

**WHY PORNOGRAPHY IS NOT PROSTITUTION:  
FOLK THEORIES OF SEXUALITY IN THE LAW OF VICE**

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TABLE OF CONTENTS

I. INTRODUCTION .....	245
II. THE MEANING OF “PROSTITUTION” AND THE ANOMALY OF PORNOGRAPHIC ACTING .....	249
A. <i>The Meaning of “Prostitution”</i> .....	249
B. <i>The Anomaly of Pornographic Acting</i> .....	252
III. ARE THERE PLAUSIBLE RATIONALES FOR DIVERGENT TREATMENT? .....	255
A. <i>The Courts’ Rationales for Divergent Treatment</i> .....	255
1. First Amendment Rationale .....	256
2. The Non-Participating Payor Argument .....	258
3. The Payment-for-Performance Argument .....	259
B. <i>Moralistic Rationales for Divergent Treatment</i> .....	261
1. Traditional Norms for Sexual Conduct .....	262
2. Contemporary Norms for Sexual Conduct .....	264
C. <i>Harm-Based Rationales for Divergent Treatment</i> .....	267
1. Harms to the Prostitute .....	267
2. Harms to Their Partners .....	269
3. Ripple Effects: Harms to Clients’ Families .....	270
4. Harms to the Community .....	272
5. Harms to Women Collectively .....	275

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IV. EXPLANATIONS FOR DIVERGENT TREATMENT .....	276
A. <i>Political Process Explanation</i> .....	277
B. <i>Folk Theories of Gender, Sex, and Contamination</i> .....	280
1. The Cultural Commitment to Sating Male Desire .....	280
2. The Threat Posed by Prostitution: Corruption Through Sexual Contact .....	282
3. The Virtues of Pornography .....	287
V. CONCLUSION.....	291

## I. INTRODUCTION

Suppose that A has sex with B, and that one of the following is also true:

- (1) A has sex with B because B pays A to have sex with B.
- (2) A has sex with B because a third party pays A and B to have sex with each other in order to make a pornographic picture or film.

If (1) is true, then A has committed the crime of prostitution. If (2) is true, then (in many jurisdictions) A has not committed the crime of prostitution.

This seems strange. A has engaged in exactly the same physical movements in both cases, with the same intent—A had sex with B intentionally. In both cases, A has done so for money. In neither case is there any reason to think A was motivated by desire or arousal or personal pleasure of any sort; in neither case is there any reason to think A felt love or affection or any sort of personal connection to B.<sup>1</sup> In both cases, A's conduct might be described as acting or as a performance.<sup>2</sup> Indeed, it is not unreasonable to suspect in both cases that A has engaged in this behavior unhappily, under conditions of deprivation and limited choice, with a background of serious personal suffering.<sup>3</sup> As far as anyone can tell, then, A has done the same

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1. The dominant and heavily supported view is that those who engage in these behaviors do not feel personal connections with their partners or take any pleasure in these activities. *See, e.g.,* Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 995–96 (2005) [hereinafter MacKinnon, *Pornography*] (those who participate in pornography “say they usually feel nothing sexually . . . with someone they have no sexual interest in[] doing things that do nothing for them sexually”); Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 294 n.81 (2011) [hereinafter MacKinnon, *Trafficking*] (noting research showing that prostitutes neither enjoy nor recommend prostitution and that “going to bed with a customer is a joyless, even distasteful, experience”). There are, however, some conflicting reports. For example, some prostitutes report taking satisfaction in therapeutic or caretaking aspects of their interactions with some clients. Others report experiencing sexual pleasure in acts of prostitution. *See, e.g.,* Noah D. Zatz, *Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution*, 22 SIGNS 277, 299 (1997) (briefly discussing literature containing such reports); Elizabeth Bernstein, *What's Wrong With Prostitution? What's Right With Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN'S L.J. 91, 97 (1999) (discussing “pro-sex feminis[t]” defenses of prostitution, which include reports from prostitutes who claim to experience excitement, adventure, and power in performing prostitution). Such conflicting reports may be attributed to false consciousness or other sorts of motivated delusion, though such attribution itself may risk disrespecting those who claim these experiences. *See* Zatz, *supra*, at 296 n.19.

2. Noah Zatz observes that prostitutes not uncommonly characterize their conduct as a performance, and he highlights that this raises interesting questions about the relationship between prostitution and “more explicitly performance-oriented sex work such as live sex shows and photographic pornography.” Zatz, *supra* note 1, at 284 n.12.

3. There is an enormous body of research and literature documenting that prostitutes are typically unhappy, work under conditions of deprivation and limited choice, and come from backgrounds involving abuse, poverty, addiction, and other sources of personal suffering. *See, e.g.,* MacKinnon, *Trafficking*, *supra* note 1, at 273–74 (“[T]he sexual exploitation approach sees

things, with the same intents and motives and feelings, for the same reasons, and under the same background conditions, in (1) and (2). If so, it is strange that (1) is prostitution but (2) is not.<sup>4</sup>

prostitution as the oldest oppression. . . . [W]omen in prostitution are observed to be prostituted through choices precluded, options restricted, possibilities denied. . . . Prostitution . . . is observed to be a product of lack of choice;” it is “an economic sector of sexual abuse . . . a practice of serial rape.”); *id.* at 276–79 (“[P]rostituted people are overwhelmingly poor . . . Urgent financial need is the most frequent reason mentioned by people in prostitution for being in the sex trade;” they are “members of socially disadvantaged racial groups or lower castes;” “people typically enter prostitution when they are young, often well below the age of majority;” “sexual abuse in childhood . . . is a major precondition.”); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 827–28 (1998) (“Many feminists believe that prostitution is generally a form of economically coerced sex. . . . [Some depicting] the average prostitute as a teenage runaway who later suffers psychological and physical abuse at the hands of pimps, police, and customers. Studies also indicate that, as children, prostitutes are often victims of incest. The legacy of this childhood victimization may be that, as adults, prostitutes are psychologically more vulnerable to sexual exploitation by men.”). There is a similar body of research and literature regarding those who are filmed for pornography. *See, e.g.*, MacKinnon, *Pornography*, *supra* note 1, at 995 (characterizing pornography as an industry “built on force, some physical, some not,” in which “women and children” are “not there by choice but because of lack of choices” and “consent’ . . . only in the degraded and demented sense of the word . . . in which a person who despairs at stopping what is happening, sees no escape, has no real alternative, was often sexually abused before as a child, may be addicted to drugs, is homeless, hopeless, is often trying to avoid being beaten or killed, is almost always economically desperate, acquiesces in being sexually abused for payment . . . .”); *id.* at 998 (“The majority of adults enter the industry as children and are exploited in ways that do not disappear when they reach the age of majority.”). However, there is some dispute about these accounts of the conditions and experiences associated with prostitution. *See, e.g.*, Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 534–35 (2000) (noting competing accounts).

4. Others have noted the seeming overlap between prostitution and pornography. *See, e.g.*, MacKinnon, *Pornography*, *supra* note 1, at 996–97 (“To distinguish pornography from prostitution . . . is to deny the obvious: when you make pornography of a woman, you make a prostitute of her.”); *id.* at 993 (noting that in pornography “the bulk of the industry’s products . . . are rented out for use in commercial sex acts,” and arguing that anti-trafficking laws are “more promising for addressing pornography than has been recognized”); *id.* at 997 (quoting a United Nations Secretary-General report observing that “it is hard to make distinctions . . . between prostitution and other sexual services, including those of the pornographic media”).

Some have relied on this apparent similarity to argue that paid pornographic acting should be treated as prostitution. *See, e.g.*, Zachary David Streit, Note, *Birds of an Illegal Feather: Prostitution and Paid Pornography Should Be Criminalized Together*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 729, 733 (2007); *see also* Sarah H. Garb, *Sex for Money Is Sex for Money: The Illegality of Pornographic Film as Prostitution*, 13 LAW & INEQ. 281, 301 (1995) (arguing that prostitution statutes should be extended to treat producers of pornography as promoters; “prostitution behind a camera is still prostitution”).

The issue has not uncommonly arisen in a somewhat more complicated way, with authorities prosecuting the director or producer for pandering (i.e. pimping) because the director arranged for the actors to engage in sex with each other for money. The director can only be guilty of pandering, of course, if the actors engaged in prostitution, requiring the courts to determine whether they did so. *See, e.g.*, *People v. Freeman*, 758 P.2d 1128, 1130 (Cal. 1988)

Nevertheless, many jurisdictions do treat (1) as prostitution while holding that (2) is not. This Article aims to explain why. It begins with a brief review of the conventional understanding of prostitution and a survey of cases considering whether pornographic acting<sup>5</sup> fits within this conventional understanding, highlighting the seemingly anomalous treatment of pornographic acting. Having set out this anomalous divergence, this Article assesses a number of the more accessible possible justifications for this divergence. It considers several rationales offered by the courts, and several possible moralistic and harm-oriented justifications (informed by traditional liberal, feminist, and sex-progressive views). Though many of these justifications have some superficial appeal, it concludes that these justifications are unsatisfying—either because they fail to adequately explain the divergence or because they are grounded in implausible premises.

Dissatisfied with such justifications, this Article looks instead for an explanation—an account that will help us understand why the law makes this anomalous distinction between prostitution and pornographic acting, even if it cannot be justified. After considering an intriguing but inadequate political process explanation, this Article develops an explanation rooted in a complex of cultural attitudes about sex, and especially in cultural anxieties about the imagined ways in which sex may taint or corrupt men. This is an explanation that comes from our culture's folk theories about sex, theories that themselves look more like childish superstitions than defensible foundations for policy or law. As such, this explanation does not justify the law's divergent treatment of prostitution and pornographic acting, but it may help us better understand the origins and persistence of this anomaly in the law.

On this folk theory explanation, the divergence at issue springs from the interplay between a cultural commitment to satiating male desire and a cultural

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(holding that the director was not guilty of pandering because acting in pornographic film was not prostitution).

While this Article focuses on the law's differential treatment of apparently similar acts of prostitution and pornography, similar questions might be asked about how the law treats other scenarios that are arguably like prostitution in important ways. Stripping and other (ostensibly) non-contact, live sexual performances raise these questions in obvious ways, but it has also become cliché, for example, to ask whether marriage, "gold digging," or having sex with a date who paid for dinner are like prostitution. See, e.g., David A. J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1206 (1979). More subtly, Lauren Kaplin has highlighted "the parallels between sexual harassment and prostitution and their almost antithetical treatments by the law." Lauren Kaplin, *When Money Changes Hands: "Unwelcomeness" in Sex for Money*, 33 WOMEN'S RTS. L. REP. 43, 57 (2011) (Kaplin's view is that prostitution law ought to be modified to better parallel sexual harassment law).

5. For the purposes of this article, the term "pornographic acting" is meant to refer to sexual conduct engaged in with another person while being photographed, video recorded, or otherwise recorded for subsequent viewing or consumption by other parties.

anxiety about dangers imagined to lie in direct sexual involvement with the female. According to ideas common in our cultural folklore, satiation of male sexual desire is a compelling good, and prostitution and pornography both serve to sate male desire. Prostitution, however, threatens to taint or corrupt the male consumer in a way that pornography does not. It does so because it requires direct physical involvement of the male consumer with the female provider, contact that exposes the male consumer to an array of physical, moral, and social contaminations that folk theories of sexuality attribute—in the tenor of a superstition or a child’s anxiety about “cooties”—to such physical intimacy. Pornography, in contrast, does not require this direct physical involvement,<sup>6</sup> and thus it spares the male consumer from these dangerous physical, moral, and social contaminations. On these folk theories, then, pornography strikes a more “favorable” balance between satiating male desire and protecting men from potential corruption than prostitution does. This explains why performing sex for money in pornography is privileged over doing so in prostitution.<sup>7</sup> The former does not involve direct sexual contact with the male consumer, and thus it does not threaten to taint or corrupt the male consumer in the way that direct sexual contact does.

Of course, this cultural mythology about sex does not supply a defensible justification for the state of the law any more than childish folklore about cooties does. Indeed, on the contrary, it resonates strongly with atavistic and ugly ideologies about gender and sex. It does, however, help explain why the criminalization of prostitution persists so stubbornly today, despite the increasingly pervasive acceptance of feminist, libertarian, and sex-positive insights that might lead to decriminalization, and why the law treats prostitution differently than it treats pornographic acting. The explanation offered here, then, does not harmonize the law, but it does diagnose in it a persisting pathology.

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6. Of course, the sort of pornography at issue here does often involve direct physical, sexual involvement between a male and a female. As I argue below, however, the law’s primary concern appears to be about the male consumer (the prostitute’s client or the one who watches the pornography), such that the male participant in the pornography is rendered (paradoxically) invisible. He may be treated as already corrupted or merely incidental, or he may be “sacrificed” for the benefit of the masses of male consumers.

7. The privilege referred to lies in the formal legal status of the two activities: under the laws at issue, prostitution is a crime, while sex-for-pornography is not. It is true that the formal legal categories are only a small part of the functional picture, in which prostitution is so widely practiced that its formal illegality may seem a sham. Nevertheless, this Article assumes that the formal legal distinction matters. It matters, in part, because it is not accurate to say that the criminal prohibition against prostitution is a sham, given that there continue to be a very high volume of prostitution-related arrests today. It matters, also, because of the expressive value of the formal law. By labeling some conduct criminal prostitution and other conduct non-criminal acting-in-pornography, the law sustains and cultivates certain values and beliefs. One purpose of this Article is to develop a clearer picture of those beliefs and values.

Though this Article is primarily concerned with a discrete anomaly in the law of vice, uncovering the pathology that perpetuates the anomaly may have some implications for larger questions in vice theory. For example, while this Article does not directly address the long-standing and fiercely debated questions as to whether prostitution and pornography should be criminalized in the first place, the analysis here may have some bearing on those debates, resonating at some points with pro-abolition feminism and at others with anti-criminalization feminism, libertarianism, and sex-progressivism. Likewise, while this Article does not directly address pressing questions about the future of vice law after *Lawrence* and in an increasingly libertarian and sex-progressive political culture, the analysis here may have some implications for the future of vice law generally, highlighting the way some pockets of vice law may be sheltered from cultural shifts by cultural preoccupations as stubborn and resistant to analysis as playground superstition. In these ways, unpacking this anomaly may cast new light on broader issues in the law of vice.

## II. THE MEANING OF “PROSTITUTION” AND THE ANOMALY OF PORNOGRAPHIC ACTING

The anomaly at the heart of this Article is that the law treats pornographic acting as though it is not prostitution, despite employing a definition of prostitution that seems to straightforwardly encompass pornographic acting.

### A. *The Meaning of “Prostitution”*

In popular use, the term “prostitution” has not had a crisp and stable meaning. Rather, its meaning has changed in important ways over time,<sup>8</sup> and it has been used to cover a range of significantly different experiences and activities.<sup>9</sup>

A standard definition, appearing in both popular discourse and law, is that prostitution is “the exchange of sexual activity for money.”<sup>10</sup> This basic definition, however, may not capture everything that the term prostitution connotes, and richer definitions are therefore not uncommon. One such alternative incorporates the idea that prostitution must be “indiscriminate”: a prostitute is “an individual who indiscriminately provides sexual relations in

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8. See, e.g., Law, *supra* note 3, at 525 (noting change in meaning of “prostitution” over time); Zatz, *supra* note 1, at 278–79 (discussing variation in meaning and practice of prostitution across time and place).

