Even Aristotle, from whom Aquinas borrows heavily, does not seem to judge sex and sensual pleasures as harshly as Aquinas.

Since Aquinas relies upon Aristotle for his argument, it may be possible to refute Aquinas' interpretation of natural law using Aristotelian philosophy. A possible critique of Thomas can be based on the fact that for Aristotle, sexual acts "fall into the sphere of sensual pleasure, which is governed by the virtue temperance."<sup>89</sup> And thus, many of Thomas' conclusions do not always apply to certain sexual acts outside of marriage when considered in this light because unlike Thomas, Aristotle advocates moderation and temperance in acts that seem to allow for a wider variety of acts, depending on the situation. The virtue temperance, oftentimes understood as moderation, is difficult to define in sexual terms because Aristotle is often vague as to what exactly fits into temperate sexual acts. With sexual acts, it must be "with the right people, to the right degree, on the right occasions, with the right goals."<sup>90</sup> However, he does not give many examples or parameters to judge the proper amounts, situations, etc because it depends on the individual situation. However, one act Aristotle does address is adultery and condemns it based upon the fact that certain things are bad and have no mean or moderate act.

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<sup>89</sup> Howard J. Curzer, *Ethical Theory and Moral Problems*, (Belmont, CA: Wadsworth Publishing Co, 1999) 510.

<sup>90</sup> Aristotle, *Nicomachean Ethics*, II: 6; Curzer, *Ethical Theory and Moral Problems*, 511.

He claims that “goodness or badness with regard to such things [do not] depend on committing adultery with the right woman, at the right time, and in the right way, but simply to do any of them is to go wrong.”<sup>91</sup> However, when Aristotle speaks of the sensual desires a temperate person would have, he claims that while the desires should be moderate, as long as they do not harm or prevent the end of humans, they are acceptable. This provides both a “positive and wide content.”<sup>92</sup> Many sexual acts can be included because they do not threaten the end of humans. What Aristotle excludes are those acts that are contrary to the noble, beyond the person’s means, or unhealthy. So, when considering prostitution, which Thomas would condemn as being against the function of sex, Aristotle would find such an act acceptable if it was performed in moderation with a willing participant because the act of sex, whether it produces offspring or not, does not harm the person or his/her overall interests. It may, therefore, be temperate for one person to perform a sexual act with a prostitute and wrong for another. It is also interesting to note that Aristotle does not classify things as natural and unnatural as Thomas does, but temperate or intemperate (vice). So, there may be an act, such as prostitution, that Thomas would condemn as unnatural that Aristotle would see as perfectly acceptable. However, Aristotle does have a view of “good sex” and compares every other sex act to this ideal, yet, just because it does not meet the ideal, does not mean it is immoral.<sup>93</sup> Similarly, simply because someone has sex for a reason other than procreation, may mean that it falls short of the function of sex, but not that it is immoral.

So, to sum up Thomas’ natural law view, humans should only act in those ways that fulfill their function as humans. Since everything a human does impacts his/her function, every

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<sup>91</sup> Aristotle, *Nicomachean Ethics*, II: 6.

<sup>92</sup> Curzer, *Ethical Theory and Moral Problems*, 511.

<sup>93</sup> Curzer, *Ethical Theory and Moral Problems*, 511-2.

act should be conducive to that end. When one performs a sexual act, it should only be done in a manner consistent with its function. The function of sex is reproduction and the upbringing of that offspring in a marriage. So, any form of sex other than this fails to fulfill the function and is thus morally wrong. However, Thomas makes some significant mistakes in his analysis. One, he fails to make the distinction between an act not fulfilling its function and that act being immoral. Two, he assumes that everything has a single function. Three, he adds the extraneous elements of marriage and the raising of offspring into the function of sex which seems unfounded. Finally, he fails to consider that procreation may be the ideal situation not the normal or proper function of sex. It could be that in failing to have sex for procreation, one is failing to live up to the ideal, but even then, simply failing to live up to an ideal does not make an act wrong. Thus, while prostitution may be considered morally impermissible on his view, his view is fraught with problems.

Another similar attempt to appeal to the function of sex while remaining religiously neutral looks to the biological function of human sexuality and, like Thomas, tends to argue that the natural function of sex is for reproduction. This socio-biological view looks to a biological understanding of sex and claims that procreation is the natural (i.e. biological) function or purpose of sex and any sexual act done for reasons other than the potential for procreation is morally wrong or sexually perverse. Since reproduction is the natural function of sex, sex is only acceptable if performed to reproduce. This, however, seems overly strict. There are several situations in which humans use certain body parts for something other than their 'natural' or 'biological' function and this appears perfectly acceptable and, if not morally acceptable, certainly not morally condemnable. For example, people often wear rings on their fingers and in their ears, use their nose and ears to hold on glasses, and use their mouth to hold things when

their hands are not free, all of which, while not the biological function of such things, are completely acceptable or morally neutral. So, it seems unreasonable to suggest that if the biological function of something is not fulfilled it is perverse and therefore morally unacceptable. This could also be the case with sex. Those who hold this socio-biological view seem to suggest (as does Thomas) that if it is not for the purpose, it is automatically immoral. This does not seem to hold. However, as Barbara MacKinnon states, some who hold this socio-biological view seem to believe that the act is acceptable if it has the potential to lead to procreation. This does not make the intention to reproduce necessary, only acting in such a way that the opportunity is present. In other words, only “that which interferes with or seeks deliberately to frustrate this natural purpose of sexual intercourse.”<sup>94</sup> This seems to accept all forms of vaginal intercourse in which birth control methods are not used. Prostitution, in this case very well may be acceptable, so long as there are not contraceptives used because it would not interfere with or frustrate the potential for offspring, especially since this view does not always link the reproductive purpose of sex to the necessity of marriage as natural law tends to do. According to this view, prostitution, adultery, rape, pre-marital sex, can all be suitable sexual methods, since all can lead to procreation or can be done for the purpose of reproduction. Nevertheless, these types of sex can still be condemned on other grounds, such as coercion (in the case of rape) or breaking of a vow (as in adultery and some acts of prostitution).<sup>95</sup>

The socio-biological function argument, as well as the Thomistic natural law theory, has more work to do to maintain that the only function of sex is reproduction. Igor Primoratz correctly claims that while reproduction is a function of sex, so is expression of love or emotion,

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<sup>94</sup> Barbara MacKinnon, *Ethics: Theory and Contemporary Issues*, 2<sup>nd</sup> ed. (Belmont, Ca: Wadsworth Publishing co, 1998) 193.

<sup>95</sup> Igor Primoratz, “Sexual Perversion,” *American Philosophical Quarterly* 34 (1997): 245-6.

as well as physical enjoyment. So, while it may be the case that reproduction is *a* purpose of sex, it is not the *only* purpose of sex for humans. To claim that humans who have sex to express emotion, or to enjoy it physically and not to reproduce are morally wrong seems to be a faulty conclusion.<sup>96</sup> Even if it is the case that procreation is the natural function of sex, there is still a “gap between the natural, thus defined, and the morally proper.”<sup>97</sup> There is not an argument for the connection between unnatural and immoral. Further, it could be plausible for someone to put forth a ‘natural law’ argument that biologically explains homosexuality or other types of sex. For example, one can argue that gay men and lesbian women have a ‘natural’ biological inclination toward desiring their own gender, and this is thus, “natural” to them.<sup>98</sup> And further, though controversial, some could argue that anything that a human desires comes from nature, and is thus natural. For example, the ‘plain sex view,’ as described by Alan Goldman, bases sexual perversion on statistics as opposed to a moral ideology.<sup>99</sup>

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<sup>96</sup> *Ibid*, 246.

<sup>97</sup> *Ibid*, 247.

<sup>98</sup> MacKinnon, *Ethics*, 193.

<sup>99</sup> Alan Goldman, “Plain Sex,” *Philosophy and Public Affairs* 6(1977): 249, 268; Goldman claims that “sex continues to be misrepresented ... in philosophical writings [which] attribute a necessary external goal or purpose to sexual activity, whether it be reproduction, the expression of love, simple communication, or interpersonal awareness.” According to this view, an act is sexually perverse if it is statistically uncommon and not perverse if it is common. The concept is based on “a norm, but is merely statistical, rather than moral or aesthetic.” This definition removes the connection between perversions, morality, and quality. A certain act can be perverted and yet still be moral, for example, if sex within marriage were to become statistically uncommon, it would be perverted on this view, but not viewed as immoral. Furthermore, the sexual inclination that homosexual men have could be explained as ‘natural’ and not perverse because it is statistically common. On this definition of perversion, prostitution would not be perverted at all, since it is statistically common. A typical criticism of this view is that pedophilia and other typical “perversions” would not be considered perversions at all. However, since Goldman divorces morality from his definition, there is not necessarily a “problem” with these acts not being a perversion yet still being immoral. They are separate questions. However, there seems to be little point in using the term at all if it is simply based on a statistical abnormality. If the condemnatory aspect of the definition is left out, the entire use of the word should be left out, according to Primoratz, because it seems unlikely that the moral

Nevertheless, these arguments against naturalistic theories focus on what seems to be the central issue of such theories, namely, what exactly do the proponents mean by “natural” and is there really a single case of “natural sex?” So, while Primoratz correctly argues that the argument ultimately fails to link natural functions and morality in any meaningful way, how does prostitution fare under its dictates? If we recall that the sole criteria of a sexual encounter being morally acceptable according to the socio-biological view is its potential for the procreation, on this view, prostitution, as such, cannot be condemned as being morally wrong because it can lead to reproduction, though, admittedly, it typically does not. However, if birth control or a sterile partner is involved, prostitution can become morally unacceptable. But as it stands, prostitution in itself is not impermissible when understood in these socio-biological terms. Yet, under the natural law theory of Thomas, if a sexual act is not done for reproduction and there is no marriage involved, it is immoral. Nevertheless, the actual argument that Thomas sets up is problematic and his link to the proper function of sex and immorality is strained and unconvincing. Simply because prostitution does not fulfill the function of sex, does not mean it is immoral. Additionally, the link between the function of sex and marriage for the purpose of raising offspring is extraneous and is not adequately defended.

### **The Necessary Expression of Love in Sex**

Another ethical view that defends much of conventional sexual morality is put forth by Roger Scruton in his book, *Sexual Desire: A Moral Philosophy of the Erotic*. Scruton argues that the natural function of sex is not procreation, but to express love while recognizing the other human being as the unique individual he/she is. This is not to say as *an* individual, but as *that*

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aspect can ever be divorced from the usage. This type of argument for perversion, while able to distinguish sexually common from uncommon, has no moral import at all, and serves simply as a statistical catalogue of human sexuality.

*specific* individual. For Scruton, sexual perversions, which are immoral, are “all deviations from the unity of animal and interpersonal relation” (i.e. impersonal sex).<sup>100</sup> Sex should, according to Scruton, represent recognition of the “personal existence of the other.”<sup>101</sup> To defend his thesis, Scruton first discusses sexual desire, sexual arousal, and personhood before turning to his conclusions on sexual morality, which coincides with many ideas found within conventional sexual ethics. He claims his view of sexual desire will not be based in religion but in human nature, nevertheless, it will utilize religious ideas because “erotic and religious sentiments show a peculiar isomorphism... [and] religious experience provides the securest everyday background to sexual morality.”<sup>102</sup> In fact, Scruton makes a bold claim, one that seems to echo the words of the *Humanae Vitae*, that “it needs little observation to recognize that our civilization has suffered a profound crisis in sexual behavior and in sexual morality.”<sup>103</sup> While he does not defend this claim, he believes that his text and the moral view he presents would go a long way to improve what he sees as the current crisis.

The primary theory Scruton attempts to address and refute is the idea that sexuality and the sex act are properly understood as an instinctual and animalistic aspect of human behavior. He claims that “according to this view, our animal nature is the principal vehicle of sexual desire, and provides its overriding motive. In desire we act and feel as animals; indeed, desire is a motive which all sexual beings—including the majority of animals—share.”<sup>104</sup> However, for Scruton, it is not animal instinct that motivates sexual desire, but rather a complex system of rational intentions. He argues for this by considering and comparing arousal, desire, and love.

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<sup>100</sup> Roger Scruton, *Sexual Desire: A Moral Philosophy of the Erotic*, (New York: The Free Press, 1986) 289; quoted in Primoratz, “Sexual Perversion,” 248.

<sup>101</sup> Scruton, quoted in Primoratz, “Sexual Perversion,” 248; Scruton, *Sexual Desire*, 289.

<sup>102</sup> Scruton, *Sexual Desire*, 14.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*, 1.

He claims that “all are purely human phenomena, or rather, ...they belong to that realm of reciprocal response which is mediated by the concept of the person, and which is available only to beings who possess and are motivated by that concept [i.e. of the person or self].”<sup>105</sup>

Scruton takes a similar position to that of the church and Thomas Aquinas on the role of reason in the lives of humans. He believes that reason distinguishes humans from other animals and reason alters the way in which we experience many things that define sexual ethics, such as the aforementioned concepts of arousal, desire, and love, all of which are interconnected on his view. He believes

that we can understand desire only if we first display the outline of a more passive state of mind—the state of arousal, in which the body of one person awakens to the presence or thought of another. Arousal provides the underlying circumstance of sexual enjoyment, and it contains the seeds of all that is distinctive in the sexuality of the rational being.<sup>106</sup>

Indeed, sexual arousal, for Scruton, while focusing on pleasure, is not merely a pleasurable physical sensation, it is instead what he calls an “intentional pleasure” that involves “intentional content” which focuses not on the physical act, but on “the meaning of another’s gesture” which is “pleasure *directed onto* an object” not merely “*at or about* an object.”<sup>107</sup> Scruton claims that the ‘intentional content’ of arousal (i.e. the thought directed onto another) makes the specific object or person about whom the thought is directed essential to sexual arousal. Arousal itself is not a general pleasurable feeling directed out into the ether which can be fulfilled by any object or person because, according to Scruton, “in the normal case of sexual arousal, it would be quite extraordinary if the caresses of one party were regarded by the other as the accidental causes of a

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<sup>105</sup> *Ibid*, 14.

<sup>106</sup> *Ibid*, 16.

<sup>107</sup> *Ibid*, 18-9.

pleasurable sensation, which might have been caused in some other way.”<sup>108</sup> The reason for this, argues Scruton, is that “sexual arousal is a response, but not a response to a stimulus that could be fully described merely as the cause of a sensation. It is a response, at least in part, to a thought, where the thought refers to ‘what is going on’ between myself and another.”<sup>109</sup> This is not to say that non-intentional pleasures (i.e. purely physical pleasures at or about an object) are not sought in sexual arousal, desire, and the sex act, but rather, non-intentional pleasures are secondary to the intentional pleasures in arousal and desire that are awakened about a particular person. In other words, Scruton believes, A is sexually aroused by thoughts of B which have intentional content. Because of the intentional content, A desires to feel non-intentional pleasures with B. C or D would not be able to replace B for A because while C or D could perhaps fulfill the non-intentional pleasures just as well as B, they could not fulfill the intentional pleasures that arise because they are not B. Only B will suffice for A because only B is B. Because, as Scruton claims, “arousal is ‘leaning towards’ the other, a movement in the direction of the sexual act, which cannot be separated, wither from the thought upon which it is founded, or from the desire to which it leads.”<sup>110</sup> While this may be a specific type of arousal, it does not seem to be the only type of arousal. Indeed some species of arousal, such as in pubescence, seem to come not from a particular thought about a particular person, but almost as an instinctual function of the body. Additionally, arousal may be about a specific person, but this does not mean that only that person will suffice in a subsequent sexual engagement. In marital fantasy, for instance, one may become aroused by the thought of another, but engages sex for the ‘non-intentional’ pleasures with the spouse, not the person or thought that initiated the arousal.

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<sup>108</sup> *Ibid*, 20.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid*, 22.

Arousal may be initially caused by a thought of another, but there does not seem to be any indication that once aroused only the person who caused the initial arousal is sufficient for any subsequent sexual interaction.

Further, Scruton believes arousal also requires an additional component, that of reciprocity. It is not merely enough for an agent to be aroused by another, but the other needs to recognize the agent's arousal and then become aroused as well because "arousal is a response to the thought of the other, as a self-conscious agent, who is alert to me, and who is able to have 'designs' on me."<sup>111</sup> However, this seems extraneous. A person can become aroused when thinking about a person without the person reciprocating or even being present. Yet, Scruton claims this reciprocity is not only a part of arousal, but also a part of desire which "concentrates into itself the whole life of the human being, constituting a direct appeal to the other to recognize my embodied existence" which is an attempt to "enlist his participation in a cooperative act."<sup>112</sup> This attempt to elicit consent seems to be nothing more than a recognition of an individual's autonomous right to choose to engage in the act or not. However, from this point, Scruton begins to add what he sees as a 'normal' account of sexual interaction that does not rely on consent, though it is a necessary component. According to Scruton, this act closely mirrors the view of Thomas Nagel in which

we should expect the glance of desire to involve, first, an intention to arouse sexual interest; secondly, the intention that this first intention be recognized; thirdly, the intention that, through being recognized, it play a part in precipitation what is intended. ... In the normal case, the intention is that the other's desire be reciprocated, not by a recognition of my *intention*, but by a recognition of my *desire*.<sup>113</sup>

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<sup>111</sup> *Ibid*, 23.

<sup>112</sup> *Ibid*, 24.

<sup>113</sup> *Ibid*.

For Nagel, it is the recognition of intention. Scruton disagrees here and claims that, it is not intention but desire that is recognized. In order to understand the comparison that Scruton makes here to Nagel, a brief aside to discuss Nagel's article on sexual perversion, is needed because on the whole, Nagel's view and Scruton's are very similar, and it may clarify Scruton's position.

Nagel claims that when a person experiences sexual attraction toward another, it is for more than the qualities or characteristics the person has. The attraction is brought about because of these qualities, but the qualities are not sufficient. The particular person has the characteristics, but it is the *person*, not the *qualities*, that is the object of the sexual attraction. It is not the case, according to Nagel, that any person with quality x, y, and z can fulfill the sexual desire, it is that particular person. He claims that while it may be the case that in each situation in which a person has quality x, y, and z, sexual attraction or desire will result in the agent; however, it is a different and singular attraction toward the person, it is "not merely a transfer of the old desire onto someone else."<sup>114</sup> This highly individualized and personal nature to sexual attraction seems similar to Scruton's concept that in order for sex to be natural, it must elicit recognition of the "personal existence of the other."<sup>115</sup>

Nagel obtains this necessary interpersonal connection of the sexual partners from Sartre in *Being and Nothingness* and indeed Scruton often references this aspect of Sartre. Nagel claims that while Sartre states the purpose of the sexual relationship (i.e. "the perpetual attempt of an embodied consciousness to come to terms with the existence of others")<sup>116</sup> is always unsuccessful, Nagel believes it can in certain circumstances be successful. Nagel argues that sexual desire involves not only awareness of another, but self-awareness, as well as the other

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<sup>114</sup> Thomas Nagel, "Sexual Perversion," *The Journal of Philosophy* 66(1969): 9.

