

# PANDORA'S BOX: AN ESSAY REVIEW OF AMERICAN LAW AND LITERATURE ON PROSTITUTION

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"So, if she has been called a woman of the town, a tart, a bawd, a wanton, a bawdy-basket, a bird-of-the-game, a bit of stuff, a buttered bun, a cockatrice, a cock-chafer, a cow, a crack, a cunt, a daughter of Eve, a gay girl, a gobble-prick, a high-flyer, a high-roller, a hussy, a hurry-whore, a jill, a jude, a judy, a jug, laced mutton, lift-skirts, light o'love, merry legs, minx, moll, moon-lighter, morsel, mount, mutton-broker, nestcock, night-bird, night-piece, night-walker, nymph of darkness, nymph of the pavement, petticoat pick-up, piece, pillow-mate, pinch-prick, pole-climber prancer, quail, quiet mouse, or even Queen—it is not surprising."<sup>1</sup>

## I. PROSTITUTION IN LAW AND LITERATURE

### A. *Introduction*

Erica Jong's introduction to her story of Fanny Hackabout-Jones is

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In Hesiod's THEOGONY, Pandora introduces sexuality into the world (opens her "box") and destroys the golden age when men were free from work, sickness, and old age. In his WORK AND DAYS, Pandora is perilous temptation sent by Zeus to ruin men. Pandora, like Eve, carries the stigma of all sexual responsibility and is responsible for the fall of man. In Genesis, Chapter 3, Adam, too, is tempted by Eve who offers him fruit from the tree of knowledge of good and evil. When God asks Adam why he disobeyed God's commandment not to eat of the fruit of the forbidden tree, Adam places all responsibility on Eve. God says to Eve: "I will multiply thy sorrow, and thy conceptions: in sorrow shalt thou bring forth children, and thou shalt be under thy husband's power, and he shall have dominion over thee." In both stories, the tempter is a god, the woman takes the rap, and the man is held blameless for his fall.

1. E. JONG, *FANNY: BEING THE TRUE HISTORY OF THE ADVENTURES OF FANNY HACKABOUT - JONES*, 448-453, 490-95 (1980). (*FANNY* is the feminist retelling of J. Cleland - *FANNY HILL OR MEMOIRS OF A WOMAN OF PLEASURE*, (1748-49 Penguin ed. 1985), in which Fanny becomes an initiator of her own actions. She both recognizes her debased status in the patriarchal system and works to substitute a communal version of power sharing. Fanny never denies the humanity of men but, rather, recognizes the inhumanity of patriarchal oppression. Fanny transcends modern feminists by expressing the life of every woman, recognizing the existence of sexuality, accepting her own complex nature, and truly entering into the universal sisterhood).

a feminist scholar's ironic comment on prostitution and female sexuality in a society that equates power with gender. Catherine MacKinnon argues that gender is not a biological difference but a social construct of male domination over women. Sex roles and sexuality, MacKinnon asserts, are both defined by men for women. Sexuality is what men want as erotic gratification and, therefore, how women must define their sexuality. Sex roles are the circumscribed social roles that women are given in a male-dominated society. "Gender is an inequality of power, a social status based on who is permitted to do what to whom."<sup>2</sup>

The literature I survey in this essay shows that the United States created its own version of prostitution. This version told a story of a public sphere for men's political and economic power and a private sphere for women's domesticity. Prostitution became a marketplace version of women's sexuality and sex role, controlled by men. By labelling the fate of a woman who did not conform to norms of sexual behavior and sex role, prostitution defined the legitimate domestic role of acceptable women in the private, domestic sphere.

The sanctions against prostitution were overt suppression and covert control. Suppression upheld the norm of acceptable female sexuality and sex role. Control maintained the reality of economic and political male power in the marketplace to buy or sell women as sexual objects. The stories about prostitution justified the social and legal norms as well as behavior. Historians and economists asserted prostitution was the oldest profession. Politicians considered prostitution a necessary evil. Medical reformers called prostitution the social evil. Churchmen denounced prostitutes as scarlet women. New abolitionists said prostitutes were white slaves. Behind each of these statements was a story about women and the patriarchy they lived in. They were explicit statements of social and legal norms; whereas the statement, unlike slaves, the wife could usually deny her sexual favors to her husband, was an implicit assertion of the status and role of women, who, under male control, were only able to act through passive resistance.<sup>3</sup>

Indeed prostitution is one of the oldest professions, if by that we mean it is an accepted trade. What type of trade it is, however, has been viewed in many ways. The earliest recordings of legal codes include prostitution as another set of property relationships among men. The discourse created on this topic views prostitution as another aspect of the role of women as property—subjects of exchange, barter, and slavery—which

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2. C. MACKINNON, *FEMINISM UNMODIFIED* 6-10, quotation at 8 (1987) See R. BLEIER, *SCIENCE AND GENDER* 80 (1984) (" . . . gender is, in fact, a social construction or accomplishment, and gender attributions differ across cultures. Science, however, in the form of gender-difference and gender role (sex-difference and sex-role) research, views these attributions as 'natural' categories for which biological explanations are appropriate and even necessary.").

3. V. BULLOUGH & B. BULLOUGH, *THE HISTORY OF PROSTITUTION* (1964); *THE IMAGE OF THE PROSTITUTE IN MODERN LITERATURE*, at 1-17 (1984).

was regulated by legal codes, customs, and taboos.<sup>4</sup> Prostitution can just as easily be analyzed under a modern market economy theory: prostitution as a business relationship, a market transaction which should be regulated by appropriate zoning, tax, health, safety, and fair advertising laws.<sup>5</sup>

Each story about prostitution was created in the context of patriarchal society in different historical settings. Since each story has a distinct origin which includes a cultural and political setting with its own legal norms and cultural explanations, each can be used as a fundamental analysis of the nature of that patriarchal society.<sup>6</sup> Necessary evil is at least as old as the Old Testament, Plato, Aristotle, and St. Paul.<sup>7</sup> Social evil is a product of the near-plague conditions brought about by the spread of syphilis in the sixteenth and seventeenth centuries.<sup>8</sup> White slavery caught the fervid attention of old and new abolitionists, suffragettes, and the social purity movement in late nineteenth century America as well as of nativists who could then blame immigration and degenerate races for the growth of urban crime and poverty.<sup>9</sup>

The purpose of each story has been to explain prostitution as a product of women's irrational nature and to justify the social and legal regulation of all women. Prostitution describes the final degradation of women through their sexuality which permits men to place women in a subservient status.