9. See, e.g., Bernstein, *supra* note 1, at 94 (drawing on field research to “problematize the category of ‘prostitute’” and “to suspend belief in *any* essential meaning of prostitution”); *id.* at 99 (“[D]ifferent varieties of prostitution may have different social meanings . . .”).

10. Tom DeFranco & Rebecca Stellato, *Prostitution and Sex Work*, 14 GEO. J. GENDER & L. 553, 555–56 (2013); see also Zatz, *supra* note 1, at 279 (“[P]rovisionally” defining prostitution as “attending to the sexual desires of a particular individual (or individuals) with bodily acts in exchange for payment of money”).

return for money payments.”<sup>11</sup> Prostitution has also been defined in gendered terms, as something that only women can do,<sup>12</sup> and it has sometimes been defined, without the requirement of commercial exchange, as promiscuous or indiscriminate female sexual conduct.<sup>13</sup> The term “prostitution” is also sometimes defined without reference to sexual conduct, applying to those who use or give something of value for an unworthy purpose.<sup>14</sup>

American courts have long been pressed to clarify what prostitution means, and they have struggled to respond. In one well-known 1846 Massachusetts case, for example, the state argued that a man who sought to lure a woman into leaving her father’s home to have sex with him should be guilty of “taking away an unmarried woman for the purpose of prostitution.”<sup>15</sup> The court treated the question as a difficult one, acknowledging that in popular use the term “prostitution” was used in diverse ways, some of which might cover engaging in unmarried intercourse. Ultimately, the court resorted to the narrower “definitions of lexicographers,” which held that prostitution should involve payment and indiscriminate sex with multiple partners.<sup>16</sup>

The term is also often associated with the concept of “profession.” An old and common cliché labels prostitution “the oldest profession,”<sup>17</sup> and those parsing the concept sometimes find the element of professionalism in the requirement that there be a “fee,” as fee is sometimes understood to be a payment in return for a professional service.<sup>18</sup> This is why, it is said, a

11. Richards, *supra* note 4, at 1203.

12. Zatz, *supra* note 1, at 279; Richards, *supra* note 4, at 1204.

13. Zatz, *supra* note 1, at 279 n.5; Law, *supra* note 3, at 525; Richards, *supra* note 4, at 1204.

14. See, e.g., MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/prostitute> [<http://perma.cc/T4LW-5UER>] (last visited Oct. 14, 2015) (defining “prostitute” as “to offer indiscriminately for sexual intercourse especially for money” and “to devote to corrupt or unworthy purposes”).

15. Commonwealth v. Cook, 53 Mass. 93, 93 (Mass. 1846).

16. *Id.* at 97–98. The court wrote:

If we refer to Walker’s Dictionary, we find prostitution defined “the act of setting to sale;” “the life of a public strumpet.” A prostitute is defined “a hireling; a mercenary; one who set to sale; a public strumpet.” Johnson defines a prostitute “a public strumpet; a hireling.” To prostitute, “to expose upon vile terms.” In Webster’s Dictionary, prostitution is “the act or practice of offering the body to an indiscriminate intercourse with men.” Prostitute is “a female given to indiscriminate lewdness; a strumpet.” Prostituting is “offering to indiscriminate lewdness.” These definitions, it will be seen, all apply to prostitution the act of permitting illicit intercourse for hire, an indiscriminate intercourse, or what is deemed public prostitution.

*Id.* at 97.

17. See, e.g., Zatz, *supra* note 1, at 278 (“It is quite common to talk glibly of prostitution as the world’s oldest profession, existing universally across time and place.”).

18. People v. Block, 337 N.Y.S.2d 153, 157 (Nassau Cty. Ct. 1972).



romantic partner who provides sex in return for a gift is not engaging in prostitution.<sup>19</sup>

Statutory definitions today typically specify that prostitution requires sexual conduct (or an offer or agreement to engage in sexual conduct) in exchange for a fee.<sup>20</sup> The contours of the relevant sexual activity are not always clear but typically include intercourse, oral sex, anal sex, and masturbation.<sup>21</sup> Sexual conduct may also include other physical contact with specified (typically “intimate”) body parts intended to gratify sexual desire.<sup>22</sup> Conduct that gratifies sexual desire but does not include physical contact—such as erotic dancing or other sexual performances for a viewing audience—is generally not considered prostitution<sup>23</sup> (though it does fall within the broader category of sex work). The “fee” requirement is normally interpreted broadly, so that it may be satisfied not only by monetary payments but also by other valuable compensation (such as a gold necklace or an expensive drink).<sup>24</sup> Prostitution laws are also understood to be inapplicable to married couples, even when one partner compensates the other for sexual activity.<sup>25</sup>

These popular and legal definitions, then, encompass a cluster of components. They generally require that the prostitute engage in sexual conduct, and that the conduct is exchanged for a fee or thing of value.<sup>26</sup> It is generally understood that the participants must not be married. It is sometimes suggested that the sexual conduct must be provided indiscriminately (perhaps as shown by frequency and large numbers of partners), though statutory definitions generally do not incorporate this requirement. The idea that prostitution is “promiscuous unchastity in women,”<sup>27</sup> once essential to the popular understanding, is generally not reflected in contemporary formal or legal definitions of prostitution (except perhaps through the exclusion of marital sexual conduct).<sup>28</sup>

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19. *Id.*

20. DeFranco & Stellato, *supra* note 10, at 557.

21. *Id.*

22. *See, e.g.,* Pryor v. Municipal Court, 599 P.2d 636, 639 (Cal. 1979) (defining the sexual conduct required for prostitution as including “the touching of the genitals, buttocks, or the female breast, for the purposes of sexual arousal, [or] gratification”).

23. DeFranco & Stellato, *supra* note 10, at 555, 559.

24. *Id.* at 560.

25. *Id.* at 565.

26. While the monetary exchange appears essential to contemporary understanding of prostitution, the term has sometimes been used to refer to women who had multiple sexual partners, highlighting the term’s malleability. Zatz, *supra* note 1, at 279.

27. Richards, *supra* note 4, at 1204.

28. *Id.*

*B. The Anomaly of Pornographic Acting*

Given this understanding of prostitution, it appears that when a person is paid to engage in sex for the purpose of a pornographic film that person commits prostitution. That person engages in sexual conduct and does so in exchange for a fee or thing of value. Normally, pornographic actors are not married to each other, and most pornographic actors engage in sex professionally, indiscriminately, and promiscuously. On both basic and complex conventional understandings of prostitution, pornographic acting is prostitution.

And yet, despite this definitional fit, there is something wrong with calling pornographic acting prostitution. At least in the context of contemporary American popular culture, it feels “off,” forced, or counterintuitive to call a pornographic actor a prostitute. There is today an extraordinarily rich and profuse public discourse about pornography, and this discourse often focuses on individual pornographic actors, but those actors are generally not referred to as prostitutes, and their conduct is generally not referred to as prostitution. That is, unguarded and natural popular discourse about pornography generally does not categorize pornographic acting as prostitution. In contemporary American popular culture, prostitution and pornographic acting are treated as though they are different things.<sup>29</sup>

This seeming disjunction between definitions and unguarded popular discourse is reflected in the case law. A number of courts have considered whether a person who engages in pornographic acting commits the crime of prostitution, and the results so far suggest a struggle. Some courts have followed the straightforward definitional analysis and concluded that pornographic acting is prostitution, but the leading case and a number of other cases have followed the popular understanding and concluded that pornographic acting is not prostitution.

Some cases do follow the straightforward definitional analysis and conclude that sex on film for money is prostitution.<sup>30</sup> A New York court took

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29. Anecdotally, students in my Vice Crime course do not normally raise the question whether sex for film might be prostitution until we study prostitution. Once we have a working definition for “prostitution,” one or more students ask why acting in pornography is not prostitution. The question is sometimes raised with a sense of anxiety that the student has misunderstood something because it does not seem right that the definition of “prostitution” encompasses sex for film; other students raise this question with pleasure at the prospect of upending expectations. Both the anxiety and the pleasure suggest that characterizing sex for film as prostitution is unexpected.

30. *People v. Kovner*, 409 N.Y.S.2d 349, 352 (N.Y. App. Div. 1978); *People v. Fixler*, 128 Cal. Rptr. 363, 365–66 (Cal. Ct. App. 1976); *see also* *United States v. Roeder*, 526 F.2d 736, 739 (10th Cir. 1975) (holding that transporting a woman across state lines for the purpose of pornographic acting constituted a violation of the Mann Act, treating paid acting in pornography as equivalent to prostitution); *State v. Kravitz*, 511 P.2d 844, 846 (Or. Ct. App. 1973) (holding

this view in *People v. Kovner*, where the defendant paid actors to engage in intercourse and other sexual conduct with each other while the defendant filmed them.<sup>31</sup> Under New York law, prostitution included “engag[ing] . . . in sexual conduct with another person in return for a fee.” The *Kovner* court reasoned that the purpose and language of this statute encompassed the conduct of the actors in this case, for the statute “intended to prohibit . . . sexual conduct of a commercial nature,” and “[n]either the statute itself . . . nor any decisions interpreting it, exclude explicit sexual conduct by a paid performer from the definition of prostitution.”<sup>32</sup> Another court reached a similar conclusion in *Fixler*, a California case in which the defendant photographed for publication models engaged in sexual activity with each other.<sup>33</sup> The court emphasized that the plain language of the definition of prostitution encompassed the models’ conduct. Applying statutory language defining prostitution as “any lewd act between persons for money,” the court reasoned that “[t]here can be no question but that [one of the models] engaged in lewd acts and sexual intercourse for money;” indeed, the court thought it “self-evident that if A pays B to engage in sexual intercourse with C, then B is engaging in prostitution,” and that the result does not change just because “A may stand by to observe the act or photograph it.”<sup>34</sup>

Other courts, however, have taken a different view, holding that sex on film for money does not constitute prostitution,<sup>35</sup> sometimes treating this conclusion as one deeply entrenched in the law.<sup>36</sup> The courts taking this view have offered an array of explanations. In the leading case *Freeman*, the California high court relied heavily on the First Amendment. As the court saw it, non-obscene pornographic films are protected expressions under the First

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that engaging in sex before a live audience for money constituted prostitution under the plain language of the prostitution statute); *State v. Taylor*, 808 P.2d 314, 318–19 (Ariz. Ct. App. 1990) (same, where performance was “semi-private” because audience was limited to one person).

31. *Kovner*, 409 N.Y.S.2d at 350.

32. *Id.* at 351.

33. *Fixler*, 128 Cal. Rptr. at 364–65.

34. *Id.* at 365. Another California court followed similar plain language reasoning to hold that stage performers who engaged in sexual conduct with paying audience members were guilty of prostitution: “Nothing in the language of [the] Penal Code . . . defining ‘prostitution’ excludes such conduct merely because it occurs during a theatrical performance.” *People v. Maita*, 203 Cal. Rptr. 685, 689 (Cal. Ct. App. 1984).

35. The seminal case is *Freeman*. *People v. Freeman*, 758 P.2d 1128, 1130 (Cal. 1988); see also *State v. Theriault*, 960 A.2d 687, 692 (N.H. 2008); *Escort Services, Adult Film Industry Not Similar; No First Amendment Issues With Brothels*, N.Y. L.J., Aug. 4, 2005, at 19 (reprinting a 2005 New York county trial court decision: *People v. Paulino*) [hereinafter *Paulino*].

36. See, e.g., *Paulino*, *supra* note 35, at 19, where the court concluded that pornographic acting is not prostitution and bolstered this conclusion with the observation that “the pornographic motion picture industry has flourished without prosecution since its infancy.” (Presumably, the court meant that the industry had flourished without prosecution for prostitution, since pornography has long been prosecuted under obscenity statutes.)

Amendment. Treating the filmed performances as acts of prostitution “would rather obviously place a substantial burden on the exercise of protected First Amendment rights” and “therefore unconstitutionally infringe on First Amendment liberties.”<sup>37</sup> In order to avoid this result, the court held that California’s definition of prostitution should not be read to encompass sex on film for money.<sup>38</sup> Other courts have endorsed this reasoning.<sup>39</sup>

Courts taking this view have also offered arguments rooted in a conceptual analysis of prostitution, looking past the statutory definition to find additional elements essential to the concept of prostitution. One such argument maintains that in prostitution the payor must pay for sexual conduct, and that in pornographic acting the payor pays for a performance or for acting rather than for sex.<sup>40</sup> The *Freeman* court, for example, suggested this view. There, the court held that prostitution requires “the money . . . be paid for the purpose of sexual arousal or gratification;” this requirement, it said, was not met where the producer paid actors to engage in pornographic acting, where the payments, it said, were “acting fees” given “to the actors for performing in a non-obscene film.”<sup>41</sup> Along similar lines, courts have reasoned that the performer’s conduct was not “for the purpose of sexual arousal or gratification” (as required under some definitions of prostitution).<sup>42</sup>

Another conceptual argument found in these cases contends that prostitution requires that the person who pays for the prostitute’s sexual conduct also participate in the sexual encounter.<sup>43</sup> As one such court explains, “prostitution is and has always been intuitively defined as a bilateral exchange between a prostitute and a client,” “a bilateral exchange involving only two

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37. *Freeman*, 758 P.2d at 1132.

38. *Id.*

39. See, e.g., *Therault*, 960 A.2d at 692; *Paulino*, *supra* note 35, at 19.

40. See, e.g., *Freeman*, 758 P.2d at 1131; *Therault*, 960 A.2d at 692.

41. *Freeman*, 758 P.2d at 1131. The court in *Therault* made somewhat awkward use of this argument as well. There, the relevant statutes made a person guilty of prostitution if she engaged in certain acts conventionally seen as intrinsically sexual (including “penetration”), or if she engaged in other acts for the purpose of sexual arousal or gratification. The defendant was charged with soliciting prostitution for offering to pay a couple to engage in penetration for fifty dollars (one of the acts treated as intrinsically sexual under the statute). In holding that the defendant could not be found guilty of soliciting prostitution, the court suggested that conviction in his case would pose a greater threat to protected speech than conviction in cases alleging payment for acts intended to arouse or gratify. *Therault*, 960 A.2d at 692. Under this reasoning, it appears that in order to convict, the state must avoid alleging the paradigmatic examples of prostitution (involving acts conventionally treated as intrinsically sexual, like intercourse) in favor of alleging less paradigmatic forms (e.g. rather than identifying the actual conduct (intercourse), characterizing the conduct as an act intended to arouse or gratify). It is at least awkward, if not implausible, to interpret speech rights so that they require (and can so easily be evaded by) such transparently disingenuous semantic maneuvers in charging.

42. *People v. Maita*, 203 Cal. Rptr. 685, 689 (Cal. Ct. App. 1984).

43. *Paulino*, *supra* note 35, at 19.

parties,”<sup>44</sup> one “where the sexual conduct is performed on the person who pays the fee.”<sup>45</sup> This requirement is often unsatisfied in pornographic acting cases, where the payor is often a producer or director who does not participate in the filmed sexual conduct.

The case law, then, tracks the disjunction between definitional analysis and popular discourse, with the more influential cases following the popular wisdom and treating pornographic acting as distinct from prostitution. Are they right to do so? After all, the prostitute and the pornographic actor engage in exactly the same physical conduct, with the same intent, for the same reason—they have sex with another person for money. There is no reason to think that either is motivated by any sort of desire, arousal, love, or affection, and there is good reason to think that both are acting or performing. And, realistically, it seems very likely that both do so unhappily, under conditions of deprivation and limited choice, with a background of serious personal suffering. In short, whether we describe their acts simplistically or think about their cases holistically, the prostitute and the pornographic actor seem to be doing the same thing. Is this an anomaly, or is there a good reason to treat them differently under the law?