<sup>115</sup> Scruton, *Sexual Desire*, 289.

<sup>116</sup> Nagel, "Sexual Perversion," 9

being self-aware. In other words, A must sexually desire B, B must sexually desire A, A must be aware that B sexually desires A, B must be aware that A sexually desires B, and both must be aware that the other is aware, and this mutual and reciprocal action is what results in a proper sexual interaction. It is not enough for one to be attracted to a person according to Nagel, it must involve the awareness of mutual attraction. This highly complicated system of attraction and reciprocity/symmetry is similar to and more clearly stated than the account Scruton provides. Nagel further argues that “desire is therefore not merely the perception of a preexisting embodiment of the other, but ideally a contribution to his further embodiment which in turn enhances the original subject’s sense of himself.”<sup>117</sup> However, the key difference, as Scruton sees it, is that Nagel focuses on the intention of the act as opposed to the desire of the person. For Scruton, the desire is what the other recognizes and to which the other responds and an agent does not become desirous because of the other’s intentions to engage sexually. For example, if A’s intentions are to have sex with B, B does not become aroused because of those intentions, B becomes aroused because A is aroused or desirous. So, while Nagel gets close to the explanation, Scruton feels he misses the mark, partly because Nagel does not introduce love or heterosexuality or marriage as Scruton later does.<sup>118</sup>

Part of Scruton’s criticism of Nagel stems from Scruton’s concept of the self and the first-person perspective. These two concepts are essential to Scruton’s thesis because of both the inter-personal aspect of arousal, desire, and sex, but also because of the ‘intentional concepts’ that are a necessary component to his theory. He claims that the concept of the self and the first-person perspective stems not only from existence in the world as a distinct entity, but from the use of language. The first-person perspective, while ultimately illusion, according to Scruton, is

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<sup>117</sup> Nagel, “Sexual Perversion,” 13.

<sup>118</sup> Scruton, *Sexual Desire*, 24.

an important part of how humans understand themselves and others within the world.<sup>119</sup>

Language and the first-person perspective instills a sense of responsibility toward others who exist in the world in much the same way that the agent does because

There is a practice among self-conscious beings, of reason-giving and reason-taking, which the agent incorporates into his own conception of what he is and does. He sees himself as one agent among many, answerable for his actions and called upon to act for reasons which might also justify his conduct. He *treats himself* as a person, and demands that others so treat him.<sup>120</sup>

This demand to be treated as a person is a recognition by the agent of his/her individual freedom as well as a responsibility to other agents to respect their freedom and also forms the basis for morality, both sexual and otherwise. Thus, in sexual arousal and desire, the other person's perspective is an integral part of the process. Because the agent sees him/herself as a person, and recognizes similarities in the other and projects this personhood on the other, the other should not be viewed as merely an object or body, but as "the embodiment of another point of view" or an embodied first-person perspective, in much the same way that the agent understands him/herself.<sup>121</sup> He claims that embodiment is an important aspect of the person; however, it is not equivalent to the self. While the self cannot exist without the body, the body is not the same as the self. It is a part, but not the whole. Thus, an agent is subject to certain involuntary aspects of the body which are an important part of the sexual act. For example, erection, the "softening of the vagina," blushing, and laughing are involuntary and it is this involuntariness in which the body "reasserts its natural rights as a person," by "ceas[ing]... to be an *instrument*."<sup>122</sup> However, one of the roles of reason, for Scruton, is to reign in and control the involuntary aspect of embodiment, and it is through this exertion of control that the foundation of morals are

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<sup>119</sup> *Ibid*, 45.

<sup>120</sup> *Ibid*, 54.

<sup>121</sup> *Ibid*, 61-2.

<sup>122</sup> *Ibid*, 70.

formed.<sup>123</sup> Thus far, the introduction of an individual's first person perspective does little else than provide a platform for morality which seems to depend upon a person's responsibility toward and recognition of other agents as autonomous beings.

However, in sexual desire, it is one of the rare instances in which the other's embodiment is that in which we are interested and the involuntary aspects of the body are a primary focus, claims Scruton.<sup>124</sup> Sexual desire, in its proper or 'normal' form is always about a human being. However, as stated, it is

not just human flesh, but also the first-person perspective which serves to individualise him in his own eyes and in the eyes of his pursuer. To put it another way...sexual desire is interested in the *embodiment* of the other, and not in his body. The interpersonal intentionality lies therefore in desire itself.<sup>125</sup>

Interestingly though, Scruton argues that while the critical intentionalising component recognizes on the other as a *person*, the sex organs and the body in general are the primary focus of sexual desire. In fact, when one desires another, they desire that person "as a man, or as a woman. ...and [agents] approach the other partly as a representative of his [or her] sex."<sup>126</sup> This seems to counter his argument that arousal and desire focus on *that* particular person and cannot be replaced by just any other of the same kind. However, he quickly qualifies his statement and, along the lines of Thomas Nagel, states that while the other represents a specific kind, i.e. male or female, with specific traits, i.e. body type, hair color, etc., and these things are those that initially bring about arousal and desire, it is a second part of desire, the intentionalising thought that refutes this. Indeed, Scruton claims,

In the very first moment of desire there is ... a paradox: the body of the other is interesting because it is one instance of a bodily kind; but the very interest which

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<sup>123</sup> *Ibid*, 71.

<sup>124</sup> *Ibid*, 73-4.

<sup>125</sup> *Ibid*, 82.

<sup>126</sup> *Ibid*, 86.

focuses upon it insists that it is no such thing, that it is unique, irreplaceable, the one and only object of this present emotion. This is yet another aspect of the tension that is present in our intentional understanding of embodiment.<sup>127</sup>

Here Scruton attempts to incorporate his idea of intentionality into sexual desire *ad hoc*. He admits that the primary focus of sexual desire is the body, but then claims that the mind somehow rationalizes that the body is not what is wanted, but the unique, irreplaceable individual. In fact, when attempting to clarify what happens, he claims that the typical “randy sailor” who comes ashore after being at sea and desires to have sex with a woman, and any woman will seem to do, does not actually desire a woman at all, but is simply “desiring to desire.” He claims that what is going on with the sailor “seriously misrepresents the transition that occurs when the woman is found and he is set on the path of satisfaction.”<sup>128</sup> Because once he finds the specific woman who is to satisfy his sexual desire, he has “found the woman whom he wants, whom he seeks to arouse and upon whom his thoughts and energies are focused.”<sup>129</sup> However, this seems to move contrary to Scruton’s theory. He claims that sexual desire and sexual arousal occur properly only when the intentionalising thoughts focus on a particular person, yet here there is the desire that occurs, and then the partner is found, and then the individualizing happens. So, it seems that in most sexual acts, even prostitution, if this example can be relied upon, the other person can still be seen as a unique individual and not merely one of a kind. There does not seem to be a grave distinction between a stranger and a well-known lover within the intentionalising thoughts; it merely seems to be the mind rationalizing its sexual desire. And thus far, on Scruton’s model, it seems as though promiscuous sex is acceptable, if not prostitution. Prostitution may still be problematic for Scruton because there may not be

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<sup>127</sup> *Ibid*, 87.

<sup>128</sup> *Ibid*, 90.

<sup>129</sup> *Ibid*.

reciprocal desire. However, his requirement of reciprocal desire, while ideal, does not seem necessary or essential to sexual intercourse. One can easily imagine a scenario in which an agent is sexually aroused by the thought of his/her spouse, sexually desires his/her spouse, and engages in sexual intercourse with the willing and consenting spouse even though the spouse does not sexually desire him/her.

It is not until Scruton discusses what he sees to be the end result of sexual desire that one gains an understanding of that to which his thesis is aiming. Many people assume that the aim or end purpose of the sex act is orgasm or sexual pleasure or, as previously discussed, reproduction. However, Scruton believes that this is not the case; it is something much more interpersonal. He claims that the aim of sexual desire is the “‘union’ with the other” which involves intimacy, and a desire “to aim one’s words, caresses and glances,... into the heart of the other, and to know him from the inside, as a creature who is part of oneself. ... intimacy tend[s] to love—to a sense of commitment founded on the mutuality of desire.”<sup>130</sup> This union, however, seems to present a paradox because, as many a philosopher have pointed out, it is impossible to achieve a union with another embodied self in the sense in which Scruton seems to be intimating. Additionally, he assumes that this particular view of sex is a ‘norm’ or what occurs between most people and there is really no evidence to suggest this. Nevertheless, he claims that “the aim of desire is first to incarnate the first-person perspective (the for-itself) of the other; and secondly to unite with it as flesh.”<sup>131</sup> He looks to Sartre for an explanation here, just as Nagel did in his article. The concepts of sexual glances, blushes, and other involuntary actions of the body that Scruton claims allow for the body to take back control as the person, is ultimately captured in the sexual caresses that occur between the two agents. For Sartre, this caress is an attempt to “incarnate”

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<sup>130</sup> *Ibid*, 92.

<sup>131</sup> Scruton, *Sexual Desire*, 121.

the self in the body, what Scruton describes as “summon[ing] your [i.e. the other’s] consciousness (your ‘for-itself’) into your flesh, so as to be able to possess you there.”<sup>132</sup>

However, Scruton takes issue with the common interpretation of possession in this sexual sense. It typically invokes the idea of ‘ownership,’ what feminist Carole Pateman (among others) calls “male sex right” which will be discussed in the subsequent section. This idea of possession of another’s freedom or ownership of the other, is dismissed by Scruton and he introduces another concept of freedom which allows him to introduce an alternate interpretation of the ‘union’ between the two agents that occurs in the sex act and serves as the aim of sexual desire. By freedom, Scruton merely discusses a ‘metaphor’ in which one acknowledges one’s responsibility toward one’s future actions. He claims that humans are free insofar as they recognize the necessity of reasons for actions and take responsibility for these reason-based actions. So, when one wishes to ‘take possession’ of another, or ‘unite’ with another sexually, it merely implies that the agent attempts to “[solicit] another’s consent to [the agent’s] desire for [him/her]... [and thus] the concept of freedom remains metaphysically innocent.”<sup>133</sup> The flow of this argument, in a sense, seems to be drifting toward a theory of autonomy and consent. The individual recognizes and respects the other’s autonomy and elicits consent in respect of that autonomy. However, while consent and ‘freedom’ are necessary in Scruton’s understanding of the first person perspective, he takes a much different turn in relation to sexual interaction. Scruton eventually gets to his primary moral evaluation of sex when he asks the question, “what place has sexual desire in love, friendship and esteem?”<sup>134</sup> The answer to which, he believes, will provide a moral basis for sexual behavior in humans which is distinct from general moral

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<sup>132</sup> Scruton, *Sexual Desire*, 121.

<sup>133</sup> *Ibid*, 124.

<sup>134</sup> *Ibid*, 213.

theories of autonomy. In his analysis of love, he admits that love and desire have separable aims and that

love seeks companionship, in which mutual well-being will be the common purpose; it is nourished on counsels and conversations, on gifts and tokens, on affection, loyalty, and esteem. Moreover, love involves dependence. It is not a commodity that can be received, now from this provider, now from that. To love is to acquire the need for another individual, and to wish for one's solace there, with him.<sup>135</sup>

This separability, however, does not mean that love and desire are not related to one another, in fact, Scruton argues, desire can be and often is an expression of love. And for Scruton, the intentional structure of sexual desire modifies love in such a way as to necessitate love within the bounds of sexual morality.<sup>136</sup>

Erotic love, which differs from the love that grows from esteem or friendship, is based not upon reason or the virtues found in the other (as is the case in the friendship of esteem), but rather it is reason-involving. Scruton claims that "erotic love, which focuses on the embodiment of the other, is ... not a rational response, even if it is a response which only rational beings may experience."<sup>137</sup> In erotic love, one is not forced to judge the continuity or virtue of the other in quite so harsh a manner as a friend would. Erotic love is able to "survive the awareness of another's depravity" and faults without disintegrating as friendship would under the same conditions. In the true friendship of esteem, the agent comes to expect an excellence and continuity of behavior from the friend, whereas inconsistency and dependence or depravity is forgiven or endeared in erotic love. This forgiveness and enjoyment in the flawed nature of the other that is a part of erotic love seems to "defy the demands of reason."<sup>138</sup> According to

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<sup>135</sup> *Ibid*, 216.

<sup>136</sup> *Ibid*, 218-9.

<sup>137</sup> *Ibid*, 234.

<sup>138</sup> *Ibid*, 235.

Scruton, love “moralises” the other or attempts to conform the other to an ideal, even if the other has not lived up to the ideal and he believes that when the other blatantly fails to fulfill the ideal, the agent simply rewrites the definition of the ideal, so that the other continues to conform. This is what he means when he says love is “reason-involving” but not based in reason. And when this reason-involving aspect of love comes into contact with desire, there is a moralizing that occurs within desire itself.<sup>139</sup> However, this seems to go too far. Scruton claims that love is what moralizes desire; however, this goes against his earlier idea that what brings morality into sexuality are the first person perspective and a recognition of such a perspective in another. The idea of the first-person perspective seems acceptable and applies to all interactions between people, both sexual and nonsexual; however, the addition of love at this point is entirely extraneous to the morality of sex. Instead, what this addition does is add an ideal form of sex to which a person can strive. However, at this point he fails to provide an adequate argument for the necessity of love in sexual interactions as the foundation of sexual ethics.

This moral transformation of love and desire, he claims, stems from self-esteem, which “requires you to love, so that, while being overcome by the other, you can believe yourself to have preserved your inner freedom.” In fact, “desire does not imply love; but it provides a motive to love—and this fact is crucial in understanding the intentionality of desire”<sup>140</sup> which attempts to preserve one’s own self-esteem. However, it is not clear why desire and partaking in sexual intercourse represent a danger to one’s self esteem as Scruton believes. Because Scruton believes the agent’s self-esteem is at stake in sexual desire and erotic love, he claims that it always involves the desire for the other’s well being, because in maintaining the well-being of the other, the agent is able to maintain his/her own well-being. This does not seem to follow.

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<sup>139</sup> *Ibid*, 236.

<sup>140</sup> *Ibid*, 238-9.

Nevertheless, Scruton states this maintenance of well-being, in part, is the fulfillment of sexual desire because

in delineating the fulfillment of a state of mind, one is recommending a long-term project, which will resolve the tensions, and fulfill the ancillary wishes and needs, that arise in the expression of the basic intentional structure. ... Erotic love provides the lover with the justification of this desire, and, if reciprocated, with the inner peace that rewards the trouble of desire.<sup>141</sup>

While he does not explain why desire needs to be justified, Scruton claims that the final purpose or function of desire, when considered normatively, is ultimately an intentional outlook that seeks mutual dependence and reciprocity with another in erotic love. Thus erotic love and the concern for the other's well-being naturally or normally, and in fact for Scruton, morally, develops into "nuptuality" or marriage. Marriage is an ultimate result or aim of sexual desire because "human love involves an inevitable tendency to seek out and be with the other, to involve one's destiny completely and inseparably with his. Love seeks, not a promise of affection, but a *vow* of loyalty."<sup>142</sup> This vow, ultimately of marriage, is a much stronger commitment than a promise and results in a "complete surrendering of one's future to a present project[,] ... which is a hidden vector within the intentionality of love."<sup>143</sup> However, while it may be the case that human love evolves in this manner, it is not love but sex that is the issue here and while love may be ideal in sexual relationships, the argument Scruton outlines does not indicate that it is the only morally permissible type.

So, to briefly summarize Scruton's sexual view thus far, he believes that sexual arousal contains an intentionalising aspect that is then expressed through sexual desire. Sexual desire focuses on the body and embodiment of the other. The body alone is not what the agent really

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<sup>141</sup> *Ibid*, 241.

<sup>142</sup> *Ibid*, 242.

<sup>143</sup> *Ibid*, 242-3.

desires in sexual desire, but rather the embodied point of view of the other, which is unique and irreplaceable. The agent sees him/herself as having a first-person perspective, or self, and attributes the same to the other. Because of this, the agent desires to unite with the other's unique first-person point of view and desires that the other desire the same. This mutuality is expressed in erotic love which focuses on the mutuality and dependence of the other, which ultimately results in a vow of marriage. Thus, only those sexual acts which involve love and marriage are morally acceptable in his view.

All of this discussion on sexual desire and love, as Scruton admits, is based on a concept of normality.<sup>144</sup> When one fulfills the function or aim of desire and love that Scruton describes, one acts in a morally appropriate manner, when one does not, he claims, it is a sexual perversion, which intends the same condemnatory attitude that was discussed previously in the section on naturalistic theories. Any act of sex that does not fit Scruton's model, he believes is morally impermissible. Prostitution, on this model would be clearly impermissible because it does not involve love or marriage and, Scruton would argue, reciprocity and intentionalizing thoughts. However, the biggest problem with Scruton's theory is the same problem that naturalistic theories encounter, namely that that which is not normal is morally impermissible. He fails to provide the link between love and moral permissibility. He merely makes the claim that love is what makes sex morally acceptable.

However, his key complaint of sex without love is the intention of the agent to divorce the interpersonal nature of the act from the bodily aspect.<sup>145</sup> The perverted agent wishes only to experience the bodily aspect and cares nothing for the agency of the other. This sounds very much like the Kantian criticism that the agent is failing to treat the other as an end but merely as

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<sup>144</sup> *Ibid*, 251.

<sup>145</sup> *Ibid*, 290.

a means. Part of this criticism stems from Scruton's belief in the intentional structure of desire. If the agent intends to perform a sexual act without the goal of union in mind (which remember, for Scruton entails a vow), then the act is perverted. To quote at length, Scruton believes,

The complete or partial failure to recognize, in and through desire, the personal existence of the other is therefore an affront, both to him and to oneself. Moreover, in so divorcing sexual conduct from the impulse of accountability and care, we remove from the sphere of personal relations the major force which compels us to unite with others, to accept them and to compromise our lives on their account. In other words, we remove what is deepest in ourselves—our life—from our moral commerce, and set it apart, in a realm that is free from the sovereignty of moral law, a realm of curious pleasure, in which the body is both sovereign and obscene.<sup>146</sup>

However, accountability and care for the other as an agent need not be divorced from sexual interactions without love. Love is not the only way to care for another and a person can still respect the fact that the other is an individual with rights and goals without removing morality from the interaction. Additionally, pleasure in another's company is a form of care and pleasure in general is often a motivation for 'uniting' with another.