### B. *Theories of Regulation*

The justifications for legal regulation of prostitution are numerous and not mutually contradictory. The primary reason given for controlling prostitution is preservation of the family. The family serves as a means of enforcing wider socializing controls by the state. The state, in turn, regulates prostitution in order to protect the family. Women are treated as property controlled by father, brother, husband, and state.<sup>10</sup>

Other reasons for regulation include medical regulation to prevent

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4. V. BULLOUGH & B. BULLOUGH, *supra* note 2, at 17 states the Hammurabi Code (c. 1404-1162 b.c.) regulated the position of prostitutes. *See generally*, G. LERNER, *THE CREATION OF PATRIARCHY* (1986).

5. *See, e.g.*, C. WINNICK & P. KINSIE, *THE LIVELY COMMERCE: PROSTITUTION IN THE UNITED STATES* (1971); J. DECKER, *PROSTITUTION: REGULATION AND CONTROL* (1979).

6. C. SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN THE UNITED STATES* 18 (1985); *See generally*, G. LERNER, *supra* note 4.

7. K. HARRIS, *SEX, IDEOLOGY, AND RELIGION* (1984); *THE INTERPRETERS DICTIONARY OF THE BIBLE* 963-66 (Supp. 1976); E. STANTON, *THE ORIGINAL FEMINIST ATTACK ON THE BIBLE; THE WOMEN'S BIBLE* (Arno Reprint ed. 1974).

8. V. BULLOUGH & B. BULLOUGH, *supra* note 2, at 127-144.

9. W. RECKLESS, *VICE IN CHICAGO* (1933); G. KNEELAND, *COMMERCIALIZED PROSTITUTION IN NEW YORK CITY* (1913).

10. E. MORGAN, *THE PURITAN FAMILY: RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND* (Rev. ed. 1966); S. DITZION, *MARRIAGE, MORALS, AND SEX IN AMERICA* (Rev. ed. 1969).

the spread of disease, protection of minors and victimized women, protection of property values, prevention of official corruption and the regulation of organized crime. Both Carol Smith-Rosenberg and G.J. Barker-Benfield see the imposition of strict medical and social controls over female sexuality in nineteenth century America as attempts during a period of great social disorganization to reinforce patriarchy. Gerda Lerner cautions researchers, however, to place the controls over women into a larger context of class and gender controls.<sup>11</sup>

Nineteenth century America created its own special theory of gender, stressing the need for male self-control and female passivity. The justification advanced for control over female sexuality was a belief in women's inferiority. Caesar Lombroso,<sup>12</sup> a major figure in nineteenth century criminal anthropology, began his study of female offenders by quoting the biblical condemnation of Eve and then set forth his assumption that women are by nature primitive, intellectually underdeveloped, lacking in compassion (an intellectual trait), and emotive. Male criminality arose either because of evolutionary differentiation (property crimes) or aggressive personality traits (violent crimes). Women were criminal because of their underdeveloped natures which permitted them to be led into crime. Prostitutes were normally mentally defective. But all women were of lesser intelligence and incapable of intellectual development and would become totally atavistic if led into crime. Thus nineteenth century theories of criminal responsibility and penal reform did not apply to women since they could do nothing about their underdeveloped natures or change their inferior status.<sup>13</sup> The Supreme Court opinion in *Buck v. Bell*<sup>14</sup> upholding

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11. C. SMITH-ROSENBERG, *supra* note 6 at 22-24, 182-244, *The Cycle of Femininity in Nineteenth Century America, The Hysterical Woman: Sex Roles and Role Conflict in Nineteenth Century America, The Abortion Movement and the AMA, 1850-1880*; G. BARKER-BENFIELD, *THE HORRORS OF THE HALF-KNOWN LIFE: MALE ATTITUDES TOWARD WOMEN AND SEXUALITY IN NINETEENTH CENTURY AMERICA* (1976); G. LERNER, *THE MAJORITY FINDS ITS PAST: PLACING WOMEN IN HISTORY* 3-14, 169-180 (1979).

12. C. LOMBROSO & W. FERRERO, *THE FEMALE OFFENDER* xi, xv, 109-113 (1903, trans. 1915).

13. *Id.*; C. SMITH-ROSENBERG, *supra* note 6, at 24-26; E. FREEDMAN, *THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830-1930*, at 18-21, 111-116 (1981).

14. 274 U.S. 200 (1927) "It is better for all the world, if instead of waiting to execute the degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit for continuing their kind . . . Three generations of imbeciles are enough." *Id.* at 207. See S. GOULD, *THE FLAMINGO'S SMILE: REFLECTIONS IN HISTORY* 306-318 (1985) for the story of Carrie Buck. Dr. K. Ray Nelson, director of the Lynchburg Hospital, where Carrie was sterilized, researched the records of more than 4,000 sterilizations performed at the institution, the last in 1972. He found Carrie and her sister, Doris, who was also sterilized under the same law. Carrie was a woman of normal intelligence. She was committed on the testimony of her foster parents whom she continued to live with as an adult, doing chores around the house. Carrie was raped by a relative of her foster parents and then blamed for the rape. She was sent away to have an illegitimate child. Carrie was a sexual deviant, not a mental deviant.

state laws on sterilization of delinquent women placed a great reliance on these new theories of scientific criminology.

In general, criminology classed delinquent women with the insane and children, assigning them to indeterminate sentences and "protection" by the state, which meant controls but not rights. Women were not afforded the constitutional protections given to men under criminal jurisprudence. The fourth amendment did not protect suspected prostitutes against medical inspections and enforced medical procedures. The fourteenth amendment did not protect women against lack of due process or unequal protection when laws discriminated between prostitutes and their male customers on the basis of sex. Vagrancy laws were indiscriminately applied to unescorted women on the streets.