### III. ARE THERE PLAUSIBLE RATIONALES FOR DIVERGENT TREATMENT?

This Part considers several different possible rationales for the law’s divergent treatment of prostitution and pornographic acting. It begins by assessing the most prominent rationales in the case law described above<sup>46</sup> and flagging several problems in these rationales. Dissatisfied with the courts’ rationales, it next turns to some of the traditional criteria for criminalization and asks whether they supply better rationales. It starts with a moralistic analysis of the sort associated with legal moralists like Stephen and Devlin, and then it turns to the harm-oriented lens associated with Mill and Hart. Of course, these approaches can be flexible and indeterminate, making definitive analysis unlikely. Nevertheless, neither approach easily generates a fully plausible and satisfying rationale for the anomaly at issue.

#### A. *The Courts’ Rationales for Divergent Treatment*

As we have seen, courts have offered several different rationales for divergent treatment of prostitution and pornographic acting. Though each rationale has some appeal, none seem to supply a fully convincing rationale or explanation.

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44. *Id.*

45. *Id.*

46. *See supra* Part II(B).

### 1. First Amendment Rationale

Perhaps the most developed rationale offered in the courts is the First Amendment rationale—that treating sex on film for money as prostitution would threaten speech protected by the First Amendment.<sup>47</sup> This rationale, however, seems problematic.

For one thing, as courts reaching contrary conclusions have pointed out, this rationale seems to conflate implausibly the expression in film with the conduct filmed. As they explain, we can distinguish the distribution of the pornography from the actor's conduct, treating the former as protected speech and the latter as unprotected criminal conduct.<sup>48</sup> We would surely do so, for example, with respect to a film showing the commission of a murder.<sup>49</sup> While distribution of the film might be protected expression under the First Amendment, no one would contend that the First Amendment requires us to protect the underlying conduct—the murder—in order to avoid chilling such speech. As the *Fixler* court put it, “[w]hile First Amendment considerations may protect the dissemination . . . regardless of the manner in which the material was originally obtained, where a crime is committed in obtaining the material, the protection afforded its dissemination would not be a shield against prosecution for the crime committed in obtaining it.”<sup>50</sup> Thus, while a film of sexual conduct may be protected expression under the First Amendment, it does not follow that the underlying conduct must therefore also be protected, even if that conduct is itself criminal.

Another problem with this First Amendment rationale is that it does not line up well with other First Amendment analysis in this area. While it is true that pornography is protected expression under the First Amendment, it is not true that First Amendment doctrine is therefore loathe to chill pornographic speech. On the contrary, this is an area where the existing doctrine seems

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47. *Id.*

48. *People v. Fixler*, 128 Cal. Rptr. 363, 366 (Cal. Ct. App. 1976); *People v. Kovner*, 409 N.Y.S.2d 349, 352 (N.Y. App. Div. 1978).

49. *Fixler*, 128 Cal. Rptr. at 365–66.

50. *Id.* at 365. This analysis only has force if we have already determined that actors in pornography are in fact committing prostitution. Of course it is true, as the court reasoned, that filming a murder would not extend First Amendment protection to the murder, as the murder itself remains a crime. Presumably, the same would be true of filming intercourse where one participant had paid the other for sex, as the conduct being filmed would uncontroversially be prostitution. But the pornography cases are different, for they are not cases in which one participant is paying the other for sex. Rather, they are cases where a third party is paying both participants to have sex with each other. We can only treat this as analogous to the filmed murder scenario if we first hold that third-party-payor cases constitute prostitution, and if we hold that payment for pornographic acting is or includes payment for sexual conduct. While some courts have disputed these premises, their arguments have not been convincing, as discussed in the text to follow.

especially well constructed to chill expression.<sup>51</sup> The dissemination of pornography can be and is criminalized when the pornography is obscene; thus, First Amendment doctrine straightforwardly tolerates criminalization of pornography, even though criminalizing some pornography might scare off those who wish to make and distribute pornography generally. Moreover, the standards used to distinguish protected pornography from obscene pornography are notoriously ambiguous and difficult to apply.<sup>52</sup> It is therefore often difficult for a pornography distributor to determine whether the pornography distributed is protected or not. Realistically, then, distributors of pornographic materials operate under conditions of uncertainty with a significant potential to chill protected speech. In this light, it seems at least curious to hold that because films of sexual conduct may be protected expression, punishing acts of prostitution committed in service to those films would have an intolerable, chilling effect under the First Amendment.<sup>53</sup>

A third problem with the First Amendment rationale is that it does not seem to play much role in the popular distinction between prostitution and pornography. While courts and scholars naturally spot that pornography has an expressive dimension that prostitution (at least at first glance) does not, popular discourse about pornographic actors does not seem to revolve around—or notice—this distinction. Pornographic works are not normally discussed as art or expression, and pornographic actors are not treated as the vehicles for ideas. This may help explain the Supreme Court’s persistent waffling about how best to characterize the value of pornographic media. Thus, even when courts hang their divergent treatments of prostitution and pornographic acting on a First Amendment hat, we might suspect that this rationale is a placeholder for other sorts of reasons.

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51. Pornography, of course, flourishes today, but this appears to reflect tolerant enforcement practices rather than favorable law. *Prevention and Control of Sexually Transmitted Infections and HIV in the Adult Film Industry*, AM. PUB. HEALTH ASS’N (Nov. 9, 2010), <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/15/23/prevention-and-control-of-sexually-transmitted-infections-and-hiv-in-the-adult-film-industry> [<http://perma.cc/SGE6-Y2XK>].

52. David Cole, *Playing by Pornography’s Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 111 (1994) (“The Court has now put forward a set of doctrinal ‘rules’ that in the end do little more than obscure what is basically Stewart’s intuitive approach . . . advanc[ing] an incoherent formula.”).

53. Note that even if paid pornographic acting constitutes prostitution, pornographic acting need not be paid. Indeed, it appears that there is now a flourishing practice of disseminating video of unpaid sex on the Internet (such as video created by the performers themselves). Marcus Baram, *Free Porn Threatens Adult Film Industry*, ABC NEWS (June 11, 2007), <http://abcnews.go.com/Business/story?id=3259416&page=1> [<http://perma.cc/YED7-P6JA>].

## 2. The Non-Participating Payor Argument

As we have seen, the courts have not been content to rely solely on First Amendment rationales and have supplemented them with rationales rooted in conceptual arguments, including the non-participating payor argument and the payment-for-performance argument.

The first conceptual argument—that there is no prostitution if the payor does not participate in the sex<sup>54</sup>—runs into some significant problems, too. First, as the minority view courts have noted, the statutes at issue have generally not, on their own terms, made an exception for cases where the fee was paid by a third party.<sup>55</sup> On the contrary, the statutes generally use language that appears to straightforwardly encompass cases involving a non-participating payor.<sup>56</sup> On plain language grounds, then, there should not be any exemption for non-participant payor cases.

Second, this conceptual analysis of prostitution seems plainly at odds with the conventional understanding of prostitution. Indeed, it conflicts with various cases traditionally and un-controversially treated as prostitution, and perhaps even as paradigmatic instances of prostitution. For example, in one classic and oft-repeated prostitution narrative, a father pays a prostitute to have sex with his adolescent son in order to introduce him to sex or “steer” him away from homosexuality.<sup>57</sup> In another long-standing narrative—recently employed in popular media, such as the popular television drama *Mad Men*—a company or businessperson wooing a potential client arranges for the client to have sex with a prostitute.<sup>58</sup> In both examples, the payor does not participate in the sex, yet there is no uncertainty that the prostitute engages in prostitution. Similar narratives circulate about prostitutes provided at bachelor parties and parties in

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54. See *supra* Part II(B).

55. *People v. Kovner*, 409 N.Y.S.2d 349, 351 (N.Y. App. Div. 1978) (“That the fee paid for the sexual activity was provided by a non-participant or that the defendant’s object was to photograph the activity creates no legal distinction.”).

56. See *supra* Part II(A).

57. Numerous recent news reports highlight that such conduct is routinely viewed by media, prosecutors, and juries as prostitution. *Father Who Asked Prostitute to Take 14-Year-Old Son’s Virginity as a Present Is Spared Jail*, DAILY MAIL ONLINE (May 15, 2009), <http://www.dailymail.co.uk/news/article-1182548/Father-asked-prostitute-14-year-old-sons-virginity-present-spared-jail.html> [<http://perma.cc/LJG7-4MLQ>] (father prosecuted for seeking to arrange for prostitute to have sex with son); Greg Stolz, *Dad Charged for Son’s Alleged Holiday Sex With Prostitute*, COURIER-MAIL (Apr. 4, 2013), <http://www.couriermail.com.au/news/queensland/dad-charged-for-sons-alleged-holiday-sex-with-prostitute/story-e6freoof-1226611985342> [<http://perma.cc/Y4W5-R3X2>].

58. The trope appears at least twice in the fifth season of *Mad Men*. *Prostitution Theme in Mad Men*, WIKIA, [http://madmen.wikia.com/wiki/Prostitution\\_theme\\_in\\_Mad\\_Men](http://madmen.wikia.com/wiki/Prostitution_theme_in_Mad_Men) [<http://perma.cc/5SLC-KPPV>] (last visited Sept. 21, 2015).



male-dominated workplaces,<sup>59</sup> and prostitutes paid for as “gifts” on other occasions.<sup>60</sup> Given non-participating payor prostitution clichés like these, the suggestion that “prostitution is and has always been intuitively defined as a bilateral exchange between a prostitute and client . . . where the sexual conduct is performed on the person who pays the fee,”<sup>61</sup> seems plainly inconsistent with the popular conventional understanding of prostitution. This conceptual rationale for the legal divergence, then, depends on a basic misunderstanding of the concept of prostitution.

### 3. The Payment-for-Performance Argument

The second conceptual argument found in the cases is that there is no prostitution in pornographic acting because the actors are paid for acting or for a performance rather than for sex.<sup>62</sup> This rationale, however, seems disingenuous, for it is plain that the actors are paid not only to act or provide a performance but also to engage in sexual conduct. An actor contracted to perform in a pornographic film would likely be let go and found to have breached the contract if that actor refused to engage in actual sexual conduct, even if that actor offered to engage in simulated sexual conduct instead. Likewise, a consumer who purchased a film marketed as pornographic might protest deception upon discovering that the film depicted simulated rather than actual sexual conduct. Indeed, obscenity law has generally distinguished between simulated and actual sex on film. From the perspectives of producers, consumers, and courts, then, at least some of the value in pornographic acting lies in the actor’s engagement in actual sexual conduct. If so, it is implausible to say that the pornographic actor is paid only for acting or for a performance. On the contrary, at least a substantial part of the value for which the actor is paid is the actual sexual conduct.

The inadequacy of this conceptual argument for divergent treatment can also be seen from the other side of the coin, for prostitution can also plausibly be characterized as acting or performance. As ample research documents, at

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59. For example, *The Wolf of Wall Street*, a recent movie drama depicting male-dominated Wall Street workplaces in the late 1900s, included several scenes of workplace parties in which organizers paid prostitutes to engage with other employees. Alyssa Rosenberg, *Why ‘The Wolf of Wall Street’ Is the Most Controversial Nominee for Best Picture*, THINKPROGRESS (Feb. 25, 2014), <http://thinkprogress.org/alyssa/2014/02/25/3299381/wolf-wall-street/> [http://perma.cc/D9BF-8PLH].

60. Along these lines, a spate of recent news and gossip stories describe an actress hiring a prostitute to have sex with her actor husband as a birthday gift. Erin Cunningham, *Actress Jenny Mollen Talks Hiring Prostitutes for Husband Jason Biggs and Embracing Her Crazy*, DAILY BEAST (June 30, 2014), <http://www.thedailybeast.com/articles/2014/06/30/actress-jenny-mollen-talks-hiring-prostitutes-for-husband-jason-biggs-and-embracing-her-crazy.html> [http://perma.cc/WLE4-MFEY].

61. *Paulino*, *supra* note 35, at 19.

62. *See supra* Part II(B).

least the vast majority of prostitutes do not engage in sex with clients out of sexual desire and do not experience any sexual pleasure with clients. At the same time, many clients believe that prostitutes engage in sexual conduct with them from desire and with pleasure.<sup>63</sup> In this sense, prostitutes supply a performance of sexual engagement. Indeed, prostitutes themselves sometimes report that they see their work not as providing sex but as providing a performance,<sup>64</sup> with the client as the audience. Thus, even if pornographic actors are paid for a performance or for acting, this may not distinguish pornographic actors from prostitutes.

A related argument seen in some cases is that prostitution entails payment to arouse or gratify another person, and that the pornographic actor is not paid to arouse or gratify another person.<sup>65</sup> After all, it may be true that so long as the actors in a pornographic film appear to the audience to be aroused or gratified the audience will be satisfied, and thus that the actors need not cause actual arousal or gratification in their partners.

But this argument, too, seems disingenuous. For one thing, it seems most likely that at least some pornographic actors are expected to cause or contribute to arousal or gratification in their partners. For another thing, this argument places an implausible meaning on the arousal/gratification element. It appears that, in statutes that include this requirement, the primary purposes of this requirement are two-fold: first, to make clear that those paid to engage in genital or otherwise intimate contact for non-sexual purposes, such as doctors, do not commit prostitution; and second, to provide a catch-all description of sexual conduct sufficing for prostitution so that detailed enumeration is not necessary. Indeed, a not uncommon structure for a statutory definition for the sexual conduct element of prostitution first establishes that certain behaviors, like intercourse and oral sex, constitute sexual conduct (without regard to sexual arousal or gratification), and then it provides that other physical contact intended to cause sexual arousal or gratification also counts as sexual conduct.<sup>66</sup>

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63. MacKinnon, *Trafficking*, *supra* note 1, at 285, 295.

64. Zatz, *supra* note 1, at 284, 284 n.12.

65. *See supra* Part II(B).

66. In New York, for example, it is prostitution to engage in “sexual conduct” for a fee. By statute, “[s]exual conduct” means sexual intercourse, oral sexual conduct, anal sexual conduct, aggravated sexual contact, or sexual contact.” N.Y. PENAL LAW § 130.00(10) (2004). “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person . . . for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.” N.Y. PENAL LAW §130.00(3). Thus, § 130.00(10) identifies certain conduct as sexual conduct without regard to the intent to arouse or gratify, including intercourse, oral sex, and anal sex (each of which are themselves defined by reference to the body parts involved, without reference to sexual gratification without arousal. N.Y. PENAL LAW § 130.00(1)–(2)). It also includes a catchall—“sexual contact”—for other intimate touching for the purpose of sexual gratification.

It seems implausible, then, that the purpose of such an element (where it appears) is to exempt from prostitution the sort of conduct occurring in pornography. For one thing, we normally characterize physical interactions such as intercourse, oral sex, and anal sex as “sex,” so long as they are voluntary, without considering whether they are intended to cause arousal or gratification, making it unlikely that we would intentionally exempt those interactions from the category of “sexual conduct.” For another thing, if what pornographic actors do does not aim for arousal or gratification in the relevant sense, it is not clear that what prostitutes do does either. (In both pornography and prostitution, that is, there may be an expectation that the other partner’s fantasy and imagination are the “real” source of any arousal or gratification that partner experiences.) If so, the suggestion that pornographic acting is not prostitution because it does not involve the intent to arouse or gratify the other actor seems to misunderstand the role of the arousal/gratification element in those statutes that include it.