So, many acts, including prostitution, are categorized as immoral. This is a mistake because while the sex may not be linked with love or viewing the person as "*the* particular, unique person he or she is" neither is the person "reduced to something less than a person, and banished beyond the pale of moral concern."<sup>147</sup> While prostitution may be impersonal, in the sense that the two agents may be strangers, this does not mean that it is necessarily immoral on those grounds. The link to perversion or immorality does not seem valid because in prostitution it does not seem to be a failure to treat one as a person or even in every case to divorce the personal from the animal. While admittedly, the often anonymous and physical aspect of prostitution tends to lead to a divorce of the animal and the personal, there can still be an

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<sup>146</sup> *Ibid*, 289.

<sup>147</sup> Primoratz, "Sexual Perversion," 248.

interpersonal recognition of the individuality and desires of the other. This initial recognition is very similar to the earlier discussed example that Scruton provides of the randy sailor. Why is it not the same as that sailor that once the john finds a prostitute, the desire is not a general desire, but is rationalized into desire about that particular woman, and likewise, once the prostitute accepts the john as a client, why is it that the interaction makes it as though she does not recognize him/her as an individual? While the desire for a union in marriage and dependence does not typically figure into the affair, Scruton claims it is the intentions of the agents that determine the perversion, not the act itself. Indeed it seems as though Scruton had difficulty with prostitution, because instead of discussing prostitution in the chapter on sexual perversion as he did with homosexuality, bestiality, etc, he discusses it in an earlier chapter where he discusses the obscene in sexual phenomenon. However, he comes to the same conclusion that the prostitute “divorced the sexual act from its project of sexual union.”<sup>148</sup> He claims that because the prostitute presents herself as a commodity, she is thus interchangeable and there cannot be the reciprocity that is necessary. However, reciprocity and indeed marriage and love seem unnecessary additions to the sexual act that seem to represent an ideal form of sexual interactions rather than a ‘norm’ of these interactions. He fails, just as the Thomistic theory, to account for multiple purposes or functions of sexual interactions. It seems rather that Scruton bases his claims on a legitimate moral ground when he states that the first-person perspective and a recognition of this in others is what provides a basis for morality in sex. Further, this understanding of the first-person perspective merely seems like a theory of autonomy that requires consent to participation. However, from this idea Scruton begins to add additional and extraneous criteria to sexual ethics and an understanding of sex that do not seem to have any

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<sup>148</sup> Scruton, *Sexual Desire*, 156.

basis. He claims that in prostitution, there is a transactionary aspect which “frees the woman from every *moral* tie with her client.”<sup>149</sup> However, the prostitute still has a first person perspective and recognizes this in the other and thus still has a moral tie to the client, even if it is to merely respect the terms of the contract. While Scruton believes that all sexual acts outside of love and marriage are immoral because of the connections he makes between love, desire, arousal, and marriage, those connections seem to be highly conjectured and based on many controversial and debatable ideas.

### **Radical Feminist Ethics of Sexuality**

While much of feminist philosophical study on sexual morality centers on what is viewed as an improper, or perhaps unnatural, relationship among men and women. In the United States, as well as around the world, feminist philosophy, in general, concentrates on the inequalities and subjugation that women as a group face in society. This subjugation, oppression, or inequality is typically attributed to the historically-based, male-dominated patriarchy that feminists argue is still quite active today. While most feminist tend to agree with this assessment of society, the ethical views that they hold towards sex and sexuality tend to vary quite widely.

Some feminist take a liberal stance toward sex and claim that only by reclaiming female sexuality and sexual practices can women liberate themselves from the oppressive male-dominated sexual structure. While this view is often criticized for endorsing and supporting promiscuous sex, what the proponents are attempting to do is to view sexuality and sex in much the same way that males do. It is an attempt, among other things to dissolve the double standard in sex that condemns women for liberal sexual practices that have been practiced by and

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<sup>149</sup> Scruton, *Sexual Desire*, 158.

accepted about men throughout history. This view will be discussed somewhat in the subsequent chapter in the context of consent and liberal sexual ethics.

The other common feminist view towards sexual ethics is often referred to as the ‘radical feminist view.’ This view, typically espoused in reference to pornography by Catherine McKinnon and Andrea Dworkin among others, and in relation to prostitution and other women’s issues by Carole Pateman, takes the general feminist perspective on the status of women in today’s society and applies it to the discussion of sexual practices, and the widely held prejudicial role of women in such domains, and concludes that all heterosexual sexual experiences and acts of sex are a form of oppression by men over women and are thus immoral on those grounds. Many of these radical feminists go so far as to claim women, because of their societal position, are unable to give proper consent to such practices and thus *all* sex acts are rape. While this position is extreme and tends to inflame the opposition, it is successful in its use of rhetoric to point out the feminist argument and position on the need for women’s improved position in society. However, while that is a version of the feminist position, this analysis will focus more on the feminist view of sexual morals and the attempt to improve women’s place in society by revising the sexual code. The subsequent analysis of radical feminist sexual ethics and prostitution will be discussed primarily using the philosophy and theory of Carole Pateman who argues that prostitution, then, is “morally undesirable,” because “it is one of the most graphic examples of men’s domination over women.”<sup>150</sup> And thus, represents an institution that diverges from the feminist goal of equality for women.

Pateman argues that feminists typically analyze the relationship between men and women in relation to power rather than sex, however, in contemporary society, it is impossible to

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<sup>150</sup> Carole Pateman, “Defending Prostitution: Charges against Ericsson,” *Ethics* 93(1983):561.

separate the power one has from his/her sexual identity and life. She claims that “the expression of sexuality and what it means to be feminine and a woman, or masculine and a man, is developed within, and inextricably bound up with, relations of dominance and subordination.”<sup>151</sup> Much of Pateman’s argument can be found in her text, *The Sexual Contract*, and is a criticism of the popular (though varied) social contract view (recently typified by Rawls’ *Theory of Justice*) which, to put it simply, argues that society is formed based on a social contract in which individuals who are naturally free and equal decide to become a group which “exchange the insecurities of natural freedom for equal, civil freedom which is protected by the state.”<sup>152</sup> Subsequently, with the equal freedom shared by the adults within the state, any agreement that is made between two people represents or mimics this original social contract between them. So, if two parties engage in a negotiation for goods, services, or even marriage, it is based on a mutual understanding of a contract being forged for their mutual benefit. Many of these theories incorporate theories of consent and coercion (the primary topic of chapter three) that determine valid and invalid contracts, however, Pateman argues that all social contract theory is inherently flawed because they neglect an aspect of contract theory that predates the social contract, namely the sexual contract.<sup>153</sup>

All contract theories attempt to explain how society established a “political right” founded on “free social relations [that] take a contractual form,” however, even before this was established, men and women were involved in a ‘sexual contract’ that “is also about the genesis of a political right, and explains why exercise of the right is legitimate—but this story is about political right as *patriarchal right* or sex-right, the power that men exercise over women. The

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<sup>151</sup> *Ibid*, 564.

<sup>152</sup> Pateman, *The Sexual Contract*, (Stanford: Stanford University Press, 1988) 2.

<sup>153</sup> *Ibid*, ix, 1.

missing half of the story [i.e. the sexual contract] tells how a specifically modern form of patriarchy is established.”<sup>154</sup> For Pateman, the sexual contract is a contract that essentially establishes male dominion over females, specifically allowing men to have equal access to intercourse with females. Pateman claims that while “the social contract is a story of freedom; the sexual contract is a story of subjugation.”<sup>155</sup> The sexual contract is established even before the social contract because before the patriarchal structure of social contract was established, there was patriarchal control of familial units based on the male-sex right in which men (later husbands and fathers) controlled women (wives and mothers).

However, when Pateman uses the term sexual contract, it does not really seem like a contract at all. A contract presupposes a mutually beneficial agreement that both parties agree to, whereas what she describes as the sexual contract is merely man dominating women. It seems as though the control that men possessed over women and the family were never contractual but merely taken, in which case she is mistaken in using the term. However, if there truly was a sexual contract in which women exchanged sex or some form of submission for protection or some other benefit in pre-societal situations, then what she is claiming with the sexual contract is not a taking of such dominance and forced submission as such but what was a mutually beneficial contract. She seems to equate the sexual contract with the concept of male-sex right which grants all men access to all women’s bodies. If it truly was a contract then it would not be equal to all men gaining access to all women’s bodies, but a specific man gaining access to a specific woman based on this sexual contract. There does not seem to be a link from an individual or common practice to a universal right. If, on the other hand, there was not a

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<sup>154</sup> *Ibid*, 1.

<sup>155</sup> *Ibid*, 2.

contract but women were truly dominated by men and forced to submit, there was not a contract at all, as she claims. She seems to equate two concepts that do not seem consistent.

Nevertheless, she claims that when the original contracts were formed, patriarchal sex-right over women was already in place and was incorporated into the social contract intact because this relationship between men and women was seen as representative of the ‘private sphere’ which was politically unimportant. The equality of freedom was only granted to men who were involved as free agents in the politically significant ‘public sphere’ in which women were denied equal access because of their subordinate position in the familial private sphere.<sup>156</sup> However, to claim, as many social contract theorists do, that patriarchy has no bearing on the public, political sphere is, according to Pateman, disingenuous because “patriarchal right extends throughout civil society.”<sup>157</sup> When contract theorists claim that they do not discuss the private sphere because it has no bearing on the political world and civil society, they are ignoring gender roles that are created in response to patriarchy, civil society, and male sex-right. The differences are relevant to incorporating women into the discussion of the original contract because “the two spheres of civil society are at once separate and inseparable. The public realm cannot be fully understood in the absence of the private sphere, and, similarly, the meaning of the original contract is misinterpreted without both, mutually dependant, halves of the story.”<sup>158</sup> An understanding not only of the sexual contract, but that there is a sexual contract is essential to understanding the problems that Pateman and other radical feminist believe arise from contracts that involve women. When these contract theories are discussed, few theorists discuss gender or if they do, they have antiquated ideas of what it means to be a man and what it means to be a

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<sup>156</sup> *Ibid*, 3.

<sup>157</sup> *Ibid*, 4.

<sup>158</sup> *Ibid*.

woman. When these ideas are incorporated into the theories, the conclusions generally equate capacities and tendencies to men and woman separately and men tend to come out ahead in the analysis. Men, according to Pateman, were the only ones who were granted “ownership of property in the person; only men, that is to say, are ‘individuals.’...the classic theorists claim that women naturally lack the attributes and capacities of ‘individuals.’”<sup>159</sup> This conclusion led to women being shunned from political life and thus, were denied freedom as an individual and instead relegated to the home and hearth as a subordinate of man through the marriage contract, which is seen as a part of the ‘natural condition’ that existed before the original contract.<sup>160</sup> And while Pateman admits that in today’s society, the marriage contract and the idea of woman as property has been reformulated to some degree, she believes that the lives of women and wives, while often entering into the public sphere, never do so as equals. Women as a group, she argues, are *always* subordinate to men as a group or fraternity. Because women are members of an oppressed and dominated group, the contracts in which they engage are always established under unequal and disadvantageous conditions. This generalization is very problematic. What Pateman is arguing is that “all women must be the victims of gender inequality. They must be so whatever other social factors operate to determine their particular identity. They must be such victims whatever their own experiences.”<sup>161</sup> Pateman’s claim seems unfounded when universalized. Nevertheless, the contracts that Pateman analyses are specifically employment contracts and what she calls the prostitution contract.<sup>162</sup>

In employment and prostitution (a type of employment), women and men enter into contracts with employers. However, while it may sometimes (though seldom), according to

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<sup>159</sup> *Ibid*, 6.

<sup>160</sup> *Ibid*.

<sup>161</sup> David Archard, *Sexual Consent*, (Boulder, Colorado: Westview Press, 1998) 89.

<sup>162</sup> Pateman, *Sexual Contract*, 5.

Pateman, be the case with men, when women enter into contracts, the theorists and even society today, often ignore the “grossly unequal position of the relevant parties and to the economic and other constraints facing workers, wives and women in general.”<sup>163</sup> Now that women take a regular and active part in the political and public sphere, the language of sexual difference, i.e. what it means to be a man or a woman, is often utilized to reinforce the idea that men and women have natural differences that explain away the inequalities that are inherent in civil society, most specifically the contracts formed with women.<sup>164</sup> This emphasis, she believes, stems from the sexual contract which “is about (hetero)sexual relations and women as embodied sexual beings.”<sup>165</sup> This sexual relationship between men and women is a relationship of power; men have power over women that enable them to then have “sexual access to women’s bodies and claim right of command over the use of women’s bodies.”<sup>166</sup> And this, she claims is not merely within the private realm of the home, but is present in civil society in the form of prostitution, which she sees as the demand by men to have sexual access to women who are not their wives, but are rather, a commodity to be bought. Similarly, in any employment contract with women, men will always have the upper hand in the interaction.

This power differential is, in modern social contract theory, explained away when theorists claim that the contracts are formed by individuals which are gender or sexually neutral. They claim that since all individuals are naturally free and equal, and since individuals have property in themselves, this property needs to be protected against infringement by others, and thus, no other can use this property in the self without the individual’s express permission. This however, does not mean that the individual cannot “allow the use of his property by another, or

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<sup>163</sup> *Ibid*, 8.

<sup>164</sup> *Ibid*, 16.

<sup>165</sup> *Ibid*, 17.

<sup>166</sup> *Ibid*.

rent it out or sell it ... if it is to his advantage.”<sup>167</sup> All contracts involve this type of exchange in property. However, as Pateman argues, when women or workers enter into any type of exchange, it is not as equals. Simply because the theoretical original position or the original contract was made between free and equal individuals, does not mean all individuals today are free and equal. The sexual contract makes women unequal and economic necessity makes many workers unequal, resulting in an agreement to a contract that is not mutually beneficial, but unfair and asymmetrical. Because of this inequality and asymmetry, it is not a contract of exchange even though there is exchange present in the contract, but rather a contract of subordination and domination. It is the one with power, the dominant man, making a contract with someone without power, subordinate women or workers.<sup>168</sup> For this reason, contracts between women and men are always coercive. The woman has no choice but to comply. Interestingly, this applies to all women and all men for Pateman. Since all men, according to Pateman, even those with limited power among men, have more power than even the most powerful of women (which does not seem very accurate), women and men can never enter into a free contract, it is always coercive.<sup>169</sup> This is problematic when one considers women negotiating with men or even when a woman is the employer offering a job to a man. Even if an individual woman does not believe herself to be dominated by a man, she is nonetheless, because she belongs to a group that is subordinate. This idea does not seem to stand up to scrutiny and is a universal claim that does not represent reality. Even if it is the case that *most* women are subordinate to *most* men, does not allow for the universalization of the claim.

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<sup>167</sup> *Ibid*, 56.

<sup>168</sup> *Ibid*, 57-8.

<sup>169</sup> *Ibid*, 113.

This generalization, though, stems from the view that women are property not of themselves but of men. Thus, the idea that the marriage contract was based on the transference of ownership from father to husband (while not the standard view today, many feminists argue that it is indeed still the case, despite feminist efforts to reform marriage laws). In a sense, Pateman argues, following Gerder Lerner's hypothesis, that women were the first slaves of men. This slavery stems from the

idea that individuals or categories of human beings could be permanently subjugated... women were already subordinated to the men of their social groups. Men must have observed that women easily became socially marginal if they were deprived of the protection of their kinsman or were no longer required for sexual use... they also developed the means to make such separation into permanent slavery.<sup>170</sup>

This hypothesis put forward seems to assume much about women and men. It does not allow for the differences between women of different societies throughout history that Pateman previously admitted existed. Not all women were and are treated this way in all societies. Nevertheless, she argues that this type of slavery seems "to stand at the opposite pole from the wage labourer."<sup>171</sup> The slave, whether man or woman, is forced into labor and made property. The wage laborer on the other hand, is "judicially free and a civil equal; he voluntarily enters into an employment contract and in exchange he receives a wage."<sup>172</sup>

However, as Pateman argued earlier, the exchange is not the primary feature of contracts, power is, and in this sense, while contracts are not exactly the same as slavery, they are also not so far off. Much of the arguments that were espoused in previous centuries and decades relied upon the idea that women lacked the capacity to enter into a contract, to be a wage laborer, to do anything on her own because of her feebleness in both mind and body. However, 17<sup>th</sup>, 18<sup>th</sup>, and

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<sup>170</sup> *Ibid*, 64-5.

<sup>171</sup> *Ibid*, 65.

<sup>172</sup> *Ibid*.

19<sup>th</sup> century scholars, men and women, argued that strength was not a sufficient criteria, and “the argument from strength, though it can still be heard today, has become more and more implausible”<sup>173</sup> and the intellectual arguments were shown to be more a matter of sufficient education than natural capacities. However, the entrance of women into the public sphere can only be understood, for Pateman, by analyzing the similarities and differences between the marriage contract and the employment contract.

In a sense, the marriage contract “is a kind of labour contract. To become a wife entails becoming a housewife; that is, a wife is someone who works for her husband in the marital home.”<sup>174</sup> However, to compare wives and workers and the marriage contract with the employment contract is “to forget the sexual contract once again.” The worker was created and only able to be a worker, originally, if there was a marriage contract in which a wife was able to take care of the home and needs of the husband. Before the worker, there was the man at home working domestically to provide for the family. The worker, who works for another in the public sphere, is strictly masculine, according to Pateman because even women who work outside of the home do not do so in the same way that men do because there is not the other at home who takes care of the daily needs of the women, she does both the house work and the outside work.<sup>175</sup> She ignores cases in which women are the workers and men stay in the home. Pateman argues, as many do, that “even as workers, women are subordinated to men in a different way than men are subordinated to other men. Women have not been incorporated into the patriarchal structure of

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<sup>173</sup> *Ibid*, 94-5.

<sup>174</sup> *Ibid*, 116.