The irony of social controls over prostitution is best seen in the double standard of enforcement. Male customers of prostitutes were very seldom arrested because male purchase of sex was acceptable legal and social behavior. The moral justifications for the legal control of prostitution were justifications for control, called protection, of women.<sup>15</sup>

The legal and cultural history of prostitution in nineteenth and twentieth century America offers us the opportunity to review attitudes towards female sexuality and sex roles, and the legal controls placed on women to control their sexuality and sex roles. The literature shows that America stood apart from Europe in its statements of values and norms, if not its treatment, of prostitution. We created a sacred vision of the American family as a counterpart to our secular vision of individualism. The legal control of women was perceived as essential to this vision because she was the upholder of virtue in a nation of opportunistic individualism.<sup>16</sup>

## II. LITERATURE OF POPULAR CULTURE REFLECTING ATTITUDES TOWARDS SEXUALITY AND PROSTITUTION

### A. *Literature of Women's Sexuality and Prostitution*

Until recently, there had been little interest in the lives of working women in early America; historical and intellectual accounts dealt primarily with the middle and upper classes. What is written about servants and

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15. B.M. HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 172-175* (1987); P. ROBY, *POLITICS AND PROSTITUTION: A CASE STUDY OF THE FORMULATION, ENFORCEMENT AND JUDICIAL ADMINISTRATION OF THE NEW YORK STATE PENAL LAWS ON PROSTITUTION, 1870-1970* (1971); H. WOOLSTON, *PROSTITUTION IN THE UNITED STATES: VOL. I. PRIOR TO THE ENTRANCE OF THE UNITED STATES INTO THE WORLD WAR* (1921, reprint 1969).

16. See Cott, *Passionless: An Interpretation of Victorian Sexual Ideology, 1790-1850*, at 162-181; Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson, 1800-1840*, at 182-196; Smith-Rosenberg, *Beauty, the Beast, and the Militant Woman: A Case Study in Sex Roles and Social Stress in Jacksonian America*, at 197-221 in N. COTT & E. PLECK, *A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN* (1979).

common laborers is about their control by masters and by the state. But it should be understood that control over all women was a part of life in early America. The male family head was the governing institution and the larger family was the state. The head of the family—the father—was expected to train, discipline, and manage his wife, children, and servants. If he failed in this responsibility, then the state intervened.<sup>17</sup>

American writers maintained the primacy of the father in decision-making but advised wisdom in accepting his children's choices as essential to a sound marriage. The religious reform background of America tempered its attitude towards the marriage as a romantic rather than a business transaction. Marriage itself, however, was a sacred institution and sexuality outside of marriage was forbidden. Early American ideology did not countenance a double standard of sexuality, and the Puritan communities used communal shaming to both rehabilitate sinners and to illustrate that the state would not condone transgressions.<sup>18</sup>

The writings of seventeenth and eighteenth century church and political leaders show continuing movement towards a growing tolerance of increased female participation in education and public life. Yet, there was a desire to place strict limits on women's activities outside the home. On the one hand, social conditions in America often required the woman to manage her husband's business affairs and to train her children and domestics in his absence. On the other hand, women in public life would destroy the stratified role women must play in upholding family values, and a clear line was drawn between education for private and for public spheres.<sup>19</sup>

Charles Brockden Brown's gothic romance, *Ormond*, set in Philadelphia during the plague of the 1790's, illustrates this dichotomy. Constantia Dudley was unable to support her sick and destitute father because he trained her in mathematics and the classics rather than in domestic skills; she was not suitable to be a governess for young ladies. Despite her pov-

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17. E. MORGAN, *supra* note 10; See, M.S. BENSON, *WOMEN IN EIGHTEENTH CENTURY AMERICA: A STUDY OF OPINION AND SOCIAL CHANGE* (1935) is a study of the middle and upper class family. For a study on working class communities of women, see T. DUBLIN, *WOMEN AT WORK: THE TRANSFORMATION OF WORK AND COMMUNITY IN LOWELL, MASSACHUSETTS, 1826-1860* (1979), and Basch, *The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution*, 12 *Signs: J. of Women and Culture in Soc.* 97-117 (1986) (for new research on working class women in early American history).

18. See, Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts*, 20 *AM. J. OF LEGAL HISTORY* 282, 298-308 (1976) (a study of fornication cases in local courts that shows the change from moral use of the courts to enforcing support obligations for illegitimate offsprings). See also, M. HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878* (1980).

19. Smith, *The Study of the Family in Early America: Trends, Problems, and Prospects*, 39 *WILLIAM AND MARY Q.* 3-28 (1982 3d Ser.) (an excellent review of the literature on post revolutionary changes in women's status); M.S. BENSON, *supra* note 17, at 131-178.

erty Constantia, educated to make her own decisions and maintain her integrity, resisted the advances of the evil Ormond. Her foil, the orphaned Helena, had no other choice than to become a fallen woman, the mistress of the evil Ormond, because her wealthy father educated her only in dancing music and romantic novels, the domestic skills. She had no mind of her own, no ethical basis to withstand the destruction of her moral purity.

Brown was the exception, however, in presenting a cultural counterpoint in his novels and in *Alcuin*, a polemical essay about the subjugation of women.<sup>20</sup> All other sermons, essays, and popular literature of his time confirmed the legal and religious concept of male authority over the family and in the state. They all set the standard for a carefully restricted education for women based on useful domestic skills.<sup>21</sup>

Popular literature reinforced the need for restrictions over women. The stories portrayed passive, sublimated, and domestically skilled women. Their foils were romantic, flighty, and ungovernable, and the result was downfall and damnation. There was no redemption for the fallen woman but death, even if the seduction was not her fault. The lesson of these stories was that sin weighed equally on both male and female. The female, however, received the greater punishment since she had the greater responsibility for falling into original sin and since the fall of the male was attributed to her sexual attractions. Each story was a recreation of Adam and Eve.<sup>22</sup>

In "Images of Women in Early American Literature,"<sup>23</sup> Ann Stanford discusses early stories which stressed the Puritan concept of male and female duties. A favorite story was the "captivity theme" where a woman prevailed among her Indian captors through belief in God.<sup>24</sup> But later eighteenth century narratives and fiction began to indicate a growing dis-

20. C.B. BROWN, ORMOND OR THE SECRET WITNESS (1887 ed.); *The Problem of Origination in Brown's Ormond*, 126-141, Davidson, *The Matter and Manner of Charles Brockden Brown's Alcuin*, 71-86, Baym, *A Minority Rendering of Wieland*, 87-103, in B. ROSENTHAL, CRITICAL ESSAYS ON CHARLES BROCKDEN BROWN (1980); C.B. BROWN, ALCUIN, Parts I and II were published in 1798 and Parts III and IV were published in 1815, in W. DUNLAP, THE LIFE OF CHARLES BROCKDEN BROWN.