At bottom, the problem with this line of conceptual rationales for divergent treatment is that it depends on artificially narrow characterizations of paid pornographic acting and prostitution. When producers of pornography pay actors to engage in sex for film, the payment reflects the value of the actual sexual conduct, not just the acting or performance; and when prostitutes engage in sexual conduct, they may do so in a way that includes elements of acting or performance. The purported conceptual boundary between the two is not sufficiently robust to pry apart these two instances of sex for money.

#### *B. Moralistic Rationales for Divergent Treatment*

In addition to the rationales suggested in the cases above, rationales might be found in the traditional criteria for criminalization, including the legal moralist criteria associated with Stephen and Devlin, and the harm-oriented criteria associated with Mill and Hart.

Some rationales for criminalizing prostitution point to moralistic rationales—ethical objections to prostitution that do not depend upon any allegation that prostitution causes harm.<sup>67</sup> While there has long been controversy about whether such “purely” moral rationales can be legitimate

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Thus, the statutory scheme treats certain sorts of physical interactions as sexual conduct (and thus sufficient for prostitution) without regard for arousal or gratification. Other statutory schemes follow this bifurcated model (treating certain conduct as sufficient for prostitution without regard to arousal or gratification, while treating other conduct as sufficient only when there a purpose to arouse or gratify). *State v. Theriault*, 960 A.2d 687, 689 (N.H. 2008) (describing New Hampshire’s bifurcated statutory scheme).

67. DeFranco & Stellato, *supra* note 10, at 579.

grounds for criminal prohibitions,<sup>68</sup> it seems plausible that moralistic rationales continue to shape the criminal law, especially with respect to vice regulation. Indeed, though policy analysis often focuses on the harms associated with prostitution and the costs of criminalization, such moralistic objections may be the most important actual drivers of criminalization of prostitution.<sup>69</sup>

If so, we might find an explanation for the law's divergent treatment of prostitution and pornographic acting in such moralistic reasoning, such as the traditional sexual mores that restricted sex to marriage and procreation, and strictly limited female sexual conduct, or contemporary sexual mores that require significant interpersonal connection between sexual partners or object to commodification of the human body or of sex.

### 1. Traditional Norms for Sexual Conduct

On traditional views, sex is immoral unless it meets strict requirements. On the strictest traditional views, it must occur within a marriage, and its purpose must be procreation.<sup>70</sup> Traditional norms also place special limitations on female sexual behavior as compared to male sexual behavior, a double standard under which it is inappropriate for women to seek or initiate sexual encounters, engage in sex with multiple partners over time, engage in sex without accompanying "sentimental attachment" to her partner, and perhaps even to desire sex at all.<sup>71</sup>

A woman who engages in prostitution violates at least several of these norms. She engages in sex outside of marriage and does so without aiming to procreate. Prostitution is (by definition) non-marital sex, in which the client (whether single or married) is not married to the prostitute, and prostitution is almost never engaged in for the purpose of procreation. Moreover, the

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68. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 115, 119, 139 n.112, 141 n.115 (2000); *Lawrence v. Texas*, 539 U.S. 558, 571, 574, 576–78 (2003).

69. Richards, *supra* note 4, at 1219 (“[I]t is disingenuous to suppose that the basis for the American criminal prohibition of prostitution rests on secular concerns for criminogenesis and venereal disease control. . . . These arguments are, at best, post hoc empirical makeweights for justifications of a quite different order, namely, moralistic and paternalistic arguments of a peculiarly American provenance.”).

70. See Chamallas, *supra* note 3, at 781, 784–85 (discussing “traditional view of sexual conduct”); Richards, *supra* note 4, at 1210–11, 1213, 1219–20 (tracing the development of Christian moral views regarding sex, marriage, and prostitution from pre-Reformation period to modern America, associating anti-prostitution laws with “a reigning theory of sentimental marriage” and the purity leagues that adopted this theory); *id.* at 1237 (discussing traditional procreation norm).

71. Law, *supra* note 3, at 542 (describing traditional norms, including double standards); Richards, *supra* note 4, at 1220 (describing traditional norms, including expectation of “sentimental attachments of a kind perfected in monogamous marriage,” and noting the “Victorian model of female asexuality”).

prostitute seeks and initiates sex with her partners, and likely does so with many partners over time, without any sentimental attachment to her partners.<sup>72</sup> Traditional narratives about prostitutes also saw in their prostitution evidence of inappropriate sexual desire, and thus a violation of the prescription against female sexual desire, but the dominant and well-supported view today is that prostitutes normally do not expect or find sexual pleasure in prostitution.<sup>73</sup> Thus, prostitution straightforwardly violates several traditional norms regarding sexuality generally and female sexuality in particular.

These norms, however, cannot explain the law's divergent treatment of prostitution and pornographic acting. For one thing, it is implausible that such norms explain or justify the current criminalization of prostitution at all, as these traditional norms are no longer widely held. Contemporary sexual ethics appear to have become significantly more liberal and plural than the traditional view.<sup>74</sup> The procreation requirement is rarely invoked today.<sup>75</sup> The suggestion that there is something wrong with non-marital sex may still circulate but appears primarily confined to fundamentalist religious populations. Traditional restrictions on female sexuality still do have a significant cultural presence but no longer appear dominant (at least in their strictest forms).<sup>76</sup> In short, traditional norms constitute an implausible explanation for the criminalization of prostitution.

Nor can such norms explain the law's distinguishing between prostitution and pornographic acting, for pornographic acting will nearly always involve the same transgressions. Normally, the actors in pornographic film are not married, do not engage in sex in order to produce a child, and do seek out and initiate sexual encounters with multiple partners. Thus, even if traditional

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72. Richards, *supra* note 4, at 1250, 1253–55 (discussing (and critiquing) the view that the prostitute's "unchaste sex" justifies her condemnation).

73. MacKinnon, *Trafficking*, *supra* note 1, at 285, 295.

74. Chamallas, *supra* note 3, at 782, 790 (noting the shift from traditional to liberal views regarding sexuality in the mid- to late- 1900s); Richards, *supra* note 4, at 1220 (discussing the shift from conservative traditional norms to more flexible contemporary norms); David A.J. Richards, *Pornography Commissions and the First Amendment: On Constitutional Values and Constitutional Facts*, 39 ME. L. REV. 275, 293 (1987) (discussing the American shift from traditional Victorian norms regarding sexuality; "that sexual morality is now under legitimate conscientious debate in society at large on the ground that it is immorally repressive and unjust").

75. Law, *supra* note 3, at 531 (attributing to David A.J. Richards the observation that "[t]he notion that sex must be confined to procreation has been widely rejected"); Richards, *supra* note 4, at 1237–38 (setting out principled and empirical objections to procreation norm and its assumptions about human sexuality, suggesting these objections account for the shift away from procreation norm in law).

76. Law, *supra* note 3, at 543 ("[T]raditional conservative moral ideas about . . . gender roles are alive and strong in contemporary U.S. society."); *id.* at 545 ("The conservative vision of appropriate sexual relations is premised on gender differentiated concepts of the interests and capacities of men and women, which are inconsistent with contemporary commitments to gender equality.").

morality regarding sex offered a rationale for sanctioning prostitution, it does not offer any grounds for distinguishing between prostitution and pornographic acting. Both violate those norms in flagrant and profound ways.

## 2. Contemporary Norms for Sexual Conduct

The liberalization and pluralization of sexual norms makes it more difficult to identify easily stated and widely endorsed moral principles supporting condemnation of prostitution today. Nevertheless, there may still be some popular moral notions supporting criminalization of prostitution. For example, some may hold that people should only have sex if they are committed to each other, love each other, or have affection for each other.<sup>77</sup> Or there may be support for the idea that people should only have sex with each other in order to achieve or reinforce emotional intimacy or a significant personal connection.<sup>78</sup>

On these sorts of views—each of which make sex’s moral legitimacy depend upon a positive and potentially lasting interpersonal connection—prostitution appears to be morally wrong.<sup>79</sup> At least on conventional accounts, prostitutes and their clients make no commitment to each other, do not love each other, do not have affection for each other, and do not engage in sex in order to achieve or reinforce any sort of emotional intimacy or significant personal connection. Thus, on these conventional accounts, prostitution is morally wrong.

Once again, however, these moral principles do not supply any rationale for distinguishing prostitution from pornographic acting. At least on conventional accounts, actors in pornography normally do not commit to, love, or feel affection for each other. Nor do they engage in sex in order to achieve or reinforce any sort of emotional intimacy or personal connection. Thus, while these more contemporary norms regarding sex offer some possible rationales

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77. Richards, *supra* note 4, at 1220 (“For many, the objection to prostitution would today be based . . . on the transformation of sex into an impersonal encounter with no emotional significance”; the idea “rests on a vision of the necessary moral unity of sex and romantic love.”); *id.* at 1240, 1243–44 (discussing American cultural commitment to the “romantic love tradition,” manifest in part in the ideal of “companionate marriage,” and its implications for regulation of sexual conduct; noting that “[t]he Calvinist-Puritan view of companionate marriage [secularized during the Victorian period,] established romantic marital love not as one ideal among others, but as the exclusive form in which sexual and affectional feeling could legitimately be experienced”; noting that “Americans today . . . no longer limit the scope of romantic love to marital relationships”).

78. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (Detaching sex from intimacy after *Lawrence*).

79. Richards, *supra* note 4, at 1243 (“[P]rostitution is morally condemned . . . because it directly contravenes the model of romantic love . . .”); *id.* at 1244 (“Romantic love occurs martially and extramaritally, homosexually and heterosexually. . . . [A]ll of these relationships, within limits, invoke it. But prostitution does not.”).

for sanctioning prostitution, they do not offer any grounds for distinguishing between prostitution and pornographic acting.

Contemporary ethical theories have identified other moral objections to prostitution as well, some of which appear to play a role in contemporary popular moral thinking. Some of those objections point to the commodifying aspects of prostitution.<sup>80</sup> On one view, it is morally wrong to commodify the human body (perhaps because treating the body like a thing is inconsistent with the integrity or the unique dignity of the human person, or because pricing the use of the body trivializes the worth of the human person, or because it contributes to degrading objectification of women's bodies and thus to women's subordination).<sup>81</sup> On another closely related view, it is wrong to commodify sex (perhaps because sex is essential to personhood, so that commodifying sex raises the same objections as commodifying the human body; or because sex is otherwise special in a morally significant sense, and its specialness is diminished or damaged by pricing it). While these views are theoretically contested,<sup>82</sup> they may resonate with some common moral intuitions about cases where sex and money become closely intertwined (seen not only in popular anxiety about prostitution but also in the oft-invoked trope of the "gold digger").

On these views, prostitution is morally wrong. By offering the use of the body for a fee, the prostitute sells the prostitute's body; the practice therefore commodifies the human body,<sup>83</sup> or the prostitute sells sex, thereby commodifying sex. Once again, however, these moral principles do not supply any rationale for distinguishing prostitution from pornographic acting. By offering the body for sex on film, the pornographic actor sells the actor's body and thus commodifies the body, or sells sex and thus commodifies sex. Thus, while these moral objections to commodification of body and sex offer some possible rationales for sanctioning prostitution, they do not offer any grounds for distinguishing between prostitution and pornographic acting.

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80. *Id.* at 1255–62 (discussing commodification).

81. Law, *supra* note 3, at 536–37 (summarizing Margaret Jane Radin's argument against commodification of body and sexuality, which emphasizes that "selling of sexual[ity]" treats "essential attributes" of the person as "fungible objects," thereby denying "the integrity and uniqueness of the self"); Richards, *supra* note 4, at 1220, 1256–58, 1261 (discussing links between commodification and objectification, "degradation of women," and threats to "integrity of moral personality").

82. Law, *supra* note 3, at 538 (noting objections to Radin's arguments from commodification); Richards, *supra* note 4, at 1256–60 (challenging the commodification argument against prostitution, arguing that prostitution is sale of a service, not the body itself, and that sale of the body would not in any event threaten moral autonomy or personhood).

83. Frances M. Shaver, *The Regulation of Prostitution: Avoiding the Morality Traps*, 9 CAN. J.L. & SOC'Y 123, 135 (1994) (associating objections to selling the body with the "principled moralism" of "radical feminists"). Whether prostitution in fact commodifies the body, or does so any more than any other sort of physical labor, has been contested in the literature.

Feminist theorists and activists have vitalized another array of ethical concerns that might support criminalization of prostitution, and some of these now play a strong role in popular moral thinking. An especially important example involves the role of consent in sex. Where consent played a crucial but undeveloped role in liberal sexual ethics (insofar as consent was treated as a marker for the autonomous choice privileged by liberalism), feminist theory has “refurbished” the meaning of consent<sup>84</sup> in the context of sexual conduct in a way that brings to the fore ethical concerns traditional liberals did not normally recognize. Thus, where traditional liberals presumed that adult women who did not object to sex (in narrowly defined ways) “consented” to sex, feminist theorists have highlighted that the social, economic, and psychological conditions under which such “consent” is given degrade or destroy its consent value. While it would be perverse to morally condemn the “consenter” in such cases, there would be strong moral objections to the conduct of the other party, and thus strong moral objections to permitting the sexual conduct. At least some of these ideas about the role of consent in sex now seem to have become part of popular moral thought.

This refurbished understanding of consent may offer an explanation for the non-criminalization of pornographic acting. Under some accounts of the production of pornography, those who act in pornography, and especially women who act in pornography, do not do so under conditions of legitimate consent. Rather, they are driven to pornography by outright violence and threats and/or economic desperation, from backgrounds of abuse and addiction, in a cultural context that strips women of other opportunities and channels them to sexual subordination, such that participation is “chosen” only because no other or better choices are available. If so, they are not consenting participants in the sexual encounter and are best understood as victims rather than perpetrators. As a result, their conduct is not a crime.

This view does not, however, explain the criminalization of prostitution. If women who participate in pornography do not exercise legitimate consent, women who engage in prostitution do not do so either. Accounts of pornography showing that choice is eviscerated in pornography commonly show that the same pressures and conditions are at work in prostitution. Thus, to the extent that women participating in pornography are victims rather than perpetrators of a moral wrong, women who engage in prostitution are also victims of moral wrongs. If so, this view would straightforwardly support criminalizing exploitation of the prostitute (i.e. by the client, pimp, or brothel owner), but it would not support criminalizing prostitution itself (since the prostitute’s lack of consent would normally show the prostitute the victim of the encounter). Thus, this view does not successfully explain the criminal law’s divergent treatment of pornographic acting and prostitution.

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84. Chamallas, *supra* note 3, at 814.



In a time of rapidly changing and plural norms about sex, it would be overreaching to resolve whether contemporary norms can supply a plausible moralistic rationale for the divergent treatment of prostitution and pornographic acting. Nevertheless, this first-cut survey of possible moralistic rationales suggests that there is not an easy or obvious explanation in contemporary moral norms regarding sexual conduct. On the contrary, it appears that several of the most accessible norms today cut in the other direction, favoring similar rather than divergent treatment of prostitution and pornographic acting.