<sup>175</sup> *Ibid*, 131.

capitalist employment as ‘workers’; they have been incorporated as *women*; and how can it be otherwise when women are not, and cannot, be men?”<sup>176</sup>

In addition to this, workers lack an aspect of work for which housewives are responsible. Not only were women responsible for house work, they were also responsible for conjugal duties, which the husband was legally permitted to demand whenever he chose. This conjugal ‘right’ was a common reason for believing that wives could not be victims of rape by their husbands, which was not revised in the law until the late 20<sup>th</sup> century.<sup>177</sup> Because of what Pateman seems as a ‘natural’ link of sex, sexuality, and male-sex right that is a part not only of marriage, but civil society, she believes, that the sex act and sexuality is inextricably linked to the concept of the self for women. She argues that humans are sexual beings and while this may be a social construction, it is ingrained in the lives of men and women. Men and women are not truly gender neutral individuals, and cannot be, because even men and women do not see themselves in this manner. The patriarchal society in which humans live create a self-identity that links sex and gender to humans, so that when one engages in the sex act, one is unable to remove the gender or sex of the self from the act. This inextricable link between the self and sex and its relation to power is part of Pateman’s criticism of the prostitution contract. She believes that any act of prostitution inherently harms the prostitute because of the dominant role of the male and submissive role of the female.

Part of many contemporary contract theorists’ views of prostitution and women in the workplace incorporate a view of ‘labor power’ or services rendered in which it is not a person or a body or a self that is contracted out, but rather the services or labor which that individual can provide in exchange for money. This ‘services rendered’ concept which contract theorists use is

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<sup>176</sup> *Ibid*, 142.

<sup>177</sup> *Ibid*, 123.

an explanation for how contracts qualify as a free exchange. This, however, for Pateman, is a faulty understanding of what is actually happening in the capitalist labor system in general, as well as in the case of prostitution. The contract theorists' argument is that only services are rendered by the owner (individual) of his/her property (body) and nothing else. However, Pateman does not believe that this can be the case in prostitution, an exchange of sex for money, if the identity of the self is inseparable from the sexuality of the individual.<sup>178</sup> Pateman argues that there is much more than services that are exchanged in the capitalist system, especially in the case of the prostitution contract. The physical body and the self are exchanged as well because "labour power, capacities or services, cannot be separated from the person of the worker like pieces of property. The worker's capacities are developed over time and they form an integral part of his self and self-identity; capacities are internally not externally related to the person."<sup>179</sup> Thus, for Pateman, labor power as property is a fiction that cannot be separated from the individual "owner" and therefore, the command and use of the individual self and body is what is being contracted out in employment.<sup>180</sup> While it may be the case that the self cannot be separated from the act, there is no reason to claim, as Pateman does that the self is being contracted out as such, but merely the use of it. The use of a body and self is not the same as ownership or alienation of the self as Pateman seems to suggest.

For Pateman, prostitution, however, is not merely another occupation that can be understood in contractarian terms, nor is it a free exchange between two individuals. Prostitution is another way in which men exercise the sexual contract. The reason that prostitution is included in the sexual contract is because the acceptance of a broader sexual status in

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<sup>178</sup> *Ibid*, 143, 203.

<sup>179</sup> *Ibid*, 150.

<sup>180</sup> *Ibid*, 151.

contemporary times allows for men to have access to women's bodies in a variety of ways outside of marriage. While marriage was the previously accepted institution in which men could control women, prostitution and the wider (though not universal) acceptance of promiscuous sex has enabled men to engage in sex with women without the marital obligations of protection or dependence entailed in the marriage contract.<sup>181</sup> However, "prostitution is seen as a private enterprise, and the contract between client and prostitute is seen as a private arrangement between buyer and seller."<sup>182</sup> Prostitution, as understood by Pateman and many others, is viewed as the selling of "the body" for money. However, many defenders of prostitution claim that it is not the body that is sold, but sexual services. And women should be seen as merely another worker, so that there is nothing inherently wrong with prostitution that is not also wrong with any other paid labor. It is merely another version of the employment contract.<sup>183</sup> This argument is insufficient for Pateman because she believes, as previously stated that one cannot divorce services from the self or body. When someone buys services, they buy the command and use of the body. Since prostitution deals exclusively with sexuality and the sexual self is unable to be divorced from the sex acts, prostitution is inherently harmful for the women who engage in it because it is a constant submission which is unhealthy and detrimental to the wellbeing of the individual. Further, not only is prostitution harmful for the prostitutes, it is harmful for women in general as a group, because it allows for the commoditization of sex, which translates into male-sex right and the subjugation of women all over again.

However, one problem with Pateman's account is that it does not grant the same status to homosexual male prostitution as heterosexual women. She claims that the purpose of a man in

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<sup>181</sup> *Ibid*, 189.

<sup>182</sup> *Ibid*.

<sup>183</sup> *Ibid*, 191.

engaging in female prostitution is to display his dominance and right to a woman's body. Since male homosexuals are not women, it does not have the same significance. While Pateman does claim that female prostitution is a version of the sexual contract, it seems that a similar display of dominance, on Pateman's account, occurs with male-male homosexual sex. It is a contract in the same sense and in which one man demands the sex-right, only it happens to be a man and not a woman. Likewise, lesbian prostitution would not be an issue for Pateman either. Pateman seems too quick to dismiss this phenomenon as "not having the same social meaning."<sup>184</sup>

Additionally, Pateman makes the claim that the sex act itself, distinguishes prostitution from other occupations because of the intimate nature of the act which cannot be separated. She places a very significant amount of attention and importance to the physical act, when the body and the self are not equivalent. She claims however, that the psychological harm caused by prostitution and the subordination in the act are long lasting and cannot be an insignificant part of the occupation. Prostitution, then, is assumed to represent a submission of women. Yet, in sexual interactions, women do not have to be submissive. However, what Pateman and many other feminists tend to do is ignore scores and scores of testimony by prostitutes that prostitution is preferable, enjoyable, and not as detrimental to the self as many claim. While there is also testimony that by prostitutes that prostitution is an extremely harmful practice that is bad for women, the other testimonies in favor of prostitution cannot be ignored.

Similarly, the universal claims that Pateman tends to make about women in the workforce being subordinate to all men as a group (which does not necessarily translate into real life), is carried on in the prostitution contract. She does not seem to have the same reaction to male homosexual prostitution as female heterosexual prostitution, which does not necessarily mean

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<sup>184</sup> *Ibid*, 199.

that prostitution is immoral or wrong, only that the male-female sexual relationship is inherently flawed and needs to be changed. However, she claims that even if the sexual relationships are changed (though she does not outline how) prostitution would still be wrong and degrading to women and would likely not occur if the sexual relationships were changed. However, this seems highly conjecture and unlikely. Pateman's dependence on the fact that the individual cannot be separated from his/her services or work seems to be a flaw in her argument. While the work one does is a part of the self, this does not mean that an employer or client purchases the person. There is still a freedom present in contract theory that allows the person to dictate what he or she does. If the prostitute does not want to have sex with a client (in the case of a free agent, not a coerced agent), she does not have to, if she does not want to perform a certain act, again, she does not have to. And similarly, because she has sex with a man, does not mean she gives ownership to him or acts as a subordinate. In prostitution, the prostitute, just like any other worker, does not give up her freedom or agree to be dominated, exploited, or oppressed, she agrees to have sex, which does not have to entail a lack of choice or consent.

### **Conclusion**

One way to look at the three theories discussed above is as sexual ideals rather than norms. All three groups tend to look at sexual ethics as a way to flourish as a human or as how best to lead a good life. In this context, the three theories would argue that under their model, one is engaging in the sexual ideal, that this is the ideal manifestation of sexual relationships and one should attempt to fulfill the ideal. If this were what the theories were proposing, then there would be little problem with choosing to endorse one or the other. If one chooses to live up to the ideal, and yet fails to accomplish the ideal, this is not immoral, just not as good as the ideal. However, the theories claim that they are describing and analyzing the sexual 'norms' that

already exist in society and in describing the sexual norm, they are not looking to what one ought to do but at what most people actually do and whether this is morally acceptable. The ultimate argument that they propose is that anything that goes against their respective theories is immoral, not merely less good, but not good at all and indeed morally bad. So to fulfill what they describe as the norm is very different than living up to the ideal. Because on these views, to fail to fulfill the sexual norm, is in itself immoral, not merely a lesser version of the ideal.<sup>185</sup> Nevertheless, the arguments proposed, if indeed they insist are representative of the norm or the actual way in which one should engage in sex, ultimately fail to support this claim and therefore do not actually provide the evidence that is needed to successfully argue that prostitution and other types of sexual acts that go against their theory are morally impermissible.

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<sup>185</sup> Igor Primoratz, "Sexual Morality: Is Consent Enough?" *Ethical Theory and Moral Practice* 4, no. 3 (2001):214-5.

### CHAPTER THREE: PROSTITUTION AS MORALLY ACCEPTABLE

While there are many sexual ethical theories, such as those discussed in chapter two, that condemn prostitution, there are also several liberal theories that support the right to engage in prostitution as a morally permissible act. Many of these theorists rely on John Stuart Mill and theories of liberty or autonomy; others look to Kantian ethics for support. Even many feminists view sex in a more liberal manner than the view expressed by Carole Pateman in chapter two and accept prostitution as morally acceptable. However, despite the fact that there are those that claim prostitution is not immoral and is in fact morally permissible, these views are not without parameters, the most primary being consent. The majority of western society, or as philosopher Seriol Morgan puts it, “all sensible people agree that consent is necessary for the moral permissibility of a sexual act.”<sup>186</sup> Not only do most laymen hold this idea, even most sexual ethical theorists believe that consent in some form is necessary for sexual permissibility. To some degree, even the views previously discussed that condemn prostitution as immoral admit that consent is a necessary feature of sexual morality.<sup>187</sup> Nevertheless, the issue is not whether consent is necessary but rather, whether consent is *sufficient* to determine moral permissibility and many theorists do not believe it is.

There are various definitions or ideas of consent that are often used equivocally to the detriment of a sound and cohesive theory of consent. When people discuss what it means to consent to something, oftentimes, they mean different things and this causes inconsistencies and

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<sup>186</sup> Seriol Morgan, “Dark Desires,” *Ethical Theory and Moral Practice* 6 no.4 (2003): 377.

<sup>187</sup> Igor Primoratz, “Sexual Morality: Is Consent Enough?” 201; While the radical feminist view argues that women cannot give their consent and therefore it is not a necessary feature of sexual ethics, it stands to reason that, on their view, if society were such that women could give their consent as equals, it would be an essential feature of permissible sex.

confusion which then weakens the foundation of such theories of consent. Because of these misunderstandings, critics often question the legitimacy of using consent as a *basis* for sexual morality while admitting that it is an important *feature*. However, many of the additional criteria that these critics pose, such as those seen in chapter two introducing love, marriage, naturalness, and even political considerations, ultimately fail to provide adequate support beyond the need for consent. Generally, consent is granted as necessary, even among critics of consent theories, but is it also sufficient? It is important to wade through the quagmire of consent to understand why critics claim that it is insufficient for determining moral permissibility. When one consents to sex for instance, what exactly does this mean, and further, how does one determine whether such consent is valid? It is important to analyze consent in order to understand the various nuances of meaning and their subsequent application to moral permissibility in sexual acts and further, its applicability to prostitution.

Because consent tends to be a common and necessary element of many acts, both sexual and non-sexual, it seems to represent a norm in human acts that determines permissibility and impermissibility, a norm which the previous theories attempt to create but, ultimately, lack. Consent in general is a determining moral factor in many interactions between individuals. It determines the difference between battery and sport, in brawling and boxing, for instance, of theft and gift, and more importantly, for this analysis, between rape and sex.<sup>188</sup> However, there are various sexual acts that fall under the umbrella of sex, prostitution included, that are graded based on a myriad of considerations that all rest on the degree of volition, which in turn,

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<sup>188</sup> These examples are common in the literature on consent and are used frequently without citation by authors, see Igor Primoratz, "Sexual Morality: Is Consent Enough?," 201; Leo Katz, "Choice, Consent, and Cycling: The Hidden Limitations of Consent," *Michigan Law Review* 104, no.4 (2006): 628; Kimberly Kessler Ferzan, "Clarifying Consent: Peter Westen's The Logic of Consent" *Law and Philosophy* 25, no.2 (2006):194, in reference to a statement by Peter Westen in his text p. 15 and subsequent articles, etc.

determines whether consent is present or not to represent a norm for determining permissibility. If consent is not present, as stated earlier, acts are ‘normally’ considered immoral or impermissible. So, what is ‘normalizing’ about consent that makes it necessary for moral considerations? When is consent valid and how does that relate to sexual ethics in such a way that determines moral permissibility? Further, can it really be argued, as the aforementioned theories suggest that consent is *not* sufficient to determine morally permissible/impermissible sexual acts? The remainder of the chapter will analyze consent generally before turning to its relation to sexual ethics and prostitution specifically.

### **Valid Consent**

One of the clearest statements of the foundation for a theory of consent is the “Principle of Consentuality” found in David Archard’s text, *Sexual Consent*, in which he states that “a practice, P, is morally permissible if all those who are parties to P are competent to consent, give their valid consent, and the interests of no other parties are significantly harmed.” Conversely, the “Principle of Non-consentuality” is also considered in whether an act is morally permissible and states that “a practice, P, is morally impermissible if at least one of those who are parties to P, and who are competent to consent, does not give their valid consent, even if the interests of no other parties are significantly harmed.”<sup>189</sup> These definitions bring to mind the earlier discussion of Mill and most theories of consent have a formulation of the Principle of Consentuality that is similarly construed. However, while this states the position of consent theorists, there is still a

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<sup>189</sup> David Archard, *Sexual Consent*, 2; later Archard brings in the principle of Dissent (“a practice, P, is morally impermissible if at least one of those who are parties to P, and who are competent to consent, does or did dissent, even if the interests of no other parties are significantly harmed, nor are these others occasioned serious offence.”) as what he sees as a better principle because of his view on relationships that are ‘beyond consent,’ or that do not need to express consent to be permissible. However, this argument is not entirely convincing, and this principle does not add anything significant, other than an alternative principle that is specific to that criticism of consent, 80-1.

matter of distinguishing what valid consent really is, when what appears to be consent is not really consent at all, which could be a case of being incompetent to consent, and who counts as a third party.<sup>190</sup>

Most theories of consentuality have three conditions or norms that distinguish valid and invalid consent: mental competence, informed decisions, and voluntariness. If any of the three components are missing, the consent is invalid, even if a person says ‘yes’ to a sexual act.<sup>191</sup> The first criterion, mental competence, amounts to “both an ability to understand the nature of that to which she [or he] is consenting and an ability to make a decision in respect of the matter.”<sup>192</sup> There are several reasons why a person would lack the necessary capacity to make a decision. A person who is mentally ill or disabled is considered incompetent to consent, as is often determined by law, for instance, when a person is deemed unfit to care for his/her estate or welfare and this would also apply to sexual consent. However, while this is a permanent incapacity, some incapacities are not permanent.

A prime example of a lack of mental competence that is temporary is embodied in a minor. Someone who is under the proper ‘age of consent’ as dictated by the law is, by definition, unable to give consent to an act because they are unable to fully comprehend the nature of the situation or to make a decision about it. There are different ages set by law for different situations depending on the impact the decision could have on a minor’s life (such as sexual intercourse) or even society at large (as is the case with setting a voting age).

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<sup>190</sup> Archard, *Sexual Consent*, 2.

<sup>191</sup> This is what Peter Westen refers to as the difference between factual attitudinal consent and factual expressive consent. Factual attitudinal consent is a mental state with an affirmative desire to consent, while factual expressive consent does not necessarily depend on the mental attitude, it is merely a verbal affirmative utterance, perhaps despite a unwillingness to consent. Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*, (Burlington, VT: Ashgate Publishing Limited, 2004) 4-5, 20-1.

<sup>192</sup> Archard, *Sexual Consent*, 44.

Unfortunately, the age of consent that is set by law can oftentimes be problematic as it is generally used to determine mental maturity and some individuals mature at differing rates. Nevertheless, setting an age under which one lacks the ability to consent is both essential and beneficial because it protects the interests and well-being of children. However, once a person ‘comes of age’ they are generally deemed competent to consent, thus making the incapacity merely temporary.<sup>193</sup>

Another instance which invalidates consent due to a temporarily diminished mental capacity involves the use of drugs and alcohol as well as temporary mental disturbances. Of the examples used for incompetence, drug and alcohol use is the most difficult to establish because in each case, the level of incapacity is problematic to determine. How incapacitated must someone be before they are deemed unable to consent to an act? As David Archard claims, “Clearly a comatose person is not able to consent to (or even properly participate in) sexual activity. But, even short of being unconscious, somebody may be so drunk as not to be aware of what they are doing or incapable of making a decision.”<sup>194</sup> Drugs and alcohol affect people differently and this makes for a complicated determination of valid consent, nevertheless, it is an important and vital case in which individuals who are generally mentally competent are unable to properly give consent. However, critics may claim that drug and alcohol use are not necessarily applicable to determining competence because of the voluntary nature of partaking in these substances. When one chooses to drink alcohol or use drugs, for the most part, that individual is aware of the risks involved in partaking of the substance and this includes an awareness of a diminished capacity to make rational decisions. Because the individual is cognizant of the possibility, critics could claim that, in a sense, they are consenting to what happens as a result of

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<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

their actions. While this claim is controversial, there have been legal cases in which allegations of rape were dismissed because of a similar interpretation of consent.<sup>195</sup> This type of ‘consent’ is referred to as ‘indirect consent’ or ‘tacit consent’<sup>196</sup> and will be discussed in more detail later in the chapter. But it tends to go against the moral grain when an agent who has had so much to drink that they are unconscious or belligerent is able to make decisions, much less consent to anything. When one chooses to take a drink or partake in drugs, does this mean that since they consent to this act, they consent to any possible outcome or consequence of this action? It seems unlikely and incorrect to assume so, especially when this involves an unwanted or unconscious sexual interaction.

Hence, drug and alcohol use seems to be distinguishable from temporary mental disturbances because of the involuntary nature of such disturbances. However, there is a similarity between the two instances, primarily in the complexity of determining whether a ‘mental breakdown’ or, more serious, mental illness is sufficient to invalidate consent. This difficulty rests in the sometimes unreliability of determining incapacitation. Nevertheless, mental disorders such as extreme depression<sup>197</sup> and anxiety affect the way in which individuals behave, causing them to act erratically, irrationally, or ‘out of character’ which influence the capacity to properly consent. The more serious the mental disturbance, the easier it is to determine the inability to consent. However, in certain circumstances, such as ‘temporary insanity’ or even extreme phobia, a decision to consent to a situation can be invalid if the mental disturbance is sufficiently severe. There are certain legal cases in which a person consents under ‘extreme mental stress’ and the consent given is invalid. However, these mental disorders or

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<sup>195</sup> *Ibid*, 45-6.

<sup>196</sup> *Ibid*, 44-6, 11.

<sup>197</sup> *Ibid*, 44.

stresses are not generally permanent and can be remedied with the use of prescription medication or sometimes with time. If the illness cannot be remedied, then it is of the more serious mental disorders spoken of previously and valid consent cannot be given in such cases.