21. M.S. BENSON, *supra* note 17, at 101-171, citing E. HITCHCOCK, MEMOIRS OF THE BLOOM GROVE FAMILY (2 vol. Boston, 1790); BENJAMIN FRANKLIN, REFLECTIONS ON COURTSHIP AND MARRIAGE; C. MATHER, ORNAMENTS FOR THE DAUGHTERS OF ZION (1692); B. RUSH, THOUGHTS UPON FEMALE EDUCATION (Philadelphia 1787).

22. S.H. ROWSON, CHARLOTTE TEMPLE: A TALE OF TRUTH (1794, reprint 1986); W.H. BROWN, THE POWER OF SYMPATHY (1798, reprint 1970); see N. BAYM, WOMEN'S FICTION: A GUIDE TO NOVELS BY AND ABOUT WOMEN IN AMERICA, 1820-1870 (1978); Welter, *The Cult of True Womanhood*; 1820-1860, 18 Am. Q. 151-174 (1966).

23. Stanford, *Images of Women in Early American Literature*, 184-234 in WHAT MANNER OF WOMAN: ESSAYS ON ENGLISH AND AMERICAN LIFE AND LITERATURE (1977).

24. M. ROWLANDSON, THE SOVEREIGNTY AND GOODNESS OF GOD (1682); C. MATHER, HUMILIATIONS FOLLOW'D WITH DELIVERANCES (1697) LUCTUOSUM (1699) are examples cited in Kolodny, *Turning the Lens on "The Panther Captivity": A Feminist Exercise in Practical Criticism*, in WRITING AND SEXUAL DIFFERENCE (1980).

content among women in their appointed roles and a fear in men of the changes. The literature ranged from satirical pieces about uppity women by Benjamin Franklin in "The Courant" (a New England periodical) and John Turnbull's satire on women, *The Progress of Dullness* (1792) to epistolary novels such as William Hill Brown's *The Power of Sympathy* which warns young women against seduction and betrayal. In Brown's novel, the theme of sexuality as a form of female insanity is fully developed.

Stanford notes that the gothic tale of seduction coincided with a rise in premarital conception and served as a moral caution of the dire consequences of sexual incontinence. Early writers linked premarital pregnancy with a change of controls over marriage property settlement and the advent of romantic marriage, but recent studies indicate that more to the point was a loss of control over the lower social classes.<sup>25</sup> Morality was still rigid in the middle classes where property and status were maintained, but the rural to urban migration of villagers to industrial settings increased premarital cohabitation among the propertyless classes. Or, at least, it reduced the former pattern in villages of enforced marriage after conception of a child out of wedlock.<sup>26</sup>

Cathy N. Davidson<sup>27</sup> explains the sentimental and gothic American novels of post-revolutionary America as setting forth a story of women's oppression within a myth of freedom. Although most critics see Charles Brockden Brown's protagonists as predecessors to the heroic tradition of James Fenimore Cooper, Nathaniel Hawthorne, and Herman Melville, Davidson places Brockden Brown in the earlier tradition of William Hill Brown's *The Power of Sympathy* and Susanna Rawson's *Charlotte Temple*. Both novels were based on recent scandals involving the seduction and betrayal of a young woman by a wealthy married man, and her subsequent suicide. The authors tell the reader they are not writing romantic novels but, rather, setting forth cautionary moral tales to inspire young women to purity.<sup>28</sup>

*Charlotte Temple* became a cult novel of the 1800's, with its sentimentalization of death as the consequences of romantic love. On one level it could be read as a moral lesson teaching the need to stay on the straight and narrow path of true womanhood, but it also contrasted the oppressed and servile status of women in the new republic with male freedom to

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25. Stanford, *supra* note 23; V. BULLOUGH & B. BULLOUGH, *supra* note 3, at 187-198; Freedman, *Sexuality in Nineteenth Century America: Behavior, Ideology, and Politics*, 10 Rev. in Amer. Hist. 196-215 197-201 (1982).

26. Stanford *supra* note 23; Smith, and Hindus, *Premarital Pregnancy in America 1640-1971: An Overview and Interpretation*, J. of Interdisciplinary History 537-570 (1975); Shorter, *Female Emancipation, Birth Control, and Fertility in European History*, 78 Am. Hist. Rev. 605-640 (1973); Shorter, *Illegitimacy, Sexual Revolution, and Social Change in Modern Europe*, J. of Interdisciplinary History 237-272 (1971).

27. C. DAVIDSON, *REVOLUTION AND THE WORD: THE RISE OF THE NOVEL IN AMERICA* (1986).

28. *Id.* at 95-109.

quest for self-fulfillment. Not only were women depicted as sexually enslaved by men, it was also clear that men were free to seek sexual gratification without fear of punishment whereas women were ruined by any indiscretion.<sup>29</sup>

Perhaps the most representative popular novelist of mid-nineteenth century America was James Fenimore Cooper, who romanticized the aristocratic ideal of arcadian America and decried the onslaught of revolutionary America in his *Leatherstocking Tales*.<sup>30</sup> In *The Ways of the Hours*, Cooper attacked two legal reforms of nineteenth century America: the jury system and women's property rights. In the novel, Mary Munson (Mildred de Larocheforte nee Millington) was a wealthy young matron, educated and married in France to a dissolute aristocrat. She abandoned him and secluded herself in the house of a poor, upstate New York farm couple, the wife, a harridan and the husband, a drunkard. A fire caused the couple's deaths, and Mary was accused of arson, murder, and theft.