### C. Harm-Based Rationales for Divergent Treatment

While there has long been controversy about whether criminal prohibitions can be grounded in purely moralistic rationales like those discussed above, it is generally accepted that the harmfulness of conduct can support its criminal prohibition. Consistent with this view, criminalization of prostitution has often been justified by reference to the harms that prostitution causes, including harms to the prostitute and harms that prostitutes cause to others (including harms to clients, clients' partners and families, the broader community, and women collectively).<sup>85</sup> Can such harms justify the law's divergent treatment of prostitution and pornographic acting?<sup>86</sup>

#### 1. Harms to the Prostitute

Some rationales for criminalizing prostitution point to the harms that prostitutes suffer as a result of engaging in prostitution. Prostitution has been associated with a host of serious harms to individual prostitutes. Working in prostitution can result in contracting sexually transmitted diseases, or it can lead to unwanted pregnancy. Prostitutes are subjected to brutal physical violence at the hands of clients, pimps, and police, including murder, rape, and battery, at rates much higher than non-prostitutes.<sup>87</sup> Those who work in

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85. Chamallas, *supra* note 3, at 827 (discussing "external effects" rationales for criminalizing prostitution).

86. At least one court has thought so. *Paulino*, *supra* note 34, at 19 ("[T]he two industries [prostitution and pornography] are not similarly situated because the prostitution laws aim to abate the underlying social ills accompanying brothels, ills which are not perpetuated when mammoth media companies film adult entertainment. . . . [P]rostitution brings with it a host of ills including AIDS, venereal diseases, drugs, pimping, loan sharking, physical abuse and rape.").

87. MacKinnon, *Trafficking*, *supra* note 1, at 277 n.16 (noting research showing that "[h]omicide of women in prostitution vastly exceeds that of any other cohort in the United States"); *id.* at 282 n.31 (discussing research concluding "that prostituted women were 'the most raped class of women in history,'" citing sources suggesting that "40% to 85% of women reported being raped in prostitution," "70% by clients an average of 31.3 times"); *id.* at 282 n.32 ("The vast majority of prostituted people report being physically assaulted in prostitution," citing sources suggesting "over half beaten once per month or more," "an average of 103 times per year by pimps and johns."); Kaethe Morris Hoffer, *A Response to Sex-Trafficking Chicago Style*:

prostitution endure psychological suffering—said to include depression, self-hatred, post-traumatic stress disorders, mental illness, and impairment of sexual pleasure—at much higher rates than non-prostitutes.<sup>88</sup> They fall into addiction,<sup>89</sup> economic marginalization, and social stigma and marginalization.<sup>90</sup> As Carlin Meyer writes, “Prostitution leaves thousands upon thousands of women diseased, brutalized, self-hating, dependent and vulnerable.”<sup>91</sup> While there is some dispute as to whether prostitutes in some sectors face these same risks, most research appears to confirm that most prostitutes are at high risk for many of these harms.

These harms provide compelling reasons to criminalize conduct associated with the prostitution industry, for they link the industry to devastating harms to vast numbers of individual prostitutes. It is not as clear, however, that they provide compelling reasons to criminalize the act of prostitution itself. This catalog of harms seems to show the prostitute to be a victim, not a perpetrator; if so, punishment adds to, rather than mitigating, the prostitute’s suffering. Of course, we sometimes criminalize conduct paternalistically to deter people from engaging in conduct that may endanger them. Doing so is always controversial but even more so in the case of prostitution, as most research shows that most prostitutes come to prostitution from desperation and abuse, making the threat of criminal sanction for engaging in prostitution ineffectual and perverse. Thus, not surprisingly, most critics of the prostitution industry who point to the harm it causes prostitutes—including most feminists—do not advocate criminalizing prostitution itself.<sup>92</sup> Rather, they favor punishing those who exploit prostitutes (such as clients and pimps).

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*Follow the Sisters, Speak Out*, 158 U. PA. L. REV. 1831, 1837–40 (2010) (discussing research showing pervasive violence against Chicago prostitutes).

88. MacKinnon, *Trafficking*, *supra* note 1, at 286. (“[P]rostituted women’s measured level of post-traumatic stress (‘PTSD’) is equivalent to that of combat veterans or victims of torture or raped women.”); Richards, *supra* note 4, at 1221 (“[V]arious kinds of harms have been adduced, including . . . mental deficiency or neurotic impairment [and] incapacity for orgasm.”).

89. MacKinnon, *Trafficking*, *supra* note 1, at 287 (“Often women in prostitution are addicted to drugs; many use substantial amounts of alcohol, too, as a result of what they are going through. Sometimes the drugs are pushed on them by pimps to addict them.”); *see id.* at 287 n.51 (surveying studies showing very high rates of drug use among prostitutes, attributing use to working in prostitution).

90. *Id.* at 306–07, 307 n.125 (discussing social stigma associated with working as a prostitute).

91. Carlin Meyer, *Decriminalizing Prostitution: Liberalization or Dehumanization?*, 1 CARDOZO WOMEN’S L.J. 105, 112 (1993); *see also* Law, *supra* note 3, at 533 (summarizing research showing very high rates of violence against prostitutes, including research showing that eighty percent of prostitutes report physical assaults and that prostitutes “are murdered . . . at a rate forty times the national average”).

92. *See* Law, *supra* note 3, at 532–33 (regarding prostitution, “[f]eminists are divided” on matters of fact, vision, and principle, but “all feminists . . . condemn the current legal policy enforcing criminal sanctions against women who offer sex in exchange for money”).

Nor do these harms to prostitutes provide a convincing rationale for the divergent treatment of prostitution and pornographic acting. On the contrary, it appears that those who act in pornography face many of the same threats that prostitutes face. Moreover, it may be that pornography itself drives demand for prostitution, and is thus responsible for harms associated with prostitution, including harms to prostitutes. Indeed, the worlds of pornography and prostitution appear highly permeable (with some participants participating in both activities), and pornography may serve as a gateway to prostitution.<sup>93</sup> If so, those who act in pornography may thereby expose themselves to all the harms associated with prostitution. Moreover, pornography may increase the incidence of dangerous activities in prostitution by depicting dangerous sexualized conduct on film; if so, acting in pornography is yet again implicated in the harms that prostitutes face.<sup>94</sup> In short, those who engage in pornographic acting appear to face many of the same threats that prostitutes face, and their conduct may increase the harms that prostitutes face. If so, the harms prostitutes face do not appear to support divergent treatment of prostitution and pornographic acting.

## 2. Harms to Their Partners

Arguments in favor of criminalizing prostitution sometimes point to the harms prostitutes cause to their clients. The most commonly mentioned danger to the client is infection with a sexually transmitted disease (STD).<sup>95</sup> More attenuated client harms might include negative psychological consequences of engagement in impersonal sex with prostitutes, such as distraction from more substantial and fulfilling sexual relationships, or from important existing relationships and responsibilities.

It is not clear, however, that these sorts of harms provide plausible explanations for the criminalization of prostitution. There is significant empirical uncertainty about the extent to which prostitutes transmit STDs to clients, with research suggesting the risk has been significantly overstated;<sup>96</sup>

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93. MacKinnon, *Pornography*, *supra* note 1, at 1000 (a former participant “told how pornography was used to train and season young girls in prostitution,” others reported that “pornography was made of them in prostitution”).

94. *Id.* (“Pornography is documented to create demand for specific acts, including dangerous and demeaning ones . . .”).

95. *See* Law, *supra* note 3, at 546 (assumption is prostitutes are primary transmitters of STDs).

96. *See, e.g.*, Carol Leigh, *A First Hand Look at the San Francisco Task Force Report on Prostitution*, 10 HASTINGS WOMEN’S L.J. 59, 69–70 (1999) (San Francisco prostitution task force report noting lack of evidence that prostitutes contract or transmit HIV at higher rates than the general population); Law, *supra* note 3, at 546–52 (summarizing research supporting conclusion that prostitutes are not “primary transmitters of venereal disease”); Richards, *supra* note 4, at 1218 (“[T]he disappearance of prostitution today would still leave about ninety-five percent of the cases of venereal disease intact.”).

clients presumably have significant ability to control their exposure to such transmission; and the most apt solution to the STD problem might be legal regulation directed at preventing STD transmission rather than wholesale prohibition of prostitution. The more attenuated psychological harms seem neither especially likely to occur nor much present in popular discourse about prostitution. Thus, it seems implausible that these sorts of harms fully explain the current criminalization of prostitution.

Moreover, even if these harms did explain the criminalization of prostitution, they do not provide a very solid rationale for the law's divergent treatment of pornographic acting. Transmission of STDs has long been a salient concern in the pornography industry, as reflected by a recent spate of legislation meant to reduce the transmission of STDs among pornographic actors. If such concern explains criminalization of prostitution, it should also lead to criminalization of pornographic acting. Alternatively, if legislated STD regulations are sufficient safeguards for pornographic acting, they should be adequate for prostitution as well. Either way, these concerns call for similar treatment of these two conducts, not divergence. The more attenuated psychological harms that might befall clients of prostitutes seem equally a concern in the context of pornographic acting, where the actors engage in sex that appears equally impersonal, and they should therefore be at similar risk of distraction from more substantial relationships and other responsibilities. Thus, the harms that prostitution purportedly causes to the client do not seem to supply a plausible rationale for the law's divergent treatment of prostitution and pornographic acting. They neither convincingly explain the criminalization of prostitution nor offer a good ground for distinguishing prostitution from pornographic acting.

### 3. Ripple Effects: Harms to Clients' Families

Prostitution may also cause harm to more closely connected third parties. For example, it may cause harm to the client's families. If an STD is transmitted to the client, the client may pass that disease on to other sexual partners (spouses or otherwise). If the client is distracted from relationships with partners and family, partners and family may feel abandonment, loneliness, or other sorts of loss. Partners may experience the client's engagement with the prostitute as infidelity or betrayal, and suffer emotionally as a result. The prostitute's engagement with the client may lead to the end of the relationships with spouses or other partners,<sup>97</sup> causing psychological, emotional, and economic harm to those partners and any children or others who depend upon the relationship.

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97. Richards, *supra* note 4, at 1243–44 (noting but rejecting the “empirical claim that the toleration of prostitution makes marriage less stable”).

Again, however, it is not clear that concerns about these sorts of harms plausibly explain either the criminalization of prostitution, or the divergent treatment of pornographic acting. For one thing, the identified threats are all (more or less equally) possible consequences of any sort of infidelity, whether it involves a prostitute or not, yet other sorts of infidelity are generally not considered criminal today. Adultery and fornication statutes have been repealed in many jurisdictions, left in desuetude in the others, and generally called into constitutional doubt by *Lawrence*. (While the popular imagination has appeared to believe that infidelity with a prostitute is more likely to lead to STD transmission than other sorts of infidelity, the empirical evidence calls this idea into question,<sup>98</sup> and, in any event, all sorts of infidelity have been treated as significant threats of STD transmission.) Indeed, prostitution arguably poses less threat of some of these harms than other forms of infidelity, insofar as it is less likely to result in ongoing romantic affairs (and thus less likely to be discovered, and less likely to motivate the client to abandon partners or families).<sup>99</sup> For another thing, prostitution obviously need not impact partners/families at all, as some clients have neither, and many partners/families presumably need not and do not learn of the client's interaction with the prostitute, foreclosing potential psychological harms. Thus, that some clients may have partners/families—some of whom may learn of the client's interaction with the prostitute, some of whom may experience such psychological harms—seems like a fairly attenuated basis for criminalization of prostitution.

If concerns about such harms do motivate criminalization of prostitution, do they also make sense of the divergent treatment of pornographic acting? The actor who engages in sex for film seems more or less as likely to transmit STDs to a sex partner, and thus to put that person's partners at risk, as the prostitute. This might suggest that prostitution and pornographic acting are similar in a relevant way. On the other hand, it may be that the person who has sex for film is expected to have fewer partners, and thus to create less total risk to partners and families than the prostitute. Likewise, the actor who has sex for film might be seen as a catalyst to the other actor's infidelity and thus the cause of psychological harm to the other actor's partners. But, again, with fewer partners the expected harm may be less. Moreover, the pornographic context

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98. Leigh, *supra* note 96, at 69–70 (San Francisco prostitution task force report noting lack of evidence that prostitutes contract or transmit HIV at higher rates than the general population); Law, *supra* note 3, at 546–52 (summarizing research supporting conclusion that prostitutes are not “primary transmitters of venereal disease”); Richards, *supra* note 4, at 1218 (“[T]he disappearance of prostitution today would still leave about ninety-five percent of the cases of venereal disease intact.”).

99. Adopting views like this one, “St. Augustine, St. Thomas, and many others” have thought “prostitution may have beneficial effects on the stability of marriage.” Richards, *supra* note 4, at 1243–44.

may be relevant here. Perhaps we expect that the partners of pornographic actors will normally be aware of and at peace with the actor's pornographic acting and thus less likely to suffer psychological harm. Thus, pornographic acting might seem to cause less expected harm to partners/families than prostitution.

Nevertheless, these possible harms to partners/families are an unsatisfactory explanation for the law's divergent treatment of prostitution and pornographic acting. As noted, these harms seem like a fairly attenuated basis for criminalization of prostitution, especially given the prevalence of other forms of infidelity that are more or less likely to cause such harms but are not treated as criminal. If so, they are poor candidates to explain the divergence at issue. Moreover, while there may be relevant differences in the anticipated harm to partners/families in prostitution and pornographic acting, they appear to be fairly speculative differences in degree—a shaky foundation for such a significant difference in legal treatment.

#### 4. Harms to the Community

More broadly, prostitution may cause harm to the communities in which prostitution is practiced. Transmission of STDs is often mentioned in the context.<sup>100</sup> So too are the “nuisance” effects of street-level prostitution markets,<sup>101</sup> including increased foot and auto traffic, offensive litter (such as condoms and drug paraphernalia), upsetting encounters with street-level prostitutes, “fostering of other crimes, the deterioration of neighborhoods, or even the decline of the moral climate of the community.”<sup>102</sup>

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100. See, e.g., Jo Phoenix, *Governing Prostitution: New Formations, Old Agendas*, 22 CAN. J.L. & SOC'Y 73, 81–82 (2007) (in popular discourse regarding prostitution in the United Kingdom during the 1980s and 1990s, “sex workers were increasingly being identified as a bridge between the undeserving and diseased few and the healthy, moral many. . . . [S]ex workers were always and already potential reservoirs for disease. . . . In the mid-nineteenth century [they were seen as] a threat to the sexual health of the nation”); Chamallas, *supra* note 3, at 827 (including STD transmission among external effects that might be taken to justify criminalizing prostitution); Law, *supra* note 3, at 545–53 (suggesting concern that prostitute transmission of STDs has played a critical role in supporting criminalization of prostitution in an era when most other legal regulation of consensual sexual activity has been repealed or fallen into desuetude). There has, however, been disagreement about the extent to which prostitution in fact accelerates the spread of STDs.

101. DeFranco & Stellato, *supra* note 10, at 579–80; Leigh, *supra* note 96, at 80–81 (San Francisco prostitution task force report noting vocal complaints about street prostitution from neighborhood activists and business groups, including complaints about “drug paraphernalia and condoms left on the streets, congested traffic, excessive noise and other nuisances”).

102. Chamallas, *supra* note 3, at 827; see also Richards, *supra* note 4, at 1215–17 (discussing and critiquing the claim that prostitution generates crime, including “theft and assault of patrons, trafficking in heroin, and the enlarged scope of organized crime operations”).