The second criterion, and typically the most disputed, that is necessary for proper consent depends on having relevant information about what it is to which an agent is consenting.

Making an informed decision on whether to consent involves a necessary understanding of the relevant facts *that one can know* about that to which one is consenting. If one does not have the relevant facts or details surrounding the situation, one may give their consent to something to which they did not intend. One of the most common issues with this criterion surrounds what it means to be informed of the relevant facts. Who or what determines which pieces of information are relevant or not? Archard, as well as other theorists, contends that “The person does not need to know everything, only everything that would make a real difference to whether or not she [he] consented.”<sup>198</sup> Some facts are understood to be relevant for most people, for instance if an agent is contemplating consenting to sex with an individual, knowledge of a sexually transmittable disease, marital status, or age is, perhaps, relevant to the decision, whereas liking the color blue is not. The relevant facts, according to these theorists, can include a number of things but tend to include “what is being consented to, prior or background information bearing on that which is consented to, or what may transpire in consequence of the giving of consent.”<sup>199</sup> One potential problem with such an understanding of ‘all the relevant’ information is what to make of such considerations as whether consenting to something will make me better off<sup>200</sup>, or will be enjoyable, or even how to determine if a particular piece of information would be

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<sup>198</sup> *Ibid*, 46.

<sup>199</sup> *Ibid*, 46.

<sup>200</sup> Richard Lee, email to author, June 21 and 22, 2011.

relevant to that particular person. In considering the first two, these are things that can only be known in hindsight. They are not something an agent *can* know, so, for our purposes, they cannot be a 'fact' until it has past or until the agent has consented, thus, they are not 'relevant' to the actual decision-making process. When Archard states that "what may transpire in consequence of the giving of consent" is also significant, he does not, and it seems most consent theorists would not, intend that the *actual* consequences be known, only potential consequences. Most people, therefore, understand that when placing a bet one may win or lose, when having sex may enjoy it or not, or consenting to heart surgery may live or die. If one did not know these things, as most notably could occur with the surgery example, the person gaining consent should inform the consentor of the possibilities or consequences. It is not about understanding whether it will or will not benefit the agent that makes this information necessary, but rather, whether the agent is being deceived or misled. If A is deliberately attempting to get B to consent to something and A is withholding a fact that A believes may cause B to refuse consent, then A is doing something impermissible and the consent that is obtained would be invalid. Additionally, if B is misleading or withholding information that 'most people' would want to consider in their deliberation of consent, this should be divulged. The less a person knows of another, the more they should include pertinent, foreseeable information. This seems to be the important and key interpretation to understand what should be understood by 'relevant information,' not knowledge about every minute detail, which could not possibly be known or communicated.

The requirement for informed consent to sexual interaction is reflected to some degree in the law. If one misrepresents pertinent facts about the interaction, and obtains consent because of this, the individual can be prosecuted for rape or a lesser charge of fraudulent misrepresentation. There are two primary types of fraud that the law recognizes as being

relevant to falsely obtaining consent; they are “fraud in the *factum* and fraud in the inducement. The first constitutes a misrepresentation of the act itself or the identity of the persons involved in the act; the second, of some state of affairs which supplies a motive for the other to consent.”<sup>201</sup> Fraud in the *factum* would involve an agent not knowing that sexual intercourse was taking place. An example of this would be a woman, during a gynecological exam, being led to believe that the doctor was using a gynecological instrument to examine her, but instead was inserting his penis (not the proper instrument) into the vaginal canal and engaging in intercourse with her without her knowledge. The second possible type of fraud in the *factum* involves not knowing who it is with whom one is engaging in sex.<sup>202</sup> There have been cases, for example, both real and fictional of twins switching places and it could be the case that an agent agrees to have sex with one twin being led to believe it was the other.<sup>203</sup> While it may be that the individual verbally consented to an act, because he/she did not actually have the correct information, that agent would be unable to give valid consent since “a person cannot subjectively choose something for [him/] herself without being aware of it.”<sup>204</sup> Consent is an act; however, it is also a choice, and one cannot choose to act if one does not have the information that would allow a

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<sup>201</sup> Archard, *Sexual Consent*, 46.

<sup>202</sup> According to Aristotle, there are several ways in which a person could be acting involuntarily based on ignorance, as is the case with fraud in the *factum*, “A man may be ignorant, then, of who he is, what he is doing, what or whom he is acting on, and sometimes also what (e.g. what instrument) he is doing it with, and to what end (e.g. he may think his act will conduce to some one's safety), and how he is doing it (e.g. whether gently or violently). Now of all of these no one could be ignorant unless he were mad, and evidently also he could not be ignorant of the agent; for how could he not know himself? But of what he is doing a man might be ignorant... Since that which is done under compulsion or by reason of ignorance is involuntary, the voluntary would seem to be that of which the moving principle is in the agent himself, he being aware of the particular circumstances of the action.” Aristotle, *Nicomachean Ethics*, III: 1.

<sup>203</sup> Archard, *Sexual Consent*, 46; Westen, *The Logic of Consent*, 39.

<sup>204</sup> Westen, *The Logic of Consent*, 39.

choice to take place. Thus, any form of consent obtained in these cases of ignorance would be invalid and would not really be sexual consent at all, but rather rape.

While cases of fraud in the *factum* are typically considered to be rape under the law, fraud in the inducement is not usually classified as strictly, though sometimes it can be. Nevertheless, while the law does not always recognize fraud in the inducement as rape, it is still often considered a case of fraud and can be tried as such. However, simply because the law does not penalize fraud in the inducement as harshly as in *factum*, does not necessarily make fraud in the inducement morally permissible. And according to many consent theorist, cases of fraud in the inducement that do not disclose relevant information pertaining to the act or decision to consent are morally impermissible because as stated earlier, a person cannot choose to consent to something of which he/she does not have proper knowledge. If a person is misled by trivial facts that may or may not affect the consent that is granted (such as being led to believe the potential sexual partner went to an Ivy league school as opposed to some less prestigious university), it may still be censured in some manner while not making it completely impermissible, but rather unfavorable or less than ideal. The reason for this seems to be the seriousness of the consequences of the deception. If to use the same example, Agent A convinces, by deception, Agent B that A attended a better university, and B is impressed and more willing to engage in sexual intercourse because of the lie, but not solely because of it, B is wronged by the lie, but not in a significant manner, B may feel cheated and may regret being misled and perhaps even desire that the sexual relationship had not taken place. Nevertheless, the lie was one of a myriad of considerations, and as it stands, Agent B may have been less likely to sleep with A, but such a lie does not alter the *consequences* of the consent very much. On the other hand, if Agent A has a sexually transmitted disease or is married, and Agent B is not aware of or is lied to about these

facts, and such fact would have been a significant reason for rejecting or consenting to the sexual intercourse, or alters the moral tenor of the act and the consequences then change, then the act is morally impermissible. When an agent engages in sexual intercourse with someone who has a sexually transmittable disease and is not made aware of the affliction, the consequences of the action are severely and significantly different than an agent who does not have the disease and the moral consequences are changed as a result. Similarly, if an agent engages in sexual intercourse with an agent and is unaware that he/she is married, the moral tenor of the consequences of the act are also significantly changed because of the way in which it affects the third party, namely, the spouse. Some agents, upon being made aware of the facts may still choose to engage in sexual intercourse, despite the facts, yet, in many cases being lied to or misled about certain facts that have a significant impact on the consequences of consent ought to be disclosed to have valid consent. While there are various degrees to which a person can be lied to or misled into engaging in sexual intercourse, “the more completely a person is misled, the less willingly [the agent] can be said to engage in that act, and the more wronged [the agent] is if [the agent] does engage in that act.”<sup>205</sup> So, while there are degrees of wrongfulness depending on the amount of deception and volition, and fraud in the *factum* may be considered intuitively and legally more serious, fraud in the inducement also has moral consequences depending on the seriousness of the lie or omission and in a case of ‘the little white lie’ may be morally acceptable though less than ideal or in the case of a sexually transmitted disease, can be as equally impermissible as fraud in the *factum* which may invalidate consent.

The third criterion that is necessary for valid consent is voluntariness which is, in some cases, closely related to the second criterion of having pertinent knowledge about the situation to

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<sup>205</sup> Archard, *Sexual Consent*, 49.

which one is considering consenting but, in other ways, surpasses simply being informed about a case. Volition is the most important component to consent because the previous two criteria are ways in which volition is either lacking (competence) or impeded (lack of information). In order for an act to be truly voluntary or free, a person must know to what it is he/she is agreeing. The less the agent knows, the less free the agent is in choosing to consent. However, there are cases at the top of the scale in which there is no choice, such as when force, threat, or coercion is used. In all three of these cases consent is never given because of the lack of voluntariness. All the same, there are cases in which an agent appears to ‘freely’ consent to something which on the surface seems valid (i.e. there is no outward coercion or threat perceived) but upon further study is actually invalid.

There are certain situations in which an action or choice falls somewhere in a gradient between completely unfree (compulsion by physical force) and free (completely voluntary). As Joel Feinberg states,

There are many ways of ‘getting’ a person to act as you want him[/her] to act, but only some of these can be described as ‘forcing him[/her] to act.’ Some of these various techniques...can be placed on a spectrum of force running from compulsion proper, at one extreme, through compulsive pressure, coercion proper, and coercive pressure, to manipulation, persuasion, enticement, and simple requests at the other extreme. ... It is only techniques in the forcing part of the spectrum (wherever that boundary is drawn) that reduce or nullify the voluntariness of the induced response.<sup>206</sup>

Compulsion and force are ways of acting toward a person without permission, there is no consent involved, it is something done to a person, not something to which there is any choice.<sup>207</sup> One way in which Feinberg describes the shift between volition and coercion is by determining where the responsibility for the act lies. He claims that consent “transfers responsibility.” In an initial

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<sup>206</sup> Joel Feinberg, *Moral Limits to the Criminal Law, Volume Three, Harm to Self*, (New York: Oxford University Press, 1986) 189.

<sup>207</sup> *Ibid*, 190; even Aristotle makes this distinction in *Nicomachean Ethics* Book III.

interaction, agent A is asked to consent to x by agent B. If B performs x without the consent of A, B is at fault or morally responsible for x, while A is not in the least culpable because B is obligated to refrain from x until the consent is given. If, however, B solicits consent from A and A grants the consent, both A and B are morally responsible and thus responsibility is transferred from B alone to both A and B.<sup>208</sup> This occurs, Feinberg argues, because “The point and effect of consent is not to create an obligation of the consentor; rather it is to grant a privilege to the consentee. Where formerly he [B] had a duty to refrain from doing X, now he [B] is at liberty to do X (at least until the consent is revoked).”<sup>209</sup> This transfer of responsibility is due to the authorization A grants B to do x. When A consents, A is granting authorization to B. If A does not consent, there is no authorization granted and thus the liability lies completely with B because there is a duty not to do x without consent from A. However, Feinberg argues that in some cases, specifically prostitution, it may be better to speak of granting “*permission* rather than authorization” because “any act that crosses the boundaries of a sovereign person’s zone of autonomy requires that person’s “permission”: otherwise it is wrongful. In this sense all sovereign persons, like sovereign nations, have ‘authority’ over their own realms.”<sup>210</sup> Consent is so important in determining moral permissibility because it clearly delineates when a person’s rights have been violated and where the responsibility for an act lays, both in sexual and nonsexual situations. The more voluntary the act, the more permissible it is morally because there is a choice involved. The various degrees of volition, as quoted above by Feinberg, depend on the amount of choice involved in obtaining consent. The less one is able to choose, as in compulsion for example, the less voluntary (there is no choice at all) which makes the consent

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<sup>208</sup> Feinberg, *Harm to Self*, 174.

<sup>209</sup> *Ibid*, 178.

<sup>210</sup> *Ibid*, 177; this comparison of the individual’s autonomy and the state’s autonomy will be explored later in the chapter.

invalid, and thus, morally unacceptable. While consent obtained through enticement, as in the case with sales rewards, can be morally unfavorable in some circumstances, are for the most part, morally acceptable because there is a great degree of freedom of choice.<sup>211</sup> For any act of consent to be valid, it must be free and informed, as well as given by an agent that is mentally competent. If these criteria are not met, the consent is not valid.

### **Obligation: Consent vs. Promises**

Nevertheless, Feinberg's interpretation of consent in this case contrasts in some sense with what Archard states in his text. Archard claims that when A consents to x, A does indeed create an obligation to B or an obligation to do x or at least not to prevent x from occurring. He states that "If I consent to the doing of something, I put myself under some sort of obligation in respect of that doing."<sup>212</sup> He goes on to say that "It may be that I consent to do the thing in question—I agree to organize the meeting, and I should then take steps to realize that end." This statement seems perfectly acceptable, since in consenting, the agent is consenting to *do* something, in which case it can be understood as a promise. For example, if A's boss asks A to hold a meeting, and A consents, what A is consenting to is something A must *actively do*. A says, 'yes, I will organize the meeting,' this statement, though an act of consent, is stated as a promise to do something, in which case A is under an obligation to perform the act of organizing the meeting. If A does not, then A is, in a sense, breaking a promise or contract. However, this is a different situation than what Feinberg states in his text. For Feinberg, A is allowing B to do something. In Archard's case A agrees to actively do something. These are different situations, which obviously have the potential to lead to different conclusions. The consent that seems to be

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<sup>211</sup> There are of course exceptions to enticement or incentives, as will be discussed in the below section on offers.

<sup>212</sup> Archard, *Sexual Consent*, 3.

most significant in sexual ethics is that which allows another, B, to do something which he/she was previously obligated not to do, though the other type which Archard discusses here may also be present in some situations, especially prostitution.

However, Archard brings another example to the table, which would indeed apply to Feinberg's sense of consent since there are things to which people consent that do not involve agreeing to actively *do* something, but rather allow the other to do something. This seems to be the case which Feinberg is describing in his analysis. And, while perhaps a small issue, Archard's analysis leads to much too strong of a statement and must be explored. Archard continues with an example that, "It may be that I consent to someone's else [sic] doing of something, in which case I am obliged not to obstruct their doing of it."<sup>213</sup> This also seems acceptable, because, for example, if A consents to B's borrowing A's book, A is granting permission to use it and is thus under a negative obligation, or an obligation *not* to do something, in this case not to prevent B from using the book. This is not an obligation in the sense of actively doing something; it is a matter of refraining from doing something, which is not necessarily inconsistent with Feinberg's interpretation, though it would be a bit of a stretch. Yet, Archard adds an additional obligation for A which is very strong and does not seem founded that leads to some potential problems with consent if accepted. Archard claims that if A consents to B's doing something, in addition to the negative obligation, A may also be under a positive obligation to assist B. He claims that it may be necessary to "assist their doing of it in a manner indicated by the giving of the consent. If I agree to a friend's using my house while I am away, I should give them a key, not change the locks or move others in beforehand."<sup>214</sup> While the second claim, that "I should *not* change the locks," is in keeping with the negative obligation of

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<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

A not to prevent the permission, the first, giving a key, and the third, not moving someone in beforehand, do not appear to be legitimate types of obligations. In granting permission to another to do something (consenting to their doing it) this does not seem to put A under any positive obligation to aid unless this aid was consented to, in which case A must give the keys to B if B asks for permission to use the keys as well. It only puts A in a negative obligation not to prevent B's actions. So while A consents to B using the house and while the key is the best way to enter the house (though not the only way), A does not appear to be under an *obligation* to give the keys to B, only not to prevent B from using the house and since there are alternate ways to get into the house, A is not necessarily preventing B from using the house. This may seem intuitively strange since in most cases of borrowing a house, car, etc, a key is an essential feature of its use. One could possibly claim that the key is a part of the house, and since it is a part of the house, agreeing to use the house is agreeing to use each part of the house, and thus use the key as well. However, there are some instances in which there is not a connection such as there is between the house and the key. Simply because something is a convention or typically happens in conjunction, does not seem to necessarily mean that consent to one is consent to the other. However, is it the case that when an agent consents to one act, the agent also consents to another which he/she does not expressly consent? Further, is there an obligation involved to which the agent had no intention of consenting?

These different types of obligation involved in the giving of consent which Archard describes seem to be linked to what he calls indirect consent, of which there are different types, two common types are frequently referred to as implied and/or tacit consent. The former type of

consent “is implied by, or can be understood from, a person’s actions.”<sup>215</sup> If A asks to enter B’s office and B steps to the side and waves his arm in the direction of the office, this is often viewed as valid consent based on the actions of B, not on express verbal consent. Another common example is in the context of an auction, A understands that B consents to bid when B raises B’s hand. The context and the conventions are often important and can often be seen as giving consent even though no express consent has been given. This, however, is not always straightforward. As Archard notes, context and convention are not the same everywhere and implied consent based on these things can sometimes be troublesome because conventions vary. A nod does not mean yes everywhere, just as raising one’s eyebrows can indicate different things in different situations. So, implied consent cannot *always* be interpreted as valid, though often it is understood to be so. And in many cases it is necessary to verbally confirm that consent is indeed being given, despite implied consent, which even Feinberg seems to accept as mostly valid.

Tacit consent “can be understood as arguing that if you expressly consent to P, then you may be taken as tacitly consenting to Q—‘if it would be generally taken that consenting to P involves consenting to Q.’”<sup>216</sup> Tacit consent is generally linked to John Locke in the second of his *Two Treatises on Government*, in which he argues that any man born under a government who then lives his life under that government, consents to the rules and laws of the government when he partakes of the benefits of that government.<sup>217</sup> Or more strongly stated in reference to

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<sup>215</sup> *Ibid*, 8; it should be noted that Archard also refers to this type of consent (implicit/implied) as tacit consent. Though for the sake of clarity, I will use implied consent here and tacit consent for the second type of ‘tacit’ consent Archard discusses that is associated with John Locke and Thomas Hobbes.

<sup>216</sup> *Ibid*, 10.

<sup>217</sup> John Locke, *Two Treatises on Government*, (Cambridge: Cambridge University Press, 1988) II: 116-120.