Exotic Mary was contrasted to pale Anna Updyke, the submissive young woman betrothed to Jack Wilmeter, one of Mary's defending attorneys. Jack was sexually attracted to Mary, but Anna cleaved faithfully to his side and dutifully supported his belief in Mary's innocence. Mr. Thomas Dunscomb was Mary's senior attorney, and, as the story unfolds, we learn that he was jilted by Mary's mother. Attorney Dunscomb is convinced that instability and recklessness, now allowed to run amuck by women's property rights, were endemic in the family. What else could account for women's actions? Certainly not men's actions towards women or a woman's rational choice.

Mary managed to escape the clutches of a biased local jury and a prosecutor out to win an election through victory in this trial, but then showed her "moral insanity." Thereafter her affairs were firmly managed by her "friends." The dissolute husband was, of course, sympathetically treated by Attorney Dunscomb as a rightful claimant to Mary and handsomely paid off with Mary's funds. Attorney Dunscomb lectured Mary,

"Your return to America has, I fear, been most inopportune. Among other innovations that are making on every side of us, even to the verge of the dissolution of civilized society, comes the liberty of woman. Need I

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29. *Id.* at 110-150. See also, C. PEARSON & K. POPE, *THE FEMALE HERO IN AMERICAN AND BRITISH LITERATURE* 1-49, 260-70, Bibliography 297-305 (1981) (A study of male and female images of self-worth in literature. Males can be independent questors. Females, the authors assert, are expected to emulate the dependent prefallen virgin. Any deviation from this ideal form is accompanied by suffering. The only way most female writers could transcend the dilemma created by independence being related to female failure was to portray a total selflessness that is experienced in a new respiritualized community.)

30. *THE LEATHERSTOCKING TALES* (Reprint 1985) include *THE PIONEERS* (1823), *THE LAST OF THE MOHICANS* (1826), *THE PRAIRIE* (1827), *THE PATHFINDER* (1840) *THE DEERSLAYER* (1841); See J. TOMPKINS, *SENSATIONAL DESIGNS: THE CULTURAL WORK OF AMERICAN FICTION, 1790-1860*, at 94-121 (1985) (on the cultural history in James Fenimore Cooper).

tell you, what will be the next step in this downward career? Her licentiousness. No woman can throw off the most sacred of all her earthly duties, in this reckless manner, and hope to escape from the doom of her sex."<sup>31</sup>

Nina Baym notes that male heroic literature of the nineteenth century did not deal with women as characters but rather used them as symbolic representations of the ideal and the soul, or the soul and the real. Cooper's good women were domesticated pillars of society. Poe created oppressive relationships between lovers and mistresses or wives and husbands as a counterfoil to the male's heroic search for self. Melville sought self-identity in freedom from female destiny. Although Hawthorne's women were more fully developed than other authors of his time they were still symbols. But women in Hawthorne's stories were symbols of values of creativity and sincerity while men were portrayed as repressed and conventional.<sup>32</sup>

Hester in *The Scarlett Letter* (1850) and Zenobia in *The Blithedale Romance* (1852) were strong, passionate women who transgressed social standards and were punished by society. Hawthorne portrayed the women in these novels as powerless to show the plight of the individual in a repressive society and to illustrate problems of choosing between self and society's moral order. Hester represents choosing oneself while Dimmesdale is constrained by a morality imposed on him by society. But literary criticism of *The Scarlet Letter* elevated Dimmesdale's choice: Dimmesdale's remorse was greater than Hester's because his was based on the ideal he has degraded whereas Hester's repentance was based on love. Hester, as woman, was able to seek redemption in loving absolution. Dimmesdale could only be redeemed through confession and deliverance from sin in death.<sup>33</sup>

Male writers used women as symbols of lightness and darkness. Some were the writers of moral tales who sought to maintain social control through cautionary tales of evil brought about by female transgression. Others were more aspirational and wrote about the heroic quest in which female represented social organization and male represented freedom and ideal. Hawthorne and Brockden Brown portrayed sympathetic pictures of strong women who were labelled deviant but who actually rep-

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31. J.F. COOPER, *THE WAYS OF THE HOUR: A TALE*, at 491 (1968) (1850).

32. Baym, *Portrayals of Women in American Literature, 1790-1870*, 211-234 in *WHAT MANNER OF WOMAN*, *supra* note 23.

33. Munger, *Notes on the Scarlet Letter*, 93 *ATLANTIC* 521-535 (April 1904); Baym, *Portrayal of Women in American Literature, 1790-1870* 211-234, in *WHAT MANNER OF WOMAN supra* note 23; D.B. DAVIS, *HOMICIDE IN AMERICAN FICTION, 1798-1860*, at 169, 205-206 (1957) (stating that popular literature assigned different moral natures to men and women. Men were rational beings, capable of freedom and responsibility, but a woman's nature was based on her sexuality. A fallen woman, even though seduced, embodies positive evil that must be condemned. Hester, therefore, had to repent for the guilt she shared with all women of having corrupted natural man through her sexuality. Back to Pandora and Eve.).

resented freedom and moral will opposed to a repressive society. On the whole, however, the popular literary culture was dominated by the gothic tale of seduction and abandonment.<sup>34</sup>

Women writers used masks of conformity to hide their assertions of individualism and their rebellion against dependence. Emily Dickinson's poetry and Harriet Beecher Stowe's and Louisa Mae Alcott's fiction used the domestic realm of a dependent woman's separate sphere to adjust to a male world. Thus domestic reality became the realm by which they measured their quest. They still used the patriarchal definitions of the status of women and the roles women should play. Women who did not adjust to domesticity were social transgressors, fallen women. Sexuality and non-conformity were sinful. Therefore, the only way to gain independence within these definitions was to withdraw from sexuality. The nineteenth century literary portrait by women of women was an attempt to gain a realistic independence through asexuality. A separate domestic sphere based on higher ideals could be maintained.<sup>35</sup>

#### B. *The Counter Culture Movement and Popular Advice Literature*

In the nineteenth century sexual immorality became the target of the commonly held fears that the established social order was disintegrating. Industrialization and the rise of individualism tended to reduce the socializing control of nuclear family organizations.<sup>36</sup>

Counter-culture reactions to nineteenth century industrialization present a vivid picture of the fear about family disintegration and loss of patriarchal control. The Mormons, Shakers, and Oneida Perfectionists were just three contemporary examples of evangelical, communal movement; each one included rigid control over female sexuality, reproduction, and child rearing. The movements were, in fact, well-ordered brothels as well as well-ordered houses. Although they advocated a new moral regime, their way of life was but a transparent parallel to the greater world where the well-ordered house and the well-ordered brothel existed side by side.<sup>37</sup>

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34. Baym, *supra* note 32; J. HART, *THE POPULAR BOOK: A HISTORY OF AMERICA'S LITERARY TASTES*, at 68-73 (1950).