At first glance, these appear to be solid rationales for criminalizing prostitution, and for the divergent treatment of prostitution and pornographic acting. While there is some uncertainty about the extent to which prostitution causes these sorts of community harms<sup>103</sup> (especially with respect to propagation of STDs),<sup>104</sup> even pro-prostitution advocates have acknowledged that street-level prostitution markets can dismay and mobilize other community members.<sup>105</sup> Moreover, pornographic actors engaging in pornographic acting are not associated with these sorts of harms.<sup>106</sup> Thus, these community-level harms might plausibly explain why prostitution is a crime and why pornographic acting is treated differently.

When more closely scrutinized, however, this explanation appears less plausible. For one thing, while street-level prostitution markets may produce nuisance-like community-level harms, most prostitution does not occur in street-level prostitution markets<sup>107</sup>—many prostitutes work in off-street venues (such as massage parlors and strip clubs),<sup>108</sup> and easy internet advertising has enabled many independent prostitutes to solicit clients off-street—and thus does not produce these community-level harms. Neighborhood-harm explanations, then, do not adequately explain why we criminalize prostitution as a whole rather than focusing the criminal sanction on on-street prostitution, or on prostitution associated with the community-level harms at issue.

For another thing, even if prostitution sometimes causes these community-level harms, it is not clear why criminalizing prostitution itself is the appropriate remedy. Indeed, there are well-known alternatives that are better tailored to the harms at issue. One is the approach taken in many Western

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103. Chamallas, *supra* note 3, at 827 (“[T]he limited amount of empirical evidence on the external effects of prostitution does not provide a convincing case for criminalization.”).

104. *See, e.g.*, Leigh, *supra* note 96, at 69–70 (San Francisco prostitution task force report noting lack of evidence that prostitutes contract or transmit HIV at higher rates than the general population); Law, *supra* note 3, at 546–52 (summarizing research supporting conclusion that prostitutes are not “primary transmitters of venereal disease”); Richards, *supra* note 4, at 1218 (“[T]he disappearance of prostitution today would still leave about ninety-five percent of the cases of venereal disease intact.”).

105. *See, e.g.*, Leigh, *supra* note 96, at 66, 80–81.

106. In fact, however, anti-pornography advocates do associate pornography with a variety of communal harms. *See, e.g.*, Richards, *supra* note 4, at 302 (quoting 1980 Commission Report 304–05 (pornography is harmful “because it causes some people to commit acts of sexual violence, because it causes promiscuity, because it encourages sexual relations outside of marriage, because it promotes so-called ‘unnatural’ sexual practices, or because it leads men to treat women as existing solely for the sexual satisfaction of men”)).

107. *See* Law, *supra* note 3, at 529 (“Although streetwalkers are the most visible and familiar [prostitutes], they compromise only ten to twenty percent of all prostitutes.”).

108. *See id.* (describing “[t]he largest group of prostitutes, high-class ‘call girls’ or ‘escorts’” and another cohort, “women who work in various off-street settings, including massage parlors, brothels, hotels and bars”).

European nations, where public advertising and soliciting are crimes, but prostitution itself is not.<sup>109</sup> Such regulatory schemes make criminal the conduct that produces the community-level harm, leaving prostitution that does not produce such harm legal. Another approach is to use zoning regulation to confine prostitution to locales where community-level harms are not a concern.<sup>110</sup> This, of course, is the approach taken in many American communities regarding other sex-related industries associated with community-level harms, including strip clubs and pornographic theatres.

Finally, many of the nuisance-style harms involved here may themselves be catalyzed or increased by criminalization of prostitution. For example, some argue that criminalization of prostitution generates “these evils by forcing prostitutional activities into the clandestine criminal underground, the covertness of which breeds incidental crime” and other problems.<sup>111</sup>

Thus, while prostitution and pornographic acting can be distinguished on the grounds that prostitution sometimes causes community-level harms that pornographic acting does not, such harms are a tenuous explanation for the criminalization of prostitution generally, and thus a poor explanation for the divergent treatment of prostitution and pornographic acting.

Prostitution has also been associated with another sort of community harm: coercion and trafficking of women into prostitution.<sup>112</sup> To the extent that prostitution drives coercion and trafficking, this appears to be a powerful rationale for criminalizing prostitution. Again, however, this appears to mean punishing the victims of the offensive behavior, and this seems perverse. Better-tailored law would punish the trafficking itself, and those who knowingly take advantage of trafficking rather than acts of prostitution. Thus, harms associated with trafficking may not adequately justify criminalizing prostitution. Moreover, even if they did, they would not supply a rationale for the divergent treatment of prostitution and pornographic acting, for pornography is also a driver of coercion and trafficking. Thus, if criminalizing prostitution is an appropriate step toward remedying trafficking, criminalizing pornographic acting should be too.

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109. See, e.g., *id.* at 526 (noting that the “United States is unique among the nations of Western Europe and the British Commonwealth in imposing and enforcing criminal sanctions on people who offer sexual services for money”); *id.* at 554–55 (describing the British and Canadian approach, under which prostitution is not a crime, but public solicitation is).

110. *Id.* at 558–59 (noting an Australian commission report suggesting use of zoning principles to address neighborhood concerns about prostitution); Richards, *supra* note 4, at 1282–84 (discussing use of zoning schemes in continental Europe and their possible use in America).

111. Richards, *supra* note 4, at 1216.

112. MacKinnon, *Trafficking*, *supra* note 1, at 304 (“[E]xperience shows that when prostitution is legalized, trafficking goes through the roof.”).



### 5. Harms to Women Collectively

Contemporary feminism—especially radical feminism—has also emphasized that prostitution causes harms to women collectively. Along these lines, writes Noah Zatz, “Radical feminists have emphasized the way that institutions that may encourage men to view women as objects for sexual use may contribute to violence, harassment, and denigration directed toward women.”<sup>113</sup> Holly Fechner describes the “radical feminist” view that prostitution “allows men to use women as sexual objects, [in] a rape-like mentality,” thereby making “all women objects for men’s use and abuse . . . reducing all of us to meat to be bought, sold, traded, used, discarded, degraded, ridiculed, humiliated, maimed, tortured, and all too often, murdered for sex.”<sup>114</sup> On grounds like these, some have characterized prostitutes as “the ‘Uncle Toms’ of gender.”<sup>115</sup>

These are potentially compelling reasons to criminalize aspects of the prostitution industry, for they link the institution of prostitution to pervasive and devastating harms to women collectively. It is not as clear, however, that they provide compelling reasons to criminalize the act of prostitution itself. As most feminists have observed, prostitutes themselves often seem to be victims, rather than perpetrators, of the dynamics at issue, such that it is perverse to punish them. (On a common view, the appropriate approach is to punish those who exploit prostitutes, including pimps and clients, rather than punishing the prostitutes themselves.) Such objections might be overcome by characterizing prostitutes as Uncle Toms, implicating them as self-serving contributors to the collective harm; but this characterization seems unrealistic, especially given the extensive evidence that most prostitutes come to prostitution under at least very difficult circumstances. Thus, it seems problematic to justify criminalization of prostitution on the basis of collective harms to women.

Moreover, even if collective harms do justify criminalization of prostitution, they do not appear to plausibly explain the divergent treatment of prostitution and pornographic acting. On the contrary, pornography has normally been seen as similarly implicated in the collective harms associated

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113. Zatz, *supra* note 1, at 292.

114. See Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes’ Groups, Law and Feminist “Truth,”* 4 COLUM. J. GENDER & L. 26, 48 (1994); Shaver, *supra* note 83, at 141 (attributing the view that engaging in prostitution “harms the collectivity” of women to “radical feminists;” maintaining that one version of this view holds that engaging in prostitution “publicly affirms the law of male sex-right” and serves as “public acknowledgement” that men are “women’s sexual masters”); Zatz, *supra* note 1, at 288 (attributing to the radical feminism view that “prostitution reinforces dominant sexual roles in which men violently use women’s sexuality for their own pleasure and reproduction, and women are constructed as sexual servants for men”).

115. Meyer, *supra* note 91, at 112 (quoting Laurie Shrage, *Should Feminists Oppose Prostitution*, 99 ETHICS 347 (1989)).

with prostitution. The same charges that have been leveled at prostitution—that it makes “all women objects for men’s use and abuse . . . reducing all of us to meat to be bought, sold, traded, used, discarded, degraded, ridiculed, humiliated, maimed, tortured, and all too often, murdered for sex”<sup>116</sup>—have been leveled at pornography.<sup>117</sup> Indeed, the mass consumption of pornographic media may make pornography an even more potent vector for many of these effects. Moreover, it may be that pornography itself contributes to all the harms associated with prostitution in that pornography “creates demand for prostitution.”<sup>118</sup> To the extent that this is true, the harms generated by prostitution and pornography genuinely collapse together, making any collective harm-based distinction between prostitution and pornographic acting difficult to sustain.

Thus, while prostitution may be an important source of collective harm to women, this collective harm does not plausibly explain the divergent treatment of prostitution and pornographic acting. It is a problematic explanation for criminalizing prostitution (rather than exploitation of prostitution), and it offers no clear ground for distinguishing between prostitution and pornographic acting. On the contrary, it seems to offer powerful reasons to treat prostitution and pornographic acting similarly under the law.

#### IV. EXPLANATIONS FOR DIVERGENT TREATMENT

This Article has argued that the law’s divergent treatment of prostitution and pornographic acting seems strange, and that neither the courts’ reasons nor conventional criteria for criminalization present fully plausible rationales for the divergence. In this part, this Article leaves behind the search for a justification and looks instead for an explanation, asking whether there are social or cultural phenomena that might help us understand why the law makes

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116. See Fechner, *supra* note 114, at 48; Shaver, *supra* note 83, at 141 (attributing the view that engaging in prostitution “harms the collectivity” of women to “radical feminists,” maintaining that one version of this view holds that engaging in prostitution “publically affirms the law of male sex-right” and serves as “public acknowledgement” that men are “women’s sexual masters”); Zatz, *supra* note 1, at 288 (attributing to the radical feminism view that “prostitution reinforces dominant sexual roles in which men violently use women’s sexuality for their own pleasure and reproduction, and women are constructed as sexual servants for men”).

117. See, e.g., Richards, *supra* note 4, at 302 (quoting 1980 Commission Report 304-05 (pornography is harmful “because it causes some people to commit acts of sexual violence, because it causes promiscuity, because it encourages sexual relations outside of marriage, because it promotes so-called ‘unnatural’ sexual practices, or because it leads men to treat women as existing solely for the sexual satisfaction of men”)); see also ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 207–09 (1989); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 206 (1989) (Dworkin and MacKinnon contend that pornography interferes with women’s participation in the political process, undermines women’s abilities to engage in First Amendment expression).

118. MacKinnon, *Pornography*, *supra* note 1, at 999.

this strange distinction. While such explanations do not justify the state of the law, they may help us understand and address some of the phenomena that shape it.

One possible explanation looks to the political process. On this explanation, pro-pornography actors influence the political process more effectively than pro-prostitution actors, and this difference in influence is manifest in more accommodating legal regulation of pornographic activities. Though this explanation has some appeal, however, it does not satisfyingly explain the way the popular discourse differentiates prostitution and pornographic acting.

A fuller explanation looks to persistent cultural folk theories about gender and sex. On these theories, prostitution threatens to taint or corrupt male consumers in a way that pornography does not. It does so because it requires direct physical involvement of the male consumer with the female provider, contact that exposes the male consumer to an array of contaminations—not just physical, but moral and social—that folk theories of sexuality associate with physical intimacy between male and female. Anxiety about these contaminations supplies the missing piece in explaining the divergent treatment of prostitution and pornographic acting.

#### A. *Political Process Explanation*

One possible explanation points to the political process. On this view, pornography and its participants may be better protected under the law because pro-pornography actors have been more effective participants in the political process than pro-prostitution actors.

At first glance, this may be a promising idea. Some pro-pornography actors look more likely to be effective participants in the political process than their pro-prostitution parallels. While both pornography and prostitution are multi-billion dollar industries, wealth appears more concentrated and stable in the pornography industry, while it is diffuse and unstable in the prostitution industry. In pornography, large production companies—“Goliath corporations”<sup>119</sup>—control significant portions of the industry’s wealth, and these companies persist over time. In prostitution, in contrast, there are no corporations of similar size and duration. On the contrary, prostitution appears to be a highly diffuse industry, in which most actors work on their own or in small groups, controlling little wealth, persisting only for short times, and having no more than local influence. Compared to pimps, prostitutes, and brothel owners, then, pornography’s large production companies are more likely to be effective players in the political process, as they control more

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119. *Paulino*, *supra* note 3, at 19 (defendant in prostitution case complains that prosecutors focus on escort services while ignoring “Goliath corporations” that pay actors to engage in sex).

wealth, persist long enough to become experienced actors, and can more easily engage in collective action with other similarly situated entities.

This might help explain the divergent legal treatment of prostitution and pornographic acting. Perhaps prostitution remains illegal because pro-prostitution actors are too poor, inexperienced, and diffuse to effectively influence the political process and the making of law. They are not effective advocates for decriminalization. In contrast, pornographic acting is not illegal because pro-pornography actors are sufficiently wealthy, experienced, and coordinated to effectively influence the political process and the making of law. They are effective advocates for decriminalization.

This is a plausible explanation for differences in the legal regimes governing pornography and prostitution, but there are some reasons to question whether it fully explains the riddle at issue.

First, it may overstate the relevant differences between the pornography and prostitution industries. In particular, it may fail to recognize the diffusion of the pornography industry. Today, that industry appears to be extraordinarily diffuse. Lone individuals and small groups can easily produce pornographic material using inexpensive equipment (such as personal digital cameras and camera phones), and that material can easily be distributed and marketed to enormous audiences via the Internet. And while the diffusion of the industry today does reflect relatively recent technological advances significantly reducing the cost of production and distribution, the pornography industry has long been populated by large numbers of small production entities, including short-lived and low-revenue entities. This is not and has not been the sort of industry normally known for significant influence in the political process.

At the same time, it may fail to recognize the potential for pro-prostitution political action. In theory, prostitutes might organize and act collectively just as other interest groups do. Indeed, prostitutes have sometimes done so. In San Francisco, some prostitutes participate in the pro-prostitution activist group COYOTE. In other countries, “prostitutes have organized to lobby for health insurance, old age pensions, and other benefits.”<sup>120</sup> Moreover, the assumption that actors in the prostitution industry are uniformly poor and without influence may be historically naïve: “[T]he real profiteers from prostitution have been wealthy property owners and their ilk . . . [influential citizens who] made [their] fortune[s] buying and selling brothel real estate.”<sup>121</sup> There may also be other actors who could work effectively on behalf of prostitutes or prostitution. For example, health care providers and prostitutes might find common ground around issues pertaining to STDs, drug addiction, mental health, or homelessness. Along these lines, the health care industry in Nevada appears to have profited from the legalization of prostitution in some Nevada counties,

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120. Meyer, *supra* note 91, at 106.

121. *Id.* at 115.

insofar as legalization has been accompanied by regulations requiring constant STD testing for prostitutes. Indeed, the more powerful actors in the legalized sex industries (such as pornography) would appear to be potential natural political allies for prostitutes as well.