Thomas Hobbes, “A person consents to all the consequences that he knows are necessary effects of his voluntary acts.”<sup>218</sup> Archard claims that not all types of indirect consent are acceptable, but that some cases may in fact lead to an obligation on the part of the consentor. Archard claims there are three cases in which consent can validly be implied or considered by law to be indirect (tacit) consent to an act: accompaniment, consequence, and precondition. “First,” states Archard, “Q could be an accompaniment of P, that is, it is not possible to do P without at the same time doing Q.”<sup>219</sup> His example relates to electricity consumption when using a television. If A consents to B watching his/her television (P), then A consents to B using the electricity (Q), which is necessary to the functioning of the television. These two things are connected in such a way that a person cannot possibly do one without at the same time doing the other. “Second, Q might inevitably succeed P. ... Third, Q might be a precondition of P.”<sup>220</sup> Archard uses medical procedures to serve as examples for succession and precondition. For the former, he claims that in consenting to an operation (P), one also consents to the outcome of the operation (Q). However, this is not so straightforward because there can be many potential outcomes, some more likely than others to occur. While if it is the case that P occurs, then the outcome could be Q, R, S, T, U, or V. So, while *an* outcome inevitable succeeds the operation, which outcome is not inevitable. So, if A consents to a heart transplant or some other surgery, and death is one of a myriad of possible outcomes, the argument would follow that one consented indirectly to death

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<sup>218</sup> Archard, *Sexual Consent*, 10; Hobbes states, “Ignorance of the penalty, where the law is declared, excuseth no man: for in breaking the law, which without a fear of penalty to follow were not a law, but vain words, he undergoeth the penalty, though he know not what it is; because whosoever voluntarily doth any action, accepteth all the known consequences of it; but punishment is a known consequence of the violation of the laws in every Commonwealth; which punishment, if it be determined already by the law, he is subject to that; if not, then is he subject to arbitrary punishment.” Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott (Oxford: Basil Blackwell, 1955), 218.

<sup>219</sup> Archard, *Sexual Consent*, 10.

<sup>220</sup> *Ibid.*

even though it was not the preferred outcome. In the latter case of precondition, Archard argues that if a patient agrees to an operation (P), the patient also consents to the anesthetic (Q) that must precede it. This last example is the weakest, since, in agreeing to surgery (P), patients can easily refuse anesthetic (Q) or the situation may be that there is no anesthetic available, in which case the surgery can still take place without the administration of the anesthetic (Q). However, one must be careful in the link between P and Q, simply because the administration of an anesthetic (Q) usually happens first, does not mean that it must. While his example may be faulty, the form is not since there are instances where some action P cannot actually happen without action Q occurring.

Despite Archard's claim that these three cases are lawful cases of indirect consent and are valid, he qualifies his remark by claiming that it is also necessary that a person is aware of the link between the two actions (P and Q). If an agent is unaware of the connection between the two, then indirect consent cannot be viewed as valid.<sup>221</sup> While Archard holds that these three types of relationships between consent and indirect consent are valid, he admits that there are potential problems with the connection and some may argue that they have "not consented to what is nevertheless a necessary accompaniment to or inevitable consequence of that to which they have consented."<sup>222</sup> Part of the problem with the three cases of indirect consent to which someone may object rests with the perceived connection between P and Q. Some connections are seen as necessary or typical, but as alluded to earlier, are merely conventions that do not hold for everyone. Many times it is difficult to determine if an action has a necessary connection to that which is consented. For example, one can argue that the anesthetic is not a necessary precondition, though it is common. An agent may be in a place where there is no available

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<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*, 11.

anesthetic or it may be against the agent's religious beliefs to use anesthetic, in which case, the anesthetic is not necessary. Similarly, one can argue simply because death is one of several possibilities as a result of an operation that the patient does not consent to death. If one accepts these as representing consent simply because they normally happen or they are part of a convention, there seems to be a problem.

Archard's argument for tacit and implied consent, while seemingly logical and valid on the surface can lead to a dangerous construal of consent when relying on conventions. The reason for using caution when using tacit or indirect consent can be seen in the example used by Lord Matthew Hale when discussing what he referred to as the "marital exemption" to the law of rape.<sup>223</sup> Hale's argument, which was the standard view until recently, and in fact is still held by many, was that when a woman agreed to marry a man, she indirectly consented to all future sexual intercourse with that man and thus, a husband could not be convicted of rape because the agreement was tacitly consented to by the marriage contract. In other words, in consenting to P (marriage), the woman also consented to Q (sex with the husband at any time) because Q was a known consequence of P. Today, this seems outrageous to most people and, indeed, it should. The argument would be that since the woman consented to marry the man, and she knows that there is a possibility of her husband forcing her or wanting to engage in sex when she herself did not wish to engage in sexual intercourse, that she consents to forced/coerced intercourse in consenting to marriage. What is essential to this argument is that a woman who agrees to marry a man is viewed as indirectly consenting to the typical conventions of marriage. However, these conventions are not uniform or indeed are often morally objectionable whether common or not. A wife who is forced to have sexual intercourse against her will did not give consent and should

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<sup>223</sup> Westen, *The Logic of Consent*, 272-4.

not be seen as giving indirect consent because she agreed to marry a man and most married people engage in sexual intercourse.<sup>224</sup> Even if sexual access was explicitly stated in the marriage contract, force would never be an acceptable means to obtaining it. While the woman may be considered to be in a breach of contract, this does not give the husband the right to force it of the wife, but rather to merely engage legal aid in her breach of contract. And if the wife should change her mind about the sexual access, she could then break/amend the contract.

The basis for indirect and tacit consent tends to lie in the participation in certain social activities which have many potential consequences, some foreseen, some not. Just as in the medical example, in which the patient is aware of the possibility of death, which occurred, the patient consented to death, the woman in being aware of the possibility of forced intercourse is aware of the possibility and it occurs, she consented. Succession and precondition seem to lead to many problems with consent. Simply because as Archard claims, there is a lawful basis of indirect consent based on precondition and succession, does not mean it is always morally permissible. What is lawful and what is moral do not always coincide and frequently conflict. Still, simply because consent to P leads to tacit consent to Q, does not necessarily create an obligation on the part of the agent as Archard claims, it simply adds an additional act of consent on the part of the agent to allow Q to occur. It is obvious why Archard believes there is an obligation or promise inferred because of this additional consent, however, there is no reason to necessitate obligation, but only to include an additional act of consent which does not imply obligation.

Feinberg, while also agreeing that tacit and implied consent are often valid and may lead to consent to an action which A did not expressly authorize, nevertheless, argues that simply

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<sup>224</sup> *Ibid.*

because one consents to something in a weak sense (i.e. “you may”) does not mean that they consent in the strong sense (i.e. “please do”). People often consent to something that they do not want to happen and thus do not intend to put themselves under any obligation to aid in the act.<sup>225</sup> The difference between putting oneself under an obligation to do something through a promise, and consenting depends on the immediate effects. Feinberg claims that while different situations often involve a mixture of consent and promises, depending on the situation, “the immediate effect of promises is to create an obligation in the speaker; the immediate effect of acts of consent is to cancel obligations in the one addressed.”<sup>226</sup> Further, he argues that “In no case should the act of consent itself be construed as a promise.”<sup>227</sup> This is because the two concepts are indeed separate and while certain situations involve a combination of the two, consent is altogether different from a promise. So, to recap, in the earlier examples, where A consents to B’s doing something, borrowing the car for example, and seemingly puts him/herself under an obligation, this is not the case because there is not always or even necessarily promise involved in consent. Indeed, A may not really want B to use the car despite the consent. The situation may be such that A does give the keys to B or does not prevent B from using the car, but A is not under an obligation to B simply because of the consent, but rather consents tacitly to allowing B to use the keys (with no additional obligation). Depending on the situation, if a separate promise to do something was given, then A is under an obligation. Some situations in which consent is given may also include an active agreement to do something, in which case a promise is given, but this does not logically follow from the act of granting consent but rather may accompany it without being synonymous with it.

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<sup>225</sup> Feinberg, *Harm to Self*, 178.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*, 180.

### When is volition obstructed?: Threats vs. Offers

While a promise and consent may be different things, certain situations in which consent is attempting to be obtained, such as offers, threats, and contracts, “involve a complex interplay of acts of consent and promises.”<sup>228</sup> The degree of this interplay makes the agent either more or less free to act when one considers the differences in how the consent and promises are obtained. Offers and some contracts differ from threats in that a threat is primarily structured as a ‘do this or else’ in which a person really is not given a true choice in the matter because if he or she does not comply, he/she is left worse off (by death, injury, etc). In other words, a threat is a form of negative coercion in which the victim is not given a real or viable choice and is thus unfree and unable to choose and thus not really under any obligation at all. Some contracts involve threats and if they do, they are invalid. Significantly, Archard claims that a threat does not have to be actually existent for the freedom of the agent to be called into question. He claims

that consent may be invalid if a coercive threat is reasonably believed to be made, yet none is intended. ... When the harm threatened is sincerely, even if not truly, believed to be significant, proximate, and real, whether the threat is explicit or implicit, then the consent obtained is invalid.<sup>229</sup>

The example that Archard uses here involves an actor playing a thief. If the thief-actor, instead of confronting the actor opposite, accidentally attempted to rob an innocent passerby who he/she thought was an actor, even though the actor is not actually intending to threaten the civilian, the passerby still feels that the threat is real, despite there not being an actual or intended threat present. The fear and the belief of threat are present and thus the consent (to hand over the wallet/purse) is invalidly obtained. Additionally, Archard uses the example of an agent believing that a stranger who has struck up a conversation with the agent is actually an escaped criminal

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<sup>228</sup> *Ibid.*

<sup>229</sup> Archard, *Sexual Consent*, 51.

and when this stranger begins talking to the agent, the agent believes that this perceived dangerous person will cause harm if he/she does not do as the stranger suggests.<sup>230</sup> Similarly, Feinberg describes instances of compulsion in which a victim is compelled to consent under severe psychological trauma and “paralysis” which is “independent of the will.”<sup>231</sup> This type of psychological effect, he claims can be difficult to determine, as with mental illnesses and disturbances, primarily because they resemble a sudden ‘change of mind’ which is essentially a choice to consent.<sup>232</sup> Threats can be implied or even imagined, but they are still real to the agent and affect the decision-making process. A threat, real or imagined, invalidates consent because of the fear, real or imagined, on which the agent bases his/her decision.

Offers and contracts that do not involve threats, on the other hand, present an option between either having life improved (through money, fame, etc) or remaining the same as it was prior to the offer. For instance, if A offers to give a car to B in exchange for sex, this is an offer. If B refuses, B is in the same position in life as he/she was prior to the offer. If B accepts, the life of the agent is perceived to be improved. The primary difference between a threat and an offer is the situation the agent would be in after refusing. Feinberg is sure to distinguish offers not only from threats but also promises. He claims, as previously stated, that offers, as opposed to threats “involve a complex interplay of acts of consent and promises ... [however,] in no case should the act of consent itself be construed as a promise.”<sup>233</sup>

An offer, however, can at times be coercive depending on the economic status of the individual or how free the agent is to refuse. It could be the case that an agent’s economic status puts him/her in such a situation that if the agent refused, the situation in which the agent was left

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<sup>230</sup> *Ibid.*

<sup>231</sup> Feinberg, *Harm to Self*, 195.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*, 180.

would be dire. So if, for example, an individual offers a destitute agent money in exchange for sex and the agent is so bad off that the money is truly needed for the well-being or subsistence of the agent, then the agent may be in the same situation that the victim of a threat is in, namely, a risk to the life of the agent. If an agent will likely starve without the money, then it is very similar to a threat (though admittedly not the same). The agent is worse off than before and it could be argued, fears for his/her life. Compare this situation with two others. Suppose a wealthy individual offers an underprivileged, but not destitute, agent money in exchange for sex. If the agent accepts the offer, the situation of the agent is improved. If the agent refuses, the situation is unfavorable, but remains the same. Now consider a middle-class agent being offered money in exchange for sex. This agent does not *need* the money, but again, the situation would be improved. In these three cases, the moral permissibility seems different. In the latter case, a desire to improve life (Archard calls this greed) is the motive for accepting. The agent is free to accept the situation and equally free to refuse the situation. The offer widens the possibilities for the agent. In the case of the underprivileged agent, the freedom of choice seems less free than that of the middle-class agent. The insufficiency of income for the second agent limits the potential avenues for income and the offer, while widening the possibilities for the agent, also make opposing the offer more difficult (though not impossible) than the middle-class agent because of the economic situation of the agent. The choice of the absolutely destitute agent is much less free than the previous two examples and leaves one to question whether it is truly free at all. This agent is indeed out of options.<sup>234</sup> Here Archard claims, “greed is not at issue in the situation where ... [the agent] is so poor, so destitute, and so starving as to have no choice but to agree to *anything* [the individual] proposes so long as it provides [the agent] with some measure

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<sup>234</sup> Archard, *Sexual Consent*, 57-8.

of relief from [the] desperate situation.”<sup>235</sup> He further argues that the individual offering the money need not even be very rich or demand sex, the agent would be willing to truly do anything in order to gain relief from the situation. The three distinct economic situations of the agents affect the level of freedom of choice in the event of an offer. Even if the three agents were offered the exact something, the consent that was obtained would be morally different in each of the situations. Archard argues that the destitute agent does not really choose, but is left with no choice due to the situation and “agrees out of dire necessity, and may be said to no more consent than she would of agreeing with a gun to [the] head.”<sup>236</sup> While Archard’s assessment of the destitute agent seems likely to be a case of invalid consent and less morally permissible than the previous two agents, it is important to point out that while the agent may have no more choice than if threatened, a threat *is* a different situation than the coercive offer.

So, while threats can be present even in offers depending on the economic status of the agent they can also be present depending on the relationship between individuals. These differing relationships tend to be reflected in power differentials, as in the case with patient/doctor, teacher/student, and boss/employee. However, simply because there is a difference in situation, does not automatically mean that there is a coercive relationship present. Nevertheless, if, for example, A’s boss offers a promotion in exchange for altering the accounts, stealing information from another company, or sex and A believes that if he/she refuses the boss’s offer, then he/she will be fired or there will be other negative consequences for refusing, this can be seen as coercive. Because, as argued earlier by Archard and Feinberg, the threat does not have to be real for the agent to believe it is present. In these cases, of threats and coercive

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<sup>235</sup> *Ibid*, 58.

<sup>236</sup> *Ibid*, 58.

offers, consent is not truly voluntary and the agent, in a sense, is unfree to properly or validly choose to consent, not just to sex, but to most offers.<sup>237</sup>

### **Why Does Consent Matter in Sex?**

There are some dangers to endorsing many of the criticisms of sexual consent, such as the idea that consent during sex is somehow passion-killing or unnecessary. For example, the idea that sexual acts are complete acts or are representative of a complete act in which there is an end goal that is the same each time, as Aquinas (and to some degree even Scruton) argues, seems problematic. This model does not allow for levels of intimacy or degrees of actions which can be consented to or not depending on the situation and this model leads to several serious and unfavorable implications for sexual morality. To claim, as many do, that there is a specific, uniform *telos* or function or end purpose to a sexual act, is to adhere to the idea that anything that falls short of that *telos* is incomplete or less than the full act and therefore unfulfilled.<sup>238</sup> So the idea many have, especially those who look to a ‘function’ of sex, that penetration and ejaculation are the end result of a ‘successful’ sexual interaction, leads to the morally unfavorable conclusion that consent interrupts this process and cannot be revoked in the midst of sexual interactions because it results in a lack of fulfillment of the function of sexual interaction. This tends to be coupled with the idea that when one (many times the man) is “in the grips of passion” this individual tends to be unable to control him (or her) self, and perhaps is less responsible for the subsequent actions, and the other (typically the woman) should recognize this as a result of sexual intercourse and therefore be sympathetic to the situation.<sup>239</sup> This almost excuses the agent who is unable to control the sexual urges or drives he/she has and negates an exchange of

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<sup>237</sup> *Ibid*, 50.

<sup>238</sup> *Ibid*, 24.

<sup>239</sup> *Ibid*, 34.

consent to various degrees of sexual interaction. Archard claims that it seems to obligate the other who “goes most of the way” to “go all the way.” This is a dangerous path to tread and the destination requires the other to act when there is not consent to the act.<sup>240</sup> Simply because an agent agrees to have sex with an individual, does not mean that the agent must engage in whatever type of sex in which the other wishes to engage. For example, an agent may consent to vaginal penetration, but not anal. Or more likely, if an agent consents to sexual intercourse, but it is not proceeding in a manner in which the agent is comfortable, for instance if the partner becomes violent, engages in a practice in which the agent did not consider, or even if the interaction becomes unpleasant or painful, the agent should be able to revoke consent or even in some situations, it may be said that what the agent consented to is no longer occurring and the ‘consent’ is thus invalidated. In the view where the function of sex is penetration and ejaculation as the *telos*, there is no revoking or negating consent once the agent gives the initial consent because there is a process which is included that does not admit of levels or degrees of intimacy. Consent theories tend to reject such a concrete analysis of sexual interactions and intercourse and allow for the possibility of altered situations and/or a change in the encounter which affects the consent that was initially given, resulting in the revocation of consent or even one could argue that the situation is changed in such a way that it results in a lack of proper consent in the first place.<sup>241</sup>

Sexual interaction is often cited as being directly associated with the self in such a way that sex cannot help but be a deeply significant act, one in which individuals guard against infraction and unwanted advances. Many sexual ethicists, including the previous theorists discussed in chapter two, often link sexual intercourse and sexual desire to the self in such a way

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<sup>240</sup> *Ibid*, 22-5.

<sup>241</sup> *Ibid*, 24-5.

that they believe sex produces a vulnerability in an individual and because of this, sex has a ‘special’ significance. Because of this significance, theorists often link sex to other extraneous things which alter the moral flavor of sexual interaction when absent. This is part of the reason Scruton attaches love to sex as a necessary feature, and why Aquinas and sociobiologists look for the ‘function’ of sex. But it seems most plausible to link sex to the self, not in a special or significantly different way than other acts, but through autonomy, upon which acts of consent, both sexual and not, depend. Archard states that “as incarnated beings we have a very strong interest in regulating and controlling access to our bodies. This interest is rooted in considerations of self-esteem, integrity, and personal dignity.”<sup>242</sup> While this seems to be the case, it is a matter of autonomy and sovereignty that determines an individual’s integrity, dignity, and self-esteem. Because of this, consent, to sex and other acts involving the embodied self, is the most important determining factor in whether an act is morally permissible or not. If a person consents to sex, and that consent is valid, it does not matter if he/she is fulfilling the biological function of sex or not, whether he/she is in love or not, or whether they are acting in a way that provides pleasure or not. What matters is that the individual had a choice to consent, validly consented, and was essentially autonomous in the choice to act.