35. N. AUERBACH, *COMMUNITIES OF WOMEN: AN IDEA IN FICTION*, 11, 55-73 (1978); *See, e.g.*, *BEHIND A MASK: THE UNKNOWN THRILLERS OF LOUISA MAY ALCOTT* (1975). (Alcott's gothic romances were published in the popular press such as Frank Leslie's "Illustrated Newspaper" and "The Flag of Our Union" and in the Ten Cent Novelette series. Although the plots were typically based on the seduced and abandoned theme, the dark ladies are interesting women who sometimes are victorious, like Jean Muir in *BEHIND A MASK, OR A WOMAN'S POWER*.) *See also*, J. DONOVAN, *NEW ENGLAND LOCAL COLOR LITERATURE: A WOMEN'S TRADITION* (1983).

36. M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

37. L. KERN, *AN ORDERED LOVE: SEX ROLES AND SEXUALITY IN VICTORIAN UTOPIAS: THE SHAKERS, THE MORMONS, AND THE ONEIDA COMMUNITY* (1981).

John Humphrey Noyes, the leader of the Oneida Perfectionists, discussed this sexual tendency of revivalism:

Revivals lead to religious love, religious love excites the passions; the converts, finding themselves in theocratic liberty, begin to look about for their mates and their paradise. Here begins the divergence. If women have to lead, the feminine idea that ordinary wedded love is carnal and unholy rises and becomes the leading principle. Mating on the spiritual plan, with all the heights and depths of sentimental love, become the order of the day. Then, if a prudent Mother Ann (The Shakers) is at the head of affairs, the sexes are fenced off from each other, and carry on their Platonic intercourse through the grating.

On the other hand, if the leaders are men, the theocratic impulse takes the opposite direction, and polygamy in some form is the result. Thus Mormonism is the masculine form, as Shakerism is the feminine form, of the more morbid product of Revival.

Our Oneida Socialism, too, is a masculine product of the great revival.<sup>38</sup>

By mid-century, America, in the eyes of many contemporary commentators, was perceived as suffering from social disorganization that threatened to destroy the basic family control mechanism. Republican ideals of individualism were turning into a license for licentiousness. Both the sectarian revivalists and the middle class establishment were struggling against the same problems created by industrialization, immigration, and urban poverty. The radical fringe characterized the establishment as the problem and wanted total reorganization of the economy and the family. The establishment viewed the revivalists as destructive of modernization and existing modes of social organization. The American establishment, however, had sown the seeds of its own destruction with the revolutionary concepts of individual salvation, romantic love, and republican government.<sup>39</sup>

America attempted to encourage modernization without social disintegration by imposing a system of rigid social controls on men and women. Men were to be trained to be entrepreneurial actors who were independent and self-actuated but socialized into a regulated economic order. Women were responsible for maintaining the domestic aspects of this well-regulated system. Although women were not allowed to be a part of the public order, they were an essential part of the economy, the private order which nurtured children, managed the domestic sphere, and tended the spiritual ideals of the country. Men dealt with production and women with reproduction.<sup>40</sup>

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38. Noyes, *Essay on Scientific Propagation*, at 145 reprinted in R. WALTERS, *PRIMERS FOR PRUDERY: SEXUAL ADVICE TO VICTORIAN AMERICA* (1974).

39. L. KERN, *supra* note 37, at 20-33.

40. C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 26-110 (1980); Degler, *What Ought To Be and What*

The popular advice literature of the day and the popular magazine story of the day repeated these lessons. Women were taught to be submissive but strong, managerial yet dependent, and, above all, chaste—a clean bill of goods on the marriage market. Men were taught to be independent but self-controlled, entrepreneurial but socialized, and self-sufficient in business but a part of a family organization. Advice literature combined health, religion, education, and science to create a new ideology of an American secular religion. Its mainstream theologians were not too far removed from their revivalist brothers and sisters of communal societies. Dr. Graham and Dr. Kellogg, popular medical health experts, wrote and lectured to young men on diet, sexual self-restraint, and the terrors of onanism while Robert Dale Owens, founder of the communal colony at New Harmony, wrote on birth control and self restraint. Catherine Beecher and Harriet Beecher Stowe lectured and wrote for young women on the same delicate subjects.<sup>41</sup>

All of the writers were particularly distressed about the vices of city life. Middle class young men were admonished to marry late when economically able and adjured to refrain from visiting houses of prostitution. The prevailing scientific theory was that men were biologically controlled by sexual energy which must be diverted to other purposes. One theory was that sexual energy expended on fornication would deplete the bodily resources needed for successful commercial enterprise thus the literature was filled with dire warning of the effects of masturbation, which included insanity, epilepsy, consumption, lassitude, bashfulness, baldness, and lower back pain.<sup>42</sup>

An important aspect of this campaign for moral control was the new science of early childhood development which held that adolescence was a time when minds and bodies should be trained for life. Earlier theory had viewed children as miniature adults, and seventeenth and eighteenth century law provided for early indentures and rigid religious instruction.<sup>43</sup> The creation of adolescence was instrumental in raising the level of female

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*Was: Women's Sexuality in the Nineteenth Century*, 79 *Am. Hist. Rev.* 1467-1490 (1974).

41. R. WALTERS *supra* note 38 at 19-31 citing examples of writings from S. GRAHAM, *Chastity*, in *A COURSE OF LECTURES TO YOUNG MEN: INTENDED ALSO, FOR THE SERIOUS CONSIDERATION OF PARENTS AND GUARDIANS* (n.d.); C. BEECHER & H. B. STOWE, *THE AMERICAN WOMAN'S HOME: OR, PRINCIPLES OF DOMESTIC SCIENCE, BEING A GUIDE TO THE FORMATION AND MAINTENANCE OF ECONOMICAL, HEALTHFUL, BEAUTIFUL, AND CHRISTIAN HOMES* (1869); R.D. OWEN, *MORAL PHYSIOLOGY OR A BRIEF AND PLAIN TREATISE ON THE POPULATION QUESTION* (1841).