Second, this explanation may overstate the effectiveness of the pornography industry in shaping the legal regime. While some forms of pornography are legally protected, it is nevertheless true that pornography remains subject to significant legal constraints because obscene pornography is not constitutionally protected speech and is generally criminalized. Of course, not all pornography is obscene. Nevertheless, courts do continue to find some pornography obscene. Moreover, the standards for identifying obscene pornography are notoriously indeterminate.<sup>122</sup> As a result, any maker of pornography must operate with some uncertainty as to whether the product produced is legally protected or not. This is a potentially onerous and restrictive uncertainty. It is also not a feature of the legal regime we would expect to see if the pornography industry was highly effective in the political process.

Third, it may not adequately explain an important part of this riddle—namely, that the legal divergence appears to track a divergence in social attitudes. It appears to be a common attitude today that prostitution is different from acting in a pornographic film, and that the difference is consistent with criminalizing prostitution while not criminalizing acting in a pornographic film.<sup>123</sup> Of course, influential political actors can influence social attitudes and shape popular narratives; but it seems implausible that the pornography industry has deployed its political influence to generate these divergent social attitudes about pornography and prostitution. One reason this seems implausible is that some of the social attitudes at issue seem to have much deeper roots than that story would suggest, as discussed in the section that follows.

This political process explanation, then, is appealing but not completely satisfactory. Putting aside the aspiration to harmonize seemingly anomalous doctrine, it points instead to social phenomena that might explain the development of inharmonious law. To the extent that it succeeds, it may undercut the legitimacy of the existing doctrine, showing that doctrine to be the

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122. See, e.g., Cole, *supra* note 52, at 111–12 (“The Court has now put forward a set of doctrinal ‘rules’ that in the end do little more than obscure what is basically Stewart’s intuitive approach . . . advanc[ing] an incoherent formula . . .”).

123. As anecdotal support for this claim, I have routinely surveyed my Vice Crime classes on their views about criminalizing various sorts of sexual conduct at the start of each semester. While my students have generally favored deregulation for most adult consensual sexual conduct, they generally favor deregulation of pornography at a higher rate than they favor deregulation of prostitution. Their comments during class discussions generally track this trend, as they more frequently and more readily articulate reasons to criminalize prostitution.

product not of principled reasoning, but of political influence in a dog-eat-dog world. It may also supply new rhetorical resources for arguing for law reform (irrational law reflecting differences in political power should be reformed in accord with rational principles). At the same time, because it does not seem to be a complete explanation for the legal anomaly at issue, it invites further investigation.

*B. Folk Theories of Gender, Sex, and Contamination*

A more complete explanation may be found in folk theories of sex and gender, and especially in cultural anxieties and narratives about the ways in which direct physical, sexual contact with women may corrupt men—not just physically but morally and socially.

On this explanation, the divergence at issue springs from the interplay between a cultural commitment to sating male desire and a cultural anxiety about dangers to the man imagined to lie in direct sexual involvement with a woman. Prostitution and pornography both serve the function of satisfying the former (by providing mechanisms to sate male desire), but pornography does not threaten to taint or corrupt the male consumer in the way that prostitution does. It does not do so because it does not require the direct physical involvement of the male consumer with the female provider,<sup>124</sup> and thus spares the male consumer from an array of physical, moral, and social dangers imagined to lie in such physical intimacy. From the perspective of these folk theories and anxieties, then, pornography strikes a more favorable balance between sating male desire and protecting men from potential corruption than prostitution does. This explains why the law privileges performing sex for money in pornography over doing so in prostitution. The former does not involve direct sexual contact with the male consumer, and thus it is not seen to threaten to taint or corrupt the male consumer in the way that the latter can.

1. The Cultural Commitment to Sating Male Desire

Traditionally, prostitution and pornography have both been considered mechanisms for sating male desire, with the vast majority of consumers of both products being men. While popular discourse and some research suggest that consumption of pornography by women is now increasing, popular discourse still associates pornography consumption primarily with men. Contemporary discourse also holds that women rarely patronize prostitutes. Thus, it remains

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124. Of course, the sort of pornography at issue here does often involve direct physical, sexual involvement between a male and a female. As I argue below, however, the law's primary concern appears to be about the male consumer (the prostitute's client or the one who watches the pornography), such that the male participant in the pornography is rendered incidental or (paradoxically) invisible. He may be treated as already corrupted, or he may be sacrificed for the benefit of the masses of male consumers.

fair to see prostitution and pornography as mechanisms oriented to sating male desire.

As the earlier discussion suggested, traditional norms for sexual conduct were ostensibly very restrictive (approving only marital and procreative sex), such that we might expect that such mechanisms for sating male desire would be condemned without reservation. While contemporary standards are considerably more flexible, continuing emphasis on intimacy and affectionate relationships with the potential to persist over time might also support restriction of such mechanisms.

In fact, however, the truth is more complex. As has often been observed, strong narratives in our culture celebrate male desire and its satisfaction, even while suppressing female desire and satisfaction. Popular and folk psychology have supported these narratives by presenting men as naturally and inevitably sexually voracious and subject to passions that are difficult or impossible to cabin. Facilitating these narratives, sex norms include sexual double standards, under which expectations for men are very different than those for women. Such “double standards reserve sexual desire and pleasure for men” and treat “sexual pleasure [as] a male domain.”<sup>125</sup> In conjunction with this double standard, men are “entitled to express their interest in and pursuit of sexual pleasure in ways women are not.”

The proliferation of strip clubs, and their glorification in popular culture, is just one illustration of this differing entitlement; the prevalence of erectile dysfunction drug advertisements is another. Ratings systems in Hollywood also have their own double standard—limiting male nudity to a much greater extent than female nudity, providing heterosexual men with more opportunities to view the naked objects of their desire than are provided to heterosexual women and gay men.<sup>126</sup>

As these narratives and double standards highlight, then, restrictive general norms for sexual conduct have long existed side-by-side with a cultural commitment to sating male sexual desire. Though at odds with general norms, that desire has nevertheless been celebrated as a virtue, naturalized as an intrinsic and immutable feature of masculinity and male psychology, and catered to in double standards that authorize men to deviate from general sex norms in ways not offered to women.

Given the general norms restricting sexual conduct, we might expect to see mechanisms for sating male sexual desire—like prostitution and pornography—prohibited. On the other hand, given the cultural commitment to sating male sexual desire, we might expect to see such mechanisms tolerated. Why, then, do we find that one mechanism is prohibited (prostitution) while

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125. Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 840 (2010).

126. *Id.*

the other is tolerated (pornography)? The answer may lie in how this ancient cultural commitment interacts with a similarly ancient cultural anxiety—an anxiety about the ways in which direct sexual contact with a woman may taint or corrupt a man.

## 2. The Threat Posed by Prostitution: Corruption Through Sexual Contact

As we have seen, there are many different possible reasons to object to, restrict, and criminalize prostitution, including First Amendment, conceptual, moralistic, and harm-based rationales. Woven into this diverse array of objections is a subtle but persistent theme that helps us to distinguish prostitution from pornography: prostitution is seen as a vector for taint and corruption in a way that pornography is not. In this light, the prostitute is not the victim that contemporary policy analysis so often sees; instead, she is cast as a dangerous, toxic force, one that exploits the opportunity presented by male desire to transmit insidious contaminations to the male consumer.

The most obvious examples of anxiety about taint and corruption appear in a standard harm-based analysis of prostitution. As we have seen, that analysis often emphasizes the potential transmittal of STDs. It points to the possibility that the prostitute will contract an STD, but it also emphasizes that the prostitute may transmit an STD to the client, that this may lead to infection of the client's spouse or partners, and that ultimately prostitution threatens to infect the community as a whole.

Though such concerns may often be motivated by sincere practical concerns about disease, they may at the same time be seen as metaphors capturing in tangible form a deeper, less practical fear. We can see this in the magnifying and nightmarish ways the danger has been perceived. As Jo Phoenix writes about United Kingdom prostitution discourse, “sex workers were increasingly being identified as a bridge between the undeserving and diseased few and the healthy, moral many. . . . [S]ex workers were always and already potential reservoirs for disease. . . . In the mid-nineteenth century [they were seen as] a threat to the sexual health of the nation.”<sup>127</sup> We can see this, also, in the way anxiety about disease transmission continues to drive policy debate and lawmaking, despite substantial research showing that STD transmission through prostitution is much less prevalent than normally imagined and is only a small part of the STD problem. And we can see this in the stumbling history of STD control regulations in Nevada. There, legal prostitutes are subject to mandatory STD testing. Prostitutes' reports suggest, however, that the testing regimen is so expensive, burdensome, and invasive of privacy that it motivates prostitutes to leave legal prostitution and return to illegal prostitution. If true, this raises the possibility that Nevada's commitment to aggressive STD testing of legal prostitutes performs a symbolic rather than

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127. See, e.g., Phoenix, *supra* note 100, at 81–82.



practical function. Not well-tailored to actually control STD transmission (since it drives prostitutes away from regulation entirely), such regulation instead symbolically expresses the more general anxiety that prostitutes must be intensively controlled lest they pass on something bad through their touch.

There are other aspects of the discourse about prostitution that suggest that the “infection” that prostitutes pass on may not be a literal one. Consider, for example, some of the other harms that are sometimes associated with prostitution. A common complaint about prostitution is that prostitution invades and then corrupts neighborhoods, transforming healthy, vibrant neighborhoods into decayed, decrepit, devitalized places—as though prostitution were a fungal infection rotting out a previously robust tree.<sup>128</sup> Another powerfully articulated concern about prostitution involves the harm it may do to women collectively. One of the ways in which it might do so resonates with these ideas of disease transmission in a vulnerable community: the woman who acts as a prostitute is objectified, and her objectification may result in other women being destructively objectified, with the destructive objectification spreading through the community like a plague. While each of these concerns about prostitution obviously carries great substantive weight, it also appears in each that the prostitute emerges as a font of something corrupting and destructive, something she may spread to others in devastating ways. In the discourse about prostitution, then, prostitutes pass on disease, but they pass on worse things, too.

In this light, consider some of the other ways that cultural narratives about prostitutes cast them as corrupting the men who engage them. That prostitutes corrupt the men who have sex with them is a long-standing trope: “[W]e picture prostitutes as, amoral, corrupting harlots who corrupt our spouses.”<sup>129</sup> The nature of this corruption is not just physical. On the contrary, it is in significant ways corruption of the man’s virtue and his status.

The idea that the prostitute corrupts the man’s moral virtue is common and straightforward. Traditional sexual norms hold that the man should not engage in sex unless it is marital and procreative. Contemporary norms favor sex that serves intimacy or an affectionate relationship. The prostitute offers to engage in sex with the man that violates these norms. The man is susceptible to this offer—on the traditional narrative—because he is naturally in the sway of a voracious and difficult to cabin sexual appetite.<sup>130</sup> If the man gives in to this

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128. For a related idea, see Shaver, *supra* note 83, at 135 (highlighting that nuisance-focused opposition to prostitution sometimes suggests “that legitimate activities and persons will be smeared by contiguity” to prostitution) (emphasis in original).

129. Michèle Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101, 103 (2009).

130. See, e.g., Shaver, *supra* note 83, at 128 (noting that traditional prostitution laws exempted johns from prosecution in part because they were seen as driven by an “uncontrollable sexual drive”).

appetite, he offends against those norms. Morally speaking, he falls from grace. He is corrupted, then, not just in the sense that he may contract an infectious disease but also in the sense that he is morally degraded.

While the physical and moral corruptions mentioned so far are prominent features of the conventional narratives about prostitution, the narrative is actually more complex than this, for these forms of corruption are accompanied by other sorts of corruption, too. Most importantly, prostitution is a vector for a sort of social degradation, tainting the consuming male by subordinating him to the already-degraded prostitute. In this sense, prostitution threatens to corrupt not just the male consumer's body and virtue but also his social status and privilege.

It is a common trope that prostitution is "seen as [a] direct threat to 'respectable' members of the population."<sup>131</sup> That is, there is something distinctively threatening to a person's respectability—his privileged social standing—about engagement with a prostitute. Several possible reasons for this emerge in discourse about prostitution. One is suggested by the quote from Jo Phoenix, above, in which "sex workers were increasingly being identified as a bridge between the undeserving" and the privileged.<sup>132</sup> In Phoenix's quote, prostitutes are literally a bridge for disease transmission; but in characterizing them as "the undeserving,"<sup>133</sup> the quote suggests that in addition to transmitting their diseases, prostitutes might also transmit their degraded social statuses. In contact with the poor, desperate, marginalized, and dissolute prostitute, the consuming man is touched by and tainted with her poverty, desperation, marginalization, and dissolution.

Why should engagement with the prostitute transfer social degradation to the consuming man? One possibility is that folk social psychology notoriously imagines that people who associate with each other mirror or "rub off" on each other (e.g. that "birds of a feather flock together," that a person can be guilty by association, that we can be judged by the company we keep, etc.). Thus, the simple fact of association with a socially degraded person may diminish an otherwise privileged person's social status. Moreover, this "rubbing off" effect is (in folk social psychology) especially powerful when it involves sexually charged social exchanges, as though the sexual ingredient makes the transmission of unwanted social characteristics from one person to another especially viable. This trope has been especially vivid, for example, in "gay panic" narratives in which actual or perceived social and sexual overtures by gay men are seen as tainting the target with homosexuality and in anti-miscegenatist horror at the loss of racial purity threatened by cross-racial flirtations. (It also appears, more mundanely, in cliché movie and TV stories

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131. *See, e.g., id.* at 127.

132. Phoenix, *supra* note 100, at 81–82

133. *Id.*

about the visceral disgust and indignation high school outsiders face when making overtures to in-group members.) And this social contamination may be most powerful of all when actual physical contact occurs, as highlighted by (among other things) the socially pervasive myths about “cooties”—indeterminate bad things that may be transferred between boys and girls by physical contact, shamefully tainting the recipient—that are so viscerally powerful to children approaching the age of sexually charged interpersonal relationships. In the context of this folk social psychology—in which one person may be contaminated by another person’s degraded social status through social and sexual association—a man who engages with a prostitute is in serious danger of taking on some of her degraded status through his direct physical, sexual association with her.

Folk theories of sexuality suggest that degraded social status may be transferred through direct physical, sexual contact with the prostitute in another way, too. On those theories, the privileged man who engages with the degraded prostitute may be seen as yielding the power associated with his privilege to the prostitute. This is not to say that the client actually yields power to the prostitute, as the actual dynamics in the encounter almost surely involve a significant power difference in the other direction. Rather, it is to say that culturally common narratives about what happens in such an encounter may fuel the notion that the client yields power. On these narratives, the prostitute controls the client through her control over his experience of intense physical sensations and psychological experiences (including desire, pleasure, and vulnerability).<sup>134</sup> Indeed, she may seem to exercise even more power than a sexual partner normally does, insofar as her own experience is unlikely to

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134. This notion of the prostitute’s power over the client emerges in narratives from diverse perspectives. Some suggest that the patron may experience the prostitute as powerful in some sense (independent of whether the prostitute experiences any sort of power). *See, e.g.*, Richards, *supra* note 4, at 1248 n.281 (quoting M. STEIN, *LOVERS, FRIENDS, SLAVES . . . THE NINE MALE SEXUAL TYPES* 313–14 (1974)) (patrons in one study assigned imagined roles to prostitutes, and “[t]he part they assigned the call girl corresponded to an idealized image of woman which exerted great power over their erotic imagination, and the correspondence was a source of excitement and pleasure”). More controversial narratives suggest that the prostitute herself may experience this sense of power. *See, e.g.*, Bernstein, *supra* note 1, at 97 (quoting Lynn Sharon Chancer, *Prostitution, Feminist Theory, and Ambivalence: Notes from the Sociological Underground*, 37 *SOC. TEXT* 143, 163 (1993)) (“[S]ome women describe a sense of . . . power in turning tricks . . . narcissistic enjoyment can emanate from seeing desire in someone’s eyes, knowing the dependency admitted by this attentiveness (however transient and fleeting), making him pay and in fact ‘getting paid’ from a sense of controlling the interaction . . .”). It seems very plausible that the idea that the prostitute experiences power over the client is either a myth or a false-consciousness. Nevertheless, the idea that the prostitute achieves power over the client may be sufficiently widespread (perhaps because it is consistent with common narratives about male and female sexuality generally) that it influences law and social attitudes about prostitution without regard to its empirical validity.

involve intense feelings of pleasure or openness, such that she may seem to be in control of both her own physical and psychological states at just the moment when her client relinquishes control of his, creating a perceived imbalance of power in her favor. Thus, on these folk beliefs, the man who engages with a prostitute might be seen as yielding the power associated with his privileged status to the prostitute. In yielding power to a person whose social status is already degraded, he subordinates himself to that person and therefore degrades his own privileged status.