Oftentimes when consent theorists discuss autonomy, they rely on Kantian ethics, specifically treating others as not merely a means, but also as an end. The typical consent theorist interprets this in a specific manner, which is often believed to serve as the basis for the necessity and sufficiency for consent in sexual ethics. As Archard explains, “the Kantian principle does not proscribe treating another as a means; it rules out treating the other merely as a means. It is permissible to treat another as a means provided that one also treats them as an

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<sup>242</sup> *Ibid*, 20.

end.”<sup>243</sup> Similarly, Thomas Mappes, in his essay, “Sexual Morality and the Concept of Using Another Person,” explicates the principle in the following manner,

According to a fundamental Kantian principle, it is morally wrong for A to use B *merely as a means* (to achieve A’s ends). Kant’s principle does not rule out A using B as a means, only A using B *merely* as a means, that is, in a way incompatible with respect for B as a person.<sup>244</sup>

Mappes goes on to say that the best way to interpret ‘using another person’ is doing something without their “*voluntary informed consent*.”<sup>245</sup> These two interpretations tend to be the start of a Kantian interpretation of consent theories. However, there is a problem with relying on Kantian theories condemning the use of a person without consideration of his/her ends because of the various interpretations of ‘using’ another. Even Scruton relies on Kantian theories of using another person when he formulates his theory of sex by claiming that only reciprocal and intentionalizing acts are appropriate in interactions among two parties and constitute treating that person as an end as well as a means. As previously noted, he claims that to use another as merely a means is to act without concern for their uniqueness as a person. Mappes interprets using a person as a mere means as acting without his/her voluntary informed consent; many critics do not think this is enough. The variety of interpretations of Kant’s meaning in this key passage is one of the reasons it is difficult to use the theory as a basis because there are strong arguments both for and against sexual interactions based on the same principle. Significantly, Mappes and other Kantian theorist supporting consent as an acceptable basis for sexual interaction do not always give a reason *why* consent is important, only that it is the best

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<sup>243</sup> *Ibid*, 41.

<sup>244</sup> Thomas Mappes, “Sexual Morality and the Concept of Using Another Person,” in *Social Ethics: Morality and Social Policy*, fifth edition, eds. Thomas Mappes and Jane S. Zembaty (New York: The McGraw-Hill Companies, 1997) 163-4, italics his.

<sup>245</sup> *Ibid*, 164 (italics his).

understanding of this passage and that this is the proper interpretation for using a person as a means and an end.

Critical of the interpretation that Mappes and other such theorists present, Archard correctly argues that, simply because A consents to an act with B, does not mean that B is not treating A as merely a means. In a sexual interaction, A may consent to sex with B, and past that, B is not concerned with whether A is enjoying the sex or even if A's end goal was being attended, so long as B is enjoying it and fulfilling B's own end. Many people (Scruton included) find this to be morally problematic because even with consent, A does not attend to the needs/wants of B. However, it is not clear that after obtaining consent to sex (or any act) that treating another as a mere means is morally impermissible as Kantians claim. There are many scenarios and examples that critics use to disprove or cast doubt upon the Kantian claim that it is morally impermissible to use another as a means only, many of which involve retail and the relationship between sales and customers, or skilled labor and clients. For example, if A wants a haircut, and goes to B for a haircut, is it morally impermissible for A to use B as merely a means to get a haircut, without considering anything further about B past the price of the haircut? Or when hiring a contractor to build a house, is it wrong for A to use that contractor as merely a means to furthering A's end of building a house? Similarly, in a sexual interaction, granting that it would be wrong to engage in sex without consent as already argued above, is it wrong, as Kantians claim, for A to use B as merely a means to sexual gratification once A consents?

According to Archard, using someone as a mere means to an end is not morally problematic. When trying to understand why Kantians believe it is wrong to use another, he looks to manipulation and exploitation as potential supporting ideas behind their claims before turning to why it is not morally impermissible to use another in an interaction, both sexual and

nonsexual. When one condemns using another person or not taking the other person's ends into account in interactions and claims that is it morally wrong, the typical reason seems to lead either to manipulation or exploitation of the other. Archard asks the reader to "consider the following scenario."

Harry is a rock star, Sue an adoring fan. ... [Sue] explicitly offers herself sexually to Harry. Harry and Sue sleep together. It is a one-night stand, and the sex is perfunctory and unpleasant to Sue. In the morning Harry leaves with barely an acknowledgement to Sue of what has happened, and they never meet again.<sup>246</sup>

For many, this seems morally problematic. However, what is it about the situation that makes it seem as though Harry is to blame and Sue was somehow used?

One potential complaint could be that Harry manipulated Sue in some way. However, in the scenario described, this does not seem to be the case at all. Harry did not approach Sue, rather, Sue approached Harry. Had Harry been the initiator, perhaps there would be a valid concern over manipulation. So, if the situation was altered and Harry approached Sue, would Harry be morally blameworthy? Manipulation lies somewhere between coercion and persuasion which leaves the permissibility of such behavior unclear.<sup>247</sup> Harry would be thought to manipulate Sue if he made "use of some part of [Sue's] motivational make-up in some set of circumstances with the view of getting [Sue] to do something [he] want[ed] [Sue] to do but [Sue] might not have wanted initially to do."<sup>248</sup> While this may seem insidious, it is not necessarily so. It could be that A knows that B is a wealthy philanthropist and knows that if he/she approaches B about a need in the community, B will donate money, though perhaps B did not want or think to do it without the approach of A. Archard even points out that one can manipulate another into doing something that will benefit the other, as for instance happens with parents and their

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<sup>246</sup> Archard, *Sexual Consent*, 74.

<sup>247</sup> *Ibid*, 75.

<sup>248</sup> *Ibid*.

children. Manipulation may not always be done in bad or dangerous ways, but one could claim that the agent is not being honest with the other in manipulating him/her, and thus is practicing deception, no matter how innocent or well-meaning.<sup>249</sup> Yet, the difference between outright deception and manipulation seems to lie in the truth or falsity of the statements. When agent A approaches agent B and discusses the need of the community in an attempt to gain his sympathy and generous donation, A is not lying or making a false statement, the community truly is in need, however, the intention of A is to get money, so it may seem deceptive. Instead of A simply asking for a donation, A plays on the motivational make-up of B to get B to donate money. Similarly, in the case of seduction, when A tells B that she is beautiful, A is not lying about it, but is merely telling B that she is beautiful in order to convince (manipulate) B into engaging in a sexual relationship. So, B is being misled as to *why* A is telling her that she is beautiful, but A is not actually lying to B because A actually believes B to be beautiful.<sup>250</sup> It is not clear that this is morally unacceptable. A is telling the truth, and may have additional motivation in telling B something, but it does not seem to be required that B divulge this motivational intent. Disclosing such information seems to go back to the earlier discussion of fraud in the inducement. While perhaps B is being misled about the intentions or desire of A, the moral consequences are merely enough to make the situation perhaps less than ideal not morally impermissible. It is not realistic or necessary for B to know everything about the situation, only those things that are relevant, and while the agent may be deceived in some way about the motivation behind the statement, the statement is not false. However, most important in Kantian criticisms of manipulation is that B is not considering the actual wants of B. A is merely after his/her own goals and ends. The ends and goals of B are not taken into consideration; A is

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<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*, 75-6.

merely using B as a means to an end and this, above all else, is what makes manipulation unacceptable morally for Kantians.

Exploitation is slightly different. Oftentimes, manipulation and exploitation are thought to go hand-in-hand; however, there is a different component to exploitation that is typically viewed as worse than manipulation. Exploitation is described by Archard as “one party gain[ing] from his relationship to the other more than he otherwise would in some suitably specified baseline set of circumstances.”<sup>251</sup> In the initial scenario between Harry and Sue, Sue approached Harry, however, Harry is often viewed as the morally blameworthy agent and many may point to exploitation of Sue as the reason. In sleeping with Sue, one may argue that Harry exploited Sue’s adoration as a fan in order to gain something that he would not have gained otherwise. In other words, Harry used his success to sleep with Sue. If he were not successful, she perhaps would not have slept with him. However, is it the case that Harry has really done something morally impermissible? In such scenarios involving exploitation, A does not harm the interests of B (in the sense discussed by Feinberg in chapter one), and while Sue may be unhappy as a result of the interaction, hurt feelings, dissatisfaction, and regret are not reasons to morally condemn another. Further, it does not seem as though it is necessarily wrong to exploit a certain situation. For example, as Archard points out, certain people exploit “extraordinary good looks, charm, intelligence, and sensitivity to the needs of others to win favors,” and in these cases and the case of Harry, these traits were not gotten immorally.<sup>252</sup> It is simply a matter of using and exploiting strengths one has, which does not seem problematic unless actual harm is caused to the interests of others. Simply because Sue is dissatisfied or unhappy with the situation also does not mean that Harry was morally blameworthy either. As argued earlier, when consenting to an

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<sup>251</sup> *Ibid*, 76.

<sup>252</sup> *Ibid*, 76-7.

act, one cannot know if one will enjoy it or gain anything from the encounter, and while it may be ideal for an agent to benefit or enjoy the consequences of an act, it is not always the case and cannot be immoral if these positive attributes are lacking in an interaction. In many situations, not merely sexual, one is disappointed with the result of an act, a purchase, or a decision (to go to a party for instance), however, in these situations, it is not unfair, unjust, or wrong of the salesperson, party-thrower/friend, or sexual partner to get more out of the exchange. The sexual activity between Harry and Sue, among other acts sexual and non-sexual, “cannot be described as unfair,” according to Archard,

since there seems no principle of justice which prescribes a fair distribution of sexual pleasures [or any other benefit /enjoyment] to the participants in a consensual activity. ... It is not required that the giving be equally proportioned. We commend generosity and reciprocity in sexual partners, but we cannot be said to think that such generosity and reciprocity are obligatory.<sup>253</sup>

When, in the case of Harry and Sue or a salesperson and customer, an agent knowingly consents to something and the outcome does not live up to the expectations, this does not mean the other is morally blameworthy, merely that the agent made a poor or bad choice (in the qualitative, not moral, sense). However, certain types of exploitation that play upon an agent’s psychological/mental problems (phobias for example), addictions, or extremely dire situation are morally problematic because, as discussed earlier, either the agent is no longer capable to consent (in the psychological/addiction cases) or as in the latter case is in a coercive situation. However, if A wants to go to a bar, and does not want to go alone, it is not morally impermissible if A uses the fact that B enjoys a particular band (which happens to be playing at a bar) to get B to go to a bar (which B would never normally do). Again, though, the issue most Kantians take is that A is merely using B to forward A’s own interests without consideration of

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<sup>253</sup> *Ibid*, 77.

B's interests. This is not always the case, as in the above example, A perhaps knows B would really like to see the band even though B despises bars and drinking.

However, the problem with using a Kantian theory as the basis for consent theories lies in the fact that a person can still be seen as using another sexually after consent is obtained as can be seen in the cases of manipulation and exploitation (which the Kantian would simply argue are impermissible). Harry received consent from Sue, and yet, many people still believe that Harry was morally wrong to 'use' Sue. "He is careless with Sue in the sense that he does not care about her. This," according to Archard, "is what is meant by 'using' another, treating her as a means to one's own ends."<sup>254</sup> Nevertheless, is it wrong in the cases of exploitation and manipulation or even persuasion to use another person? If the answer is yes, then there is a problem with using Kantian ethics as a basis for consent theories without serious alteration or exceptions which many consent theorists would not grant. Many consent theorists such as Bernard Baumrin, who claims that in consenting to sex, the two agents acquire new rights and duties that make it necessary to attempt an equal exchange, merely add additional criteria and conditions onto sexual interaction. Archard claims that in the sense that there is no moral theory that *justifies* sexually using another Baumrin and other Kantian consent theorists are correct, however, from this there is no logical necessity to conclude that simply because it is not justified, it is morally impermissible or that there is an obligation (as Baumrin and other Kantians claim) "to treat the other sexually as an end."<sup>255</sup> While it may be ideal to for two consenting adults to engage in sex that is reciprocal and mutually beneficial and enjoyable, it is not and should not be a requirement for morally permissible sex because it is a matter of ideals and what sex 'ought' to be, not what sex is. Simply because sex ought to be this way, does not mean that it is or if it is

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<sup>254</sup>*Ibid*, 78.

<sup>255</sup> *Ibid*.

not, it is morally impermissible. It merely falls short of the ideal, which, granted, could be bad for the individual who did not gain anything from the exchange, however, this does not make the other agent involved morally blameworthy, merely a poor sex partner. Archard claims that

we can characterize [such] sexual encounters ... as casual, cheap, unloving, cold, empty, impoverished, shallow, and many other similar adjectives. To say of such sex that it is 'bad' for this reason is not to say that it is morally impermissible anymore than 'bad' sex in the sense of unpleasant sex is proscribed. Sex can be evaluated, and thus described as 'bad,' in non-moral ways.<sup>256</sup>

Ultimately, the idea that sex that does not live up to what Archard calls the "mutual ends" ideal, is just that, not ideal.<sup>257</sup> However, simply because something falls short of an ideal, does not make it morally impermissible. So, while using another person may not be justified or ideal, it is not morally impermissible. Those consent theories, such as Mappes' that rely on Kantian ethics here have a major problem because they claim that treating another as an end is acting with their consent, however, simply because one says yes to a sexual encounter, does not mean that their ends are taken into consideration. Further, when one takes such a principle and extends it to other non-sexual situations, one would be hard-pressed to find many who would agree that it is wrong for customer A to use barista B at Starbucks, or homeowner A to use plumber B when the toilet is clogged, or even customer A to use hairdresser B when A wants a haircut. While it could be argued that treating the other with respect and obtaining their consent is necessary to treating them as an end, it is unlikely that this is the only component necessary for treating another as an end, and is thus insufficient for a moral basis for consent. Furthermore, Kantian principles are just as consistently used in a theory such as Scruton's which demands an additional component to treat another as an end and thus fails to be sufficient for a sexual ethical

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<sup>256</sup> *Ibid*, 79.

<sup>257</sup> *Ibid*.

theory, which leaves the consent theorist still searching for justification for consent as a sufficient criterion for sexual ethics.

Perhaps, then, the best way to look at consent theories is using a concept of autonomy that does not rely on many of the divisive and impersonal Kantian ideals. When discussing autonomy, one can mean several things. The most common understanding of autonomy is ‘self-rule’ or ‘self-governing’ which is typically derived from Kant, however, it need not be. Many of the ideas that Kant expressed in his work focus on an abstracted human dignity and do not support the choices of a person because it is that individual’s choice, but rather, because of some abstract ‘humanity’ that the individual possesses.<sup>258</sup> This is not consistent with the idea of personal autonomy that is necessary in a consent theory. There are several ways in which one can discuss autonomy and what it means to be autonomous. The most relevant understanding of autonomy for the sake of this argument is borrowed heavily from Feinberg and Mill and is related to autonomy as a ‘right’ which is, in a sense, roughly analogous with “autonomous nation-states” which “are said to have the sovereign right of self-determination.”<sup>259</sup>

However, as Feinberg notes, the two words, autonomy and sovereignty, are not always used synonymously in a political context, and are often used to make political distinctions between states which can be useful in understanding a meaning of personal autonomy. The way these two concepts differ in politics amounts to the degree of freedom that is exercised and whether such freedom can be revoked. For example, as Feinberg puts it, Great Britain is a sovereign nation made up of various parts. The nation grants ‘local autonomy,’ or freedom to self-govern to Wales, for instance; however, such autonomy can be revoked. Thus, it is a privilege that is granted, not a right, for the states to govern themselves, whereas the nation of

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<sup>258</sup> Feinberg, *Harm to Self*, 94.

<sup>259</sup> *Ibid*, 27, 47.

Great Britain has a right to govern itself that is not revocable. Consequently, in political language, “sovereignty and (mere) political autonomy seem to differ in at least two respects. First, autonomy is partial and limited, while sovereignty is whole and undivided.”<sup>260</sup> Secondly, “a more important difference is that the authority of the sovereign state is a right whereas the authority of the autonomous region is a revocable privilege.”<sup>261</sup> So, as Feinberg states, when discussing autonomy of the self, one is not referring to political autonomy as would be analogous with Wales, but perhaps more clear and analogous to the philosophical meaning of self-autonomy is self-sovereignty, as in the example of Great Britain. Therefore, when discussing self-autonomy as a right, it is analogous to the sovereign state with a permanent right to govern itself, not a rescindable privilege that is granted by a higher authority. The nation’s/individual’s rights of self-government are not typically seen as revocable. However, here the similarity to political sovereignty extends to when those sovereign nations and people can have their rights to self-rule reversed, as in the case where a sovereign individual/state infringes on the sovereignty/rights of another of its kind. When nations go to war, others often step in to prevent/aid in the fight for sovereignty. Similarly, when an individual breaches the rights of another, the government has a right to step in and prevent the other’s sovereignty from being threatened.

However, where differences between nations and people may be evident, these differences, Feinberg argues, strengthen the argument for a personal sovereignty rather than weaken it. Primarily when looking to the composition of states and individuals, a state is made up of autonomous individuals, whereas a person is made up of parts, i.e. desires, needs, ideas, body, these parts are not autonomous or sovereign. The individual has absolute right over them.

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<sup>260</sup> *Ibid*, 47.

<sup>261</sup> *Ibid*, 48.

So, while a nation may decide to exterminate a part of its population, which would be morally problematic, the analogous situation in an individual, i.e. removing a limb, would not have the same moral problems, because the body parts have no rights themselves.<sup>262</sup>

To further the political analogy, Feinberg states that when talking about sovereignty, it is that thing that independent nations “recognize” in another. Similarly, in recognizing another as a person, one is recognizing their autonomy, sovereignty, or lack thereof.<sup>263</sup> While there is a difference between autonomy and sovereignty in nations, there is also a difference between sovereignty and autonomy in people. Those that lack mental competence or are under the age of adulthood may be considered autonomous, i.e. they have revocable privileges of self-rule granted by a sovereign person who is responsible for that autonomous individual, whereas fully competent adults are seen as sovereign and under the responsibility of none other. When an individual is sovereign, the irrevocable right to act for and govern him/her self is seen as a part of what it means to be a person and this responsibility is recognized by others. When, this right is not recognized, as in the case with those who lack the competence, then the rights of those people are protected for them. And in the case with children, they are potential sovereign people and are developed in such a way that when they reach the age of adulthood, they are, in a sense, granted sovereignty and become fully responsible for their actions and choices. Now, an autonomous/sovereign individual need not be a morally upstanding citizen, indeed as Feinberg states, one cannot

rule out as impossible a selfish but autonomous person, a cold, mean, unloving but autonomous person, or a ruthless, or cruel autonomous person. After all, a self-governing person is no less self-governed if he governs himself badly, no less authentic for having evil principles, no less autonomous if he uses his autonomy

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<sup>262</sup> *Ibid*, 50.