42. R. WALTERS, *supra* note 38, at 32-48 citing examples of writings from W. ALCOTT, *THE YOUNG MAN'S GUIDE* (16th ed. 1846); J. KELLOGG, *PLAIN FACTS FOR OLD AND YOUNG* (1974) (1st ed. 1877); M. LAZARUS, *INVOLUNTARY SEMINAL LOSSES: THEIR CAUSES, EFFECTS, AND CURE* (1852); H. BEECHER, *TWELVE LECTURES TO YOUNG MEN ON VARIOUS IMPORTANT SUBJECTS* (rev. ed. 1879).

43. J. HAWES, *CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN 19TH CENTURY AMERICA*, at 12-26 (1971); Reinier, *Rearing the Republican Child: Attitudes and Practices in Post-Revolutionary Philadelphia*, 34 *WILLIAM AND MARY Q.* 150-163 (3d Ser. 1982).

education in order that women be prepared for their nurturing roles in the domestic sphere, since the family was so important in determining the outcome of a child's life. The campaign also played a major role in allowing state intervention in the control of juveniles.<sup>44</sup>

At the same time that the importance of early childhood training became accepted practice, America experienced the new problem of a mass or urban, destitute children who were falling into crime and delinquency. Reformers set out to save these children through institutionalization and socialization into middle class values. The state took the place of the family in social control.<sup>45</sup> Delinquent girls, however, fell victim to the prevailing practice of abandonment by the society. They were no longer fit for their domestic roles. Fallen girls were believed to be totally depraved due to their weak natural constitutions; delinquent girls were not educated but only placed in detention homes where they would not corrupt young men.<sup>46</sup>

Medical science also contributed to the control of women's sexuality. Dr. William W. Sanger made the first major investigation of prostitution in America in 1858. He attempted to present a realistic picture of the reasons for young women entering prostitution, the duration of most prostitute's work life, and their chances of leaving prostitution for marriage or other work.<sup>47</sup> In his interviews of prostitutes, the majority of respondents talked of deprivation and family conflict. But he noted that even in the case of those who gave inclination as a reason there were few alternatives to prostitution available.<sup>48</sup>

Dr. Sanger was unusual, however; others in the medical profession offered more radical solutions to female sexuality. Charles D. Meigs<sup>49</sup> treated "nymphomania" in a nine-year old female by applying nitrate of silver to her clitoris, which burned the tissues and nerve endings. He then gave her opium enemas. Joseph W. Howe advised amputation of the clitoris of sexually excitable female adolescents and thought blondes between the ages of sixteen to twenty-five were most susceptible to nymphomania. G.J. Barker-Benfield catalogues "gynecological history" in the United States and asserts that both psychology and medicine were used to enforce controls over women and separate the sexes in society. Gynecologists advocated sexual control of both men and women by placing on women the

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44. C. SMITH-ROSENBERG, *supra* note 6, at 167-181; E. BLACKWELL, COUNSEL TO PARENT ON THE MORAL EDUCATION OF THEIR CHILDREN (1879); S. WELLS, WEDLOCK: OR, THE RIGHT RELATIONS OF THE SEXES: DISCLOSING THE LAWS OF CONJUGAL SELECTION, AND SHOWING WHO MAY, AND WHO MAY NOT MARRY (1869).

45. J. HAWES, *supra* note 43, at 12-31.

46. *Id.* at 39, 179.

47. R. WALTERS, *supra* note 38, at 75; W. SANGER, THE HISTORY OF PROSTITUTION: ITS EXTENT, CAUSES, AND EFFECTS THROUGHOUT THE WORLD, at 488-89 (1858, reprint 1976).

48. W. SANGER, *supra* note 47, at 488-489.

49. C. MEIGS, WOMAN: HER DISEASES AND REMEDIES. A SERIES OF LETTERS TO HIS CLASS, at 151-52 (1859).

burden of preserving male energy for more noble purposes than sex as essential to a woman's role in maintaining the family.<sup>50</sup>

By applying these same restrictive definitions of female sexuality, women reformers, both liberal and purity reformers, also blamed prostitutes for much of the social disintegration of the times. They adhered to the philosophy of training females to asexuality and used it in their struggle for women's rights. They believed that women should preserve the social ideal of the Christian home against natural predatory male instincts which led to war and political corruption. It was necessary, therefore, to condemn the prostitute as not fulfilling women's higher moral role in order to advance the greater cause of women.<sup>51</sup>

A few women reformers began to see prostitution as a problem of social class and as a problem of the status of women. In 1879, Elizabeth Blackwell wrote of the use of the poor by the rich, and the translation of that use for women into prostitution. Although Blackwell still accepted the theory that a fallen woman was no longer fitted for her natural domestic role, she did recognize that prostitutes were not inherently evil. She noted the competition between prostitutes and virtuous young women brought about by the commercialism and display of modern life. Blackwell set the stage for the literary uses of that glitter and glamour of urban life invoked by Theodore Dreiser and Stephen Crane in their tragic tales of Maggie and Carrie.<sup>52</sup>

### C. *Social Realism at the Turn of the Century*

Dreiser wrote the novel, *Sister Carrie* in 1899. Like much of his work, it was based on what he saw and read: His sister, Emma, had run away to New York with a cashier in a tavern who, like Hurstwood, the character in *Sister Carrie*, absconded with his employer's funds. Dreiser turned his sister's story into a story of fatalistic destiny; he rejected placing the responsibility for their own actions on his characters. Instead, Dreiser blamed the corruption of the big city wealth, which benefitted only a few, and the poverty of the working class and migrants, rural or foreign, who settled for mere existence. Carrie and Emma wanted something more and did not settle for less.<sup>53</sup>

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50. J. HOWE, *EXCESSIVE VENERY, MASTURBATION, AND CONTINENCE*, at 108-11 (1883); G. BARKER-BENFIELD, *supra* note 11, at 37-57, 83.