There is yet another way in which sexual engagement with the prostitute threatens to taint or corrupt the client's social standing: it undermines his ability to take the benefit of certain privileged masculine roles and stereotypes. The client may aspire to privileged, distinctively masculine roles, roles that are accompanied by respectability and security, including the roles of husband, father, and protagonist in traditional romantic love.<sup>135</sup> He may also enjoy the presumption that he has various positive traits stereotypically associated with masculinity, including rationality and self-control. Engagement with the prostitute threatens his access to these roles and presumptions. His engagement with the prostitute may disrupt or destroy his marriage,<sup>136</sup> and thus prevent him from fulfilling the roles of husband and father. It may also draw him away from performance of the protagonist's part in the celebrated dance of romantic love: "[P]rostitution blatantly violates the ideal of romantic love. The patron of the prostitute engages in sexual activity and experiences sexual release impersonally without the process of courting, testing, frustration, and personal idealization of the beloved that characterize romantic love."<sup>137</sup> His engagement with the prostitute may also strip him of the presumptions of rationality and self-control normally associated with the masculine stereotype. Caving in to anti-normative sexual desire, he shows himself irrational and sexually incontinent. He reveals that he is governed by carnal desire rather than reason. Thus, his engagement with the prostitute undercuts his access to privileged social roles and stereotypes, degrading his social status. He is, once again, socially tainted by his sexual engagement with the prostitute.

Our cultural folklore about gender, sex, and prostitution, then, is loaded up with fearful stories and ideas about what can happen when a man has sexual contact with a woman, and especially when the woman has disfavored social

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135. See, e.g., Shaver, *supra* note 83, at 128 (noting that traditional prostitution laws exempted johns from prosecution in part because of the "'important social function they provided' as husbands and fathers").

136. On a common account, anti-prostitution laws reflect, in part, the concern that sex with partners outside the marriage is dangerous to the marriage. See, e.g., Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1270 (2009) ("The criminalization of adultery and prostitution . . . also were intended to protect and stabilize the marital family from the destructive influences of extramarital sex.").

137. Richards, *supra* note 4, at 1244.

attributes. Of course, these stories and ideas do not supply a defensible justification for the criminalization of prostitution any more than childish folklore about cooties does. They may, however, help explain why the criminalization of prostitution persists so stubbornly despite the increasingly pervasive acceptance of feminist, libertarian, and sex-progressive views that might favor decriminalization. On these cultural folk tales, patronizing the prostitute threatens to taint and corrupt the male consumer. Through his contact with her, he may contract a disease; he may be degraded morally; and his social standing may be undermined. He may take on her sickness, depravation, and social degradation. The prostitute appears, now, not as a victim, but as a dangerous, toxic force—toxic not for the traditional moralistic reason that she is promiscuous or wanton, but because her undesirable attributes rub off on the man who touches her, making him undesirable, too. In the process of satiating male desire through physical, sexual contact, she transfers to the male consumer a freight that threatens his body, virtue, and privileged status.

To the extent that these sorts of stories continue to circulate in our cultural conceptions of gender, sexuality, and prostitution, they help explain why we continue to criminalize prostitution, despite the powerful arguments from feminism, libertarianism, and sex-progressivism that the act of prostitution itself should not be a crime. In addition, they may also help explain the riddle this Article addresses—the divergent treatment of prostitution and pornographic acting.

### 3. The Virtues of Pornography

Despite our cultural commitment to the satiation of male sexual desire, folk theories of sexuality favor criminalizing prostitution because those theories see prostitution as threatening to contaminate male consumers not just physically but morally and socially. Pornography, in contrast, does not pose the same threat of taint and corruption to the male consumer that prostitution does, and it is therefore a less costly means of fulfilling the cultural commitment to satiation of male sexual desire. For this reason, folk theories of sexuality favor privileging pornography over prostitution, and thus help explain the law's divergent treatment of prostitution and pornographic acting.

From the perspective of the folk theories discussed so far, pornography does not threaten to taint or corrupt male consumers in the same way that prostitution does. This is true in several ways.

First, pornography does not threaten to infect the male consumer's physical body. When the male consumer uses pornography, he does not interact physically with the pornographic actor's body. Instead, he uses an inanimate visual representation to construct an imaginative representation. As a result, the pornographic actor cannot transmit disease to the male consumer. There is

no danger that his body will be harmed by his engagement with the pornography she produces.

Second, pornography does not threaten the same sort of moral corruption that prostitution does. This is not to say that pornography has been or is morally approved. On the contrary, there have long been narratives, associated with fundamentalist morality and sexual conservatism, condemning consumption of pornography as spiritually warping. Likewise, some influential feminists and psychologists have contended that consumption of pornography has perverting psychological effects, generating violent, anti-social, and/or unrealistic sexual tastes, fantasies, and behaviors. These stories echo stories of prostitution's morally corrupting character. Nevertheless, pornography has generally not been seen as presenting the same threat of moral taint or corruption that prostitution does. Popular morality typically draws an important distinction between acts and thoughts/fantasies, attaching much greater moral weight to immoral acts than to fantasies and thoughts about immoral acts. An act cannot be undone, we say, but thoughts can be buried or forgotten. We say that we do not punish people for dreams, fantasies, and thoughts, and that dreams, fantasies, and thoughts are not crimes. Indeed, the punishment of "thought crimes" was one of the startling and dismaying features of Orwell's seminal dystopia, and popular anxiety about hate crimes often casts such crimes as improperly punishing thoughts. To the extent that use of pornography is understood as an imaginative or otherwise intellectual phenomenon, then, it is not surprising that pornography use is not perceived as implicating the user's moral character to the same extent that patronizing a prostitute is. We do not see such imaginative and intellectual activity as involving the same degree of commitment or investment, and thus we do not see it tainting us the way that acts do.

Third, pornography does not threaten to taint or corrupt the user socially. The pornographic actor may be as fallen and degraded as the prostitute, but the consumer of pornography does not associate directly with the pornographic actor. There is therefore no danger that that pornographic actor's degraded status will "rub off" on the consumer—no taint by association, no transmission of degradation through sexually charged touch.

Nor does the user of pornography cede power to the pornographic actor. Though the pornography may contribute to intense physical and psychological experiences like those the client experiences with the prostitute, the pornographic actor does not exercise any control over or power through those experiences. The pornographic actor is not present, and thus cannot direct the consumer's intense feelings and experiences. Indeed, the pornographic actor is not aware that the user is having those feelings and experiences, and thus can take no benefit from them whatsoever. Thus, pornography sates male desire without appearing to subject the male consumer to the control or power of the pornographic actor. In this way, it insulates the user from any degradation that

might flow from submission or vulnerability to a socially degraded pornographic actor.<sup>138</sup>

Nor does pornography induce the male consumer to engage in conduct incompatible with favored social roles and stereotypical assumptions the way the client of the prostitute does. He does not, for example, engage in conduct that is commonly construed as marriage- and family-threatening infidelity. Rather, on the common narrative, the pornography user's spouse may (or may not) be upset by the use of pornography; but such narratives do not normally present the pornography use as grounds for ending the marriage. Thus, unlike patronizing a prostitute, using pornography is not seen as a fatal offense against a marriage, and engagement with a prostitute is a more potent threat to the man's occupation of the privileged social roles of husband and father than use of pornography.

Thus, on common cultural narratives, prostitution and pornographic acting differ fundamentally in their capacities to contaminate the consuming male. Because prostitution involves direct physical, sexual contact between the consuming male and the prostitute, it poses a serious threat of physical, moral, and social corruption. In contrast, because the user of pornography never has any sort of direct contact with the pornographic actor, pornographic acting does not pose a similar threat to taint or corrupt the consumer. While the consumer's use of pornography may still be morally disapproved and criticized, the threat to the consumer is qualitatively different than that faced by the prostitute's client.

In this sense, folk theories of gender and sex see prostitution and acting in pornography very differently. While both have the virtue of fulfilling the cultural commitment to satiating male sexual desire, only pornography has the virtue of doing so without threatening the physical, moral, and social contamination of the male consumer. From the perspective of these folk theories then, it makes sense to punish prostitution while allowing pornographic acting.

Of course, even pornographic acting does require sexual contact between a man and a woman, and thus it seems to involve the same potential for male contamination through sexual contact with a woman. It might seem that folk theory (and law) should therefore condemn pornographic acting, too. But while pornographic acting might appear to threaten the pornographic actor's partner the same way that prostitution threatens the prostitute's client, this threat is largely invisible in cultural narratives about pornography.

There are several possible explanations for this threat's invisibility. The most likely is that the male partner in pornography is seen as already fallen or

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138. MacKinnon, *Pornography*, *supra* note 1, at 997 (noting that in pornography, "[t]hat the sexually used are transported on paper on celluloid or digitally may make the transaction seem more distanced").

contaminated at the outset. The male partner is, after all, a pornographic actor, too. He has already foresworn the physical, moral, and social purity of the “respectable” citizen. As a result, nothing is gained by protecting him from contamination through sexual contact with the female pornographic actor. From the perspective of folk theory, he is not worthy of protection, and it is too late to save him anyway. Another explanation is that popular discourse frames pornography in a way that obscures the participation of the male pornographic actor. That discourse typically frames pornography as presenting objectified women to be consumed by male viewers—focusing on the victimization or promiscuity of the actress, and the misogyny or lust of the male consumer—with the male actor dropping entirely out of the discussion. Finally, lack of concern for the male pornographic actor may reflect a cultural willingness to “sacrifice” a small number of men—exposing them to threats of physical, moral, and social taint and corruption—in service to a mechanism that can sate the desires of large numbers of men without threatening to taint or corrupt them. That is, folk thinking may be willing to overlook the potential contamination of the male pornographic actor because the ratio of men contaminated to men satiated is much smaller in an instance of pornographic acting than it is in prostitution.

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The answer to this Article’s riddle, then, is that the critical difference between prostitution and pornographic acting lies in their perceived capacities to corrupt the men who consume them. As we have seen, there are many plausible arguments for criminalizing prostitution but nearly all would also mandate criminalizing pornography. And, as we have seen, there are plausible rationales for decriminalizing pornographic acting but nearly all would also mandate decriminalizing prostitution. In order to explain the law we have, then, we need another sort of explanation, one that can account for both the criminalization of prostitution and the decriminalization of pornographic acting.

We can find such an explanation in our culture’s folk theories about sexuality, and especially in the interaction between our cultural commitment to sating male desire and our cultural anxiety about the ways in which direct physical, sexual contact with a woman may taint or corrupt the man who engages in that contact. Despite the increasing influence of feminism, libertarianism, and sex-progressivism in popular thinking about sex, then, the law governing these vices remains stubbornly attached to what seem like archaic and superstitious attitudes about sexuality—attitudes that are on the one hand preoccupied with male interests and on the other hand fearfully superstitious about what happens when men and women come into physical contact.



## V. CONCLUSION

Under the conventional legal definition of prostitution, when A has sex with B because B pays A to have sex with B, A commits prostitution. The same standard definition mandates that when A has sex with B because a third party pays A and B to have sex with each other in order to make a pornographic picture or film, A commits prostitution. Nevertheless, many popular and legal authorities hold that pornographic acting is not prostitution, giving rise to the riddle that inspires this Article.

While the courts have offered an array of justifications for this anomaly in the law, their justifications are unsatisfying. Classic legal moralist and harm-oriented theories of criminalization do not do much better at making sense of this riddle. There is good reason to think, then, that it cannot be rationalized or justified.

It can, however, be explained. As this Article has shown, this anomaly in the law of vice springs from the interplay between some of our culture's folk theories of sexuality, including theories that privilege satiation of male sexual desire and theories that make sexual contact with women—and especially women of low social status—a potential source of physical, moral, and social contamination for men. This is not an explanation that makes the law's anomalous treatment of pornographic acting more appealing, for these folk theories of sexuality appear both misogynist and childishly superstitious. But discovering these folk theories at work in this anomaly should help us understand where the anomaly comes from. Moreover, in tracing the anomaly to such ugly roots, it provides new ammunition for discrediting and reforming these anomalous practices.

In addition, though this Article has not directly addressed the long-standing debates about whether prostitution and pornography should be criminalized, the ideas developed here might also have some relevance to the criminalization debates. That the law's distinction between prostitution and acting in pornography can be traced back to anxieties about corruption through direct sexual contact highlights some of the persisting preoccupations of the law of vice. It is a body of law that continues to be oriented to the concerns of the male consumers of vice, and one that continues to be shaped and moved by viscerally held and childlike superstitions about the dangers of sexual contact with the female body and the ways sex might corrupt the otherwise virtuous person who comes into contact with it.<sup>139</sup>

It may be that these insights point in different directions with respect to the criminalization of vices like prostitution and pornography. On one side, the confirmation of vice-law's preoccupation with the concerns and experiences of

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139. Richards observes that legal regulation of prostitution may “rest on a residuum of quite primitive beliefs which we self-consciously reject elsewhere in our social life but which, in certain circumscribed areas, unconsciously retain their force.” Richards, *supra* note 4, at 1236.

men and the imagined threats posed by women reinforces radical feminist observations about the law's persisting disdain for women and their experiences, and thus it supports radical feminist arguments for eradication of prostitution and pornography. On the other side, spotlighting vice-law's superstitious anxiety about potentially charged physical contact between men and women might support feminist, libertarian, and sex-progressive arguments for jettisoning sex-restrictive laws like those governing prostitution as archaic, childlike, superstitious, and irrational.

Finally, the ideas developed here may help explain why laws criminalizing prostitution hang on so stubbornly—not only against the steady tide liberalizing sex regulation generally but also in the face of the near unanimity among feminists (who are otherwise deeply fractured regarding prostitution) and others that prostitutes themselves should be seen as victims not perpetrators, and that prostitution should not be criminal (even if patronizing, pimping, and other crimes that exploit prostitution should be). If the prostitute's physical engagement with the client is understood most viscerally to taint or corrupt the client, the prostitute is recast not as victim but as vector, and not as participant in a victimless crime but as the mechanism by which serious harm is inflicted. In other words, on this account, prostitution is not a vice offence at all (at least if vice is a label for victimless crimes) but something much worse. Again, this raises the possibility that even as feminist, libertarian, and sex-progressive norms continue to advance and dissolve away increasing swaths of traditional vice law, laws against prostitution may show unexpected resilience, sustained by superstitions as primitive and stubborn as playground myths.