<sup>263</sup> *Ibid*, 48.

to commit aggression against another autonomous person. The aggressor is morally deficient, but what he is deficient in is not necessarily autonomy.<sup>264</sup>

However, whether or not a person is moral or not, does not affect the right he/she has to personal sovereignty. The individual, whether morally bad or good, has a right to his/her sovereignty.

However, when an individual violates the sovereignty of another, then he/she becomes morally responsible, and the violation of autonomy is what determines morally impermissible acts.

But what exactly is it that the sovereign individual governs over? In the analogy with the state, the state governs its territory, and is thus sovereign over its territory; similarly, the individual seems to be sovereign over his/her physical body because

we do speak of an inviolate right which is infringed whenever another person inflicts a harmful or offensive contact on one's body without one's consent—an unwanted caress, a slap, a punch in the nose, a surgical operation, or even a threatening move that provokes the reasonable apprehension of such contacts. This must one part of what we mean by personal autonomy.<sup>265</sup>

From this Feinberg states, “to say that one's body is included in one's sovereign domain then, is to say more than that it cannot be treated in certain ways without one's consent. It is to say that one's consent is both necessary and sufficient for its rightful treatment in those ways.”<sup>266</sup> The reason consent is necessary and sufficient for the authority of a sovereign individual is because such authority is a “discretionary competence, an authority to choose and make decisions.”<sup>267</sup>

But it seems as though there is more to autonomy/sovereignty than just that of the body. After all, when Feinberg talks of offence and harm, are there not certain types of offence and harm that do not involve contact directly with the body? For example, if A is sitting on her front porch and B exposes himself to her, and A is outraged and offended by this, it seems as though

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<sup>264</sup> *Ibid*, 45.

<sup>265</sup> *Ibid*, 53.

<sup>266</sup> *Ibid*.

<sup>267</sup> *Ibid*.

A's rights have been violated even though B has not done anything to A's bodily sovereignty. Additionally, if A stole B's car, while not harming B's physical body, A is harming the interests of B by stealing B's property. So, like the state, there are other things that the sovereign individual seems to rule over that are subject to dispute. The state may argue over how far into the ocean its territory extends or how high up into the atmosphere, and similarly, the individual may argue that he/she rules over his/her 'personal space.' As well as one's body, by the use of contracts and purchases, one is also understood as having sovereignty over his/her home/property and anything that is done with these possessions, must be with the permission of the owner. Additionally, one also has sovereignty over his/her privacy because one has the right to "determine by [one's] own choice what enters [one's] field of experience" because another can "violate [one's] autonomy without actually touching [one's] body, by entering and remaining, uninvited, in [one's] personal space, or by transmitting into that space unwanted, spectacles, sounds, or odors."<sup>268</sup> However, while one has this 'right to privacy,' as Feinberg refers to it, in one's own home or among one's property, one does not have a legitimate claim to it when in the public domain, because if one does not like what one experiences in the public domain, one can always choose to return to one's home or choose another way to get to where one wishes to go.<sup>269</sup> One cannot make a claim that his/her personal space has been violated in such circumstances because personal domain changes with changing circumstances. When one is in one's house or property, one has control or rule over it; however, as Feinberg illustrates, once a person steps out into the public world, the amount of 'personal space' that he/she has is lessened because the agent is leaving what is his/her own and emerging into that which is

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<sup>268</sup> *Ibid*, 54.

<sup>269</sup> *Ibid*, 54.

collective.<sup>270</sup> Simply because one does not like the experience one has in the public domain does not provide enough reason for the individual to alter it. Only when such experience harms the interests or physical well-being of another is interference acceptable. Thus, while the individual has limited personal space when entering the public domain, one's body and property also make up one's autonomous realm as long as it does not interfere with public safety and health the agent can choose to do as he she wishes. Nevertheless, as Feinberg, correctly deduces, not only is control of the body, property, and privacy a part of one's autonomy, but also

the right to make choices and decisions –what to put into my body, what contacts with my body to permit, where and how to move my body through public space, how to use my chattels and physical property, what personal information to disclose to others, what information to conceal, and more. Some of these rights are more basic and more plausibly treated than others. Put compendiously, the most basic autonomy-right is the right to decide how one is to live one's life, in particular, how to make the critical life-decisions.<sup>271</sup>

However, it is important to determine what critical life-decisions are, and further, to determine if and when these decisions are legitimately limited.

The offense and harm principles that were discussed in chapter one are the most significant principles that explicate when an individual is able to maintain his/her autonomy and when one is legitimately restrained from performing a certain act, what Feinberg refers to as 'personal domain boundaries.' This boundary is determined by whether an act is primarily self-regarding or other-regarding. A self-regarding act is an act that primarily affects the one acting, or only indirectly affects others. Other-regarding acts are those that directly affect the interests of others as well as the self. Primarily self-regarding actions that do not directly interfere with the interests of others are within the sovereign rights of the individual and cannot be infringed upon. However, other-regarding acts are those acts which can be legitimately interfered with

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<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

because they interfere with the rights of others. Now ‘others’ are those third parties that are discussed in the principle of consentuality and can be thought to be any persons (either alive or dead). However, while any and every person is considered to be a third party, they can only be said to be harmed if their interests are directly affected.<sup>272</sup>

The breach of an individual’s sovereignty determines whether an act is morally impermissible. The most significant element that legitimately allows A’s sovereign autonomy to be breached is when A performs an act without the permission of B that infringes upon B’s sovereign realm. However, when B consents to the act which would otherwise be seen as a breach of sovereignty, then the issue has changed completely. If B validly consents to an act that would have violated his/her sovereignty if the consent was not present, then the act is no longer impermissible but rather morally permissible. So, as this chapter has been discussing, when one individual gains the valid consent of another to enter upon his/her sovereignty, the act is no longer an infringement, but a morally acceptable act that does not violate the individual at all. Thus, the moral outcome of any other-regarding as well as self-regarding act depends upon obtaining valid consent because it is the right to choose for oneself to do something or not that expresses his/her right of personal sovereign autonomy and when one expresses this autonomy, there is no justifiable reason to have interference by another for any reason, and thus paternalism is rejected in any form. The consent is both necessary (because without it, the act would be a violation of the individual’s sovereignty and thus, morally impermissible) and sufficient (because it is the other individual’s permission and authorization that transforms the actions from impermissible to permissible). As a result, sovereignty can only be interfered with if another’s autonomy is being compromised directly because of this situation. The sovereignty of an agent

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<sup>272</sup> Refer back to chapter one for a complete discussion.

can no longer be interfered with when another agent grants consent and thus, the agents cannot be said to be performing a morally impermissible act.

### **Prostitution and Consent**

Some critics of prostitution claim that many prostitutes are underage, poor, and/or addicted to drugs and this is bad. These critics are correct. It is not logical for critics to conclude, as they sometimes do, that consent theorists accept these forms of prostitution because they support consensual prostitution between informed, free adults. Simply because one accepts consensual prostitution as morally permissible, does not mean that *all* forms of prostitution are permissible. Prostitution is always impermissible in the above cases because in the scenario in which the agent is economically destitute, he/she truly has no choice but to comply and ‘consent’ to sex because his/her life may be at stake in some way. Similarly, sex in exchange for drugs in which the prostitute is addicted to drugs is also invalid because the influence of drugs affects both the capacity to consent and the voluntariness of the interaction. The criticism that consent theorists accept underage prostitution as morally acceptable is unfounded. As stated earlier, any case of underage sexual intercourse is impermissible on the ground that minors are incapable of consenting because they lack the mental maturity and such ‘consent’ is invalid. These situations are bad or morally impermissible. But it is not the act of prostitution that is the issue in these cases; it is the lack of freedom to choose or autonomy and an inability to give valid consent to engage in prostitution. The prostitute actually has no other choice when destitute and can be understood to be unable to consent or in the case of the drug addict or underage agent, have the capacity to consent to sex in such a situation.

When looking at the example of prostitution, one really only needs to look to autonomy and consent to determine permissibility. If the two agents in question are validly consenting

adults, whether male or female, straight or gay, in a loving relationship or engaging in promiscuous prostitution, and are not harming the interests of any third party, their act is morally permissible and respects the sovereignty and privacy of both parties. So, let us examine the general character of prostitution. In a sense, the exchange in prostitution is not merely promiscuous sexual interaction. Prostitution is an exchange or offer that functions much as a contract. There is an offer made (i.e. promise of payment or consent to perform x, where x is a specific sex act) in exchange for something else (i.e. consent to perform x or promise of payment). So, recalling the previous discussion, there are both consent and promises involved in prostitution. In prostitution, typically B approaches A and asks A to perform a certain sex act in exchange for money, or vice versa. If A and B agree to the terms of the contract, then A conditionally consents to do x (i.e. consent to *do* implies obligation) with B on the assumption that B consents and promises (i.e. makes it obligatory) to pay x. In prostitution it seems A consents to actively do x. When A consents to do x, not only is A granting permission to B to engage in x, but is actively agreeing to *do* x, in which case, A consents to actively do a specific thing, thus resulting in a promise and an obligation on the part of the prostitute as well as the client. Where B previously had a duty to refrain from sexual intercourse with A, he/she is now permitted to engage in the act because of the consent. And it is because A agrees to do a specific thing that he/she is then under an obligation to B to actively do something. However, B, by offering to pay A, is under an obligation to A if A does engage in sexual act x with B. A's consent and promise were conditional, and since B agreed to the conditions, B is obligated to pay A the money, as in any contract. Additionally, A is under an obligation to do x if B pays the money. If A does not fulfill the terms (i.e. agreed upon (promised) sex act) then B is no longer under an obligation to pay. In which case neither A nor B are worse off than before the offer

was made if one or the other refuses the terms. If B refuses to pay after performing the agreed upon act, or if A refuses, once paid, to perform x, then the situation is morally problematic because the contract/agreement is broken and the autonomy of the individual is infringed upon. This moral problem arises because the prior consent given was conditional and the payment that was offered was also conditional. When the terms are breached, the other's sovereign choice is violated and one party is worse off than before. However, if the terms are not breached but rather fulfilled, then the situation of both parties can be said to have improved or each agent received that for which he/she bargained and their autonomy was respected.

Prostitution is an offer that is not coercive in such a context. It can become coercive or can be morally wrong, but it is not as such. It is an offer of sex for money or an offer of money for sex. There may be instances of a threat or coercion or a fear for one's life, in which case it is not voluntary and consent cannot be given. But in the case of prostitution, one's life typically remains the same if one refuses the offer. If one accepts the offer, it can be said that the life of the agent has improved; however, if an agent refuses, there are not morally negative consequences and if there are, the act is not acceptable. Therefore, if the agent is competent to consent, free to choose, is informed of the relevant facts, and no other parties are significantly harmed, the act is morally permissible. While prostitution, as an act between validly consenting adults who fulfill the terms of the contract, is primarily a self-regarding act between sovereign individuals exercising their right to choose for themselves, if this act infringes upon the sovereignty of another, say a spouse or a child, it is no longer morally permissible. Or if the prostitute misleads the client in some way, the act is no longer permissible but only because the rights of the client were breached.

One could argue that as a business, prostitution, like any other business, should follow certain moral sales guidelines. While not necessarily the primary scope of this paper, the ability to follow such guidelines could serve as justification for why prostitution should be considered no different than any other business interaction, after all, it is not the prostitute's body that is sold but rather an ability, skill, or service, similar in many senses to the barber (who does not sell his hands to the customer but rather the skillful use of them) or baseball player (who does not sell his body or self to the team but rather uses his body and skill to play for the team). When critics apply a special significance to sexual interaction, that cannot and should not be upheld, and claim that the 'self' of the prostitute cannot help but be harmed because of the intimate nature of the interaction, they trivialize the choice and autonomy of the prostitute. Since prostitution is a primarily self-regarding action in which the other participant is a consenting adult, the autonomy is the only consideration to the permissibility, just as it is in gynecology or massage therapy, both also physically intimate occupations. In which case, it is not the act of sexual ethics that is at issue, but business or sales ethics. For that reason, the interaction should be governed by an ethics of sales such as that proposed by David Holley or Thomas Carson.<sup>273</sup> The parameters for the ethics of sales, as laid out by both men in their articles on information disclosure in sales could easily apply to prostitution, and could perhaps serve as a basis for the proper interaction between client and prostitute as it does for sales associate and customer. The criteria that Holley sets for the interaction of buyer and seller of goods is a voluntary exchange that consists of the following:

1. Both buyer and seller understand what they are giving up and what they are receiving in return.

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<sup>273</sup> David Holley, "A Moral Evaluation of Sales Practices," *Business and Professional Ethics Journal* 5 (1986): 3-21; Thomas Carson, "Deception and Withholding Information in Sales," *Business Ethics Quarterly* 11 no. 2 (2001): 275-306.

2. neither buyer nor seller is compelled to enter into the exchange as a result of coercion, severely restricted alternatives, or other constraints on the ability to choose.
3. Both buyer and seller are able at the time of the exchange to make rational judgments about its costs and benefits.<sup>274</sup>

Additionally, there are certain practices that a seller cannot do to a customer, such as coerce, deceive, lie, withhold pertinent information, undermine the rationality or take advantage of the irrationality of the other party, or take advantage of the other party's lack of options,<sup>275</sup> all of which pertain to any form of consensual interaction and thus also applies to prostitution. Even Carson's slightly refined criteria for sales that "salespeople have the *prima facie* duties do the following: 1. Warn customers of potential hazards, 2. Refrain from lying and deception, 3. Fully and honestly answer questions about what they are selling (insofar as their knowledge and time constraints permit), and 4. Refrain from steering the customers toward purchases they have reason to think will be harmful to the customers."<sup>276</sup> Whichever set of guidelines one chooses to hold as legitimate, they can easily apply to prostitution as a business.

While there are many sexual ethical theories that condemn prostitution as morally impermissible, they fail to stand up to scrutiny. Consent theories based on a sense of respect for the right to individual autonomy on the other hand seem to be a more solid base to judge morally permissible acts and are able to encompass sexual ethics as well as non-sexual ethics in order to provide a normative basis to judge all actions performed by individuals. When one performs an act and the act does not infringe on the rights and sovereignty of another, the act is morally permissible. Furthermore, when one performs an act in a manner that would infringe on another's autonomy, but is granted consent by that person to perform the act, then the act is no

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<sup>274</sup> Carson, "Deception and Withholding Information in Sales," 282; Holley, "A Moral Evaluation of Sales Practices," 3-5.

<sup>275</sup> Quoted in Carson, "Deception and Withholding Information in Sales," 282.

<sup>276</sup> Carson, "Deception and Withholding Information in Sales," 276.

longer impermissible, but rather morally acceptable. This accounts for all acts equally and does not include extraneous elements that the condemnatory theories rely upon in sexual ethics.

Prostitution is a business transaction between validly consenting adults, and so long as it does not interfere with the interests of others, is a morally permissible act.

## CONCLUSION

While prostitution is illegal in the United States, there is a lively debate as to whether this is acceptable. Prostitution is often viewed as morally impermissible, and therefore, wrong. However, as John Stuart Mill states in *On Liberty*, it is not clear that the government is or should be in the process of regulating morals based in paternalistic reasons. Something should not be regulated for someone's 'own good.' Acts that are primarily self-regarding that do not harm or affect the interests of others should never be regulated for someone's own good. Things should only be regulated if they harm others. Whether an act is moral or immoral is beside the point. So, laws against prostitution, which is primarily a self-regarding action, which affects others only with their consent, should not be illegal.

Further, it is not at all clear from this point that prostitution is in fact immoral. Theories that condemn it as wrong and impermissible tend to call upon various ideas of impropriety and unnaturalness to show why it is immoral. St. Thomas and socio-biologists claim that the only proper function of sex is for procreation, and thus prostitution is morally impermissible on this account. Similarly, Roger Scruton claims that the only proper function of sex is to express love because of the interpersonal and intentionalizing nature of the act. However, among other issues, the primary problem with these two theories is the failure to connect the morally improper with a failure to fulfill the function of sex. The morally proper and the natural or proper function of sex are never shown to be the equivalent. Additionally, it is not at all clear that there is only a single function for everything. The radical feminist view that any heterosexual form of sex is immoral because of the power differential between men and women present in society makes it such that women can never properly consent to sex because women are always in a state of subjugation has many problems as well, not the least of which is universalization of the position of women that does not account for individual experiences of women. To claim that women as a group are

suppressed by men as a group is a common feminist claim that is accepted by many. However, to claim as Pateman and other radical feminists that because of this *every* woman is therefore coerced or forced or subjugated by *every* man is simply untrue. This fails to account for an interaction between a successful woman CEO and a poor man, or any woman in a place of power interacting with men. To say as Pateman does that this does not matter that she is still a victim of subjugation, is simply unfounded. To universalize such a general claim is a huge fault in such a theory. These theories simply fail to provide adequate reason to suppose that an act such as prostitution is immoral. The theories are weak in many senses because they insist that any act that does not fit within the parameters of the theory, which are already on shaky ground, is morally impermissible. If the theories instead represented the ideal situation, there would be little problem with accepting one or the other as a personal preference attempting to live up to the ideal. In which case, failing to live up to the ideal, which is less than good, is not immoral. So, not only should prostitution not be illegal whether it is moral or not, it does not even appear to be immoral.

By looking at theories of consent that are based on a concept of autonomy, one is able to understand that prostitution, when performed under certain parameters, is morally permissible. The idea of personal autonomy or sovereignty is a part of what it means to be a human. Everyone has a sense of self and self rule that allows for one to act and make choices based on their own decisions. When one acts in a way that does not infringe another's autonomy or significantly harm their interests, then they should be free to do so. If one does want to act in a way that does affect the interests of others, they are permitted to do so only with the permission, authorization, or consent of the other. This consent that is obtained must be valid. In other words, it cannot be gotten through coercion or deception. It must be gotten from a freely

(unforced), informed consenting adult who is competent to make such a decision. If the agent is underage, under the influence of alcohol, or mentally deficient or disturbed, then the consent obtained is not valid. Additionally, if the agent is forced or coerced in any way either physically or through lying and withholding relevant information, then the consent is invalid and the act is wrong. However, if the consent is validly obtained, not only is the act allowable, but it is morally permissible. Indeed, not only should prostitution not be illegal based on its moral impermissibility, it is not even morally impermissible to begin with.

To conclude, prostitution, as such, is not coercive or immoral, so long as valid consent is obtained. Indeed any sex act that occurs between freely, informed consenting adults is morally acceptable. Prostitution is a combination of consenting sex and contractual exchange. Any governing set of rules or morals that govern prostitution are based on this dual aspect of the act. If the act is between such validly consenting adults, who agree to the terms of the contract and fulfill the terms, there should be no moral issue with prostitution at all.

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