51. C. SMITH-ROSENBERG *supra* note 6, at 109-128, 167-181; L. GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA*, at 95-135 (1976).

52. E. BLACKWELL, *supra* note 44, at 105; Elizabeth Cady Stanton, however, challenged the indissoluble marriage contract and championed a view of marriage as contract rather than status. But Stanton's views on marriage and divorce were shared by only a small group of feminists. See E. CLARK, *MATRIMONIAL BONDS: SLAVERY, CONTRACT AND THE LAW OF DIVORCE IN NINETEENTH CENTURY AMERICA*, at 2-3, 18-33 (1987) (working paper, available at the Institute for Legal Studies, University of Wisconsin Law School).

53. T. DREISER, *SISTER CARRIE*, at vii-viii (1900, Penguin ed. 1981).

Dreiser vividly portrayed the difference between Carrie, a rural farm migrant who fled to Chicago, and flashy Druet, a not very intelligent but successful salesman. Carrie was relegated to sweat shops where employers wanted sex in trade for jobs. She could only aspire to working for less than \$5.00 a week in a department store, spending her pay on the clothes demanded for the job and on board and room. This was respectability for the working woman. Druet could better himself in the new profession of salesman and make enough money to impress Carrie with the glitter and glamour of theaters and restaurants. Why should Carrie not have accepted Druet's offer for a comfortable life, even if, in the eyes of society, she was a fallen woman, a concubine, a mistress, a prostitute? What did society offer to her except decent poverty?

Jane Addams, social worker and founder of Hull House in Chicago, set forth in her essays published in *A New Conscience and an Ancient Evil*<sup>54</sup> true stories of the plight of young working women like Carrie. Addams noted that economic deprivation, ". . . ventures to capitalize a virtuous girl at much less than one who has yielded to temptation, and it may well hold itself responsible for the precarious position into which, year after year, a multitude of frail girls is placed."<sup>55</sup> The factory or shop worker earns \$6.00 per week, the bar girl earns \$21.00 per week, the prostitute earns \$25.00 per week.<sup>56</sup>

She called for reform, education, rehabilitation, and better working conditions to save young women from prostitution. She noted that "thousands of women are so set aside as outcasts from decent society that it is considered an impropriety to speak the very word which designates them."<sup>57</sup> She compared the existence of commercial bondage and traffic in women with pre-Civil War slavery.<sup>58</sup> She spoke of the political corruption that deprived these women of basic rights.<sup>59</sup>

But Addams still believed that sin was personal weakness based on love of pleasure or the influence of evil companions, and that reform and rehabilitation were the answers to the social evil: increased social control over women was her solution.<sup>60</sup> Indeed, public opinion supported the theory of blaming the victim of poverty. If we were a country of unlimited opportunity, then failure must be the fault of the poor.<sup>61</sup> Critics labelled Carrie a trite, heartless, deviant woman and warned parents not to permit tender minds to read such unnecessarily vulgar prose.<sup>62</sup> The sympathetic

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54. J. ADDAMS, *A NEW CONSCIENCE AND AN ANCIENT EVIL* (1912 Arno Press ed. 1972).

55. *Id.* at 57.

56. *Id.* at 58.

57. *Id.* at 1.

58. *Id.* at 2-13.

59. *Id.* at 13-57.

60. *Id.* at 59, 181-219.

61. See, e.g., Chase, *Toward a Legal Theory of Popular Culture*, 1986 Wis. L. Rev. 527, 549-550 (an analysis of the blaming the victim psychology of the popular media).

62. J. SALZMAN, *THEODORE DREISER: THE CRITICAL RECEPTION*, at 1-54 (1972).

treatment Dreiser gave to Carrie violated the American myth of female respectability. To most reviewers, Carrie became just another Eve, responsible for the fall and punished by eternal damnation.

Stephen Crane's earlier novel, *Maggie Girl of the Streets*<sup>63</sup> was also rejected by critics as too brutal. Crane finally privately published the novel under the pseudonym, Johnston Smith. Although it failed in sales, Hamlin Garland, novelist and critic, responded favorably, comparing Maggie to Emile Zola's *Nana*.<sup>64</sup> Garland, however, felt that Crane's portrayal of Maggie's family as the "worst elements of the alley" was unrealistic and that Crane should write of families living "lives of heroic purity and hopeless hardship."<sup>65</sup>

Maggie's family was real. Maggie, herself, had none of the complexity of character of Carrie; rather, Maggie was the Victorian ideal of the pure lily who rises from the muck. Her innocence caused her seduction and fall, and she chose death rather than the dishonor of prostitution. It was the pattern story of the slums, celebrating innate purity. The triumph of the book was its vivid description of the culture of poverty that could destroy family life and push young people into the street. It stands out as a cry against the refusal of polite, Victorian America to look at itself and wonder whether its moral vision was secure.<sup>66</sup>

The novel that was successful was Reginald Wright Kauffman's *The House of Bondage*,<sup>67</sup> a polemical tract on white slavery. Kauffman, editor of a muckraking magazine and prominent reform leader, presented a vivid portrait of rural and foreign immigrant women in the big city, downtrodden by low wages, lack of security, and a corrupt political and legal system. His characters are closer to Crane's lily whites and villains than to Dreiser's complex human beings. He trades on the standard prejudices of the day, portraying the villainous white slave traders and pimps as foreign Jews and Italians. But the ironic picture of the wealthy social reformer whose family owns the very business that exploits women and pushes them into prostitution rings true. It is doubly ironic that the appendix to the book is a Presentment of a New York City Grand Jury by the foreman, John D. Rockefeller, Jr. on the trade in women for immoral purposes.<sup>68</sup>

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63. S. CRANE, *BOWERY TALES: MAGGIE AND GEORGE'S MOTHER* (Univ. of Va. Press ed. 1969).

64. E. ZOLA, *NANA* (1880) (A novel about a woman who becomes a prostitute. The novel's themes stressed both transmission of traits through heredity and the influence of environment on people's lives.).

65. S. CRANE *supra* note 63, at xxxviii-xl; Garland, *An Ambitious French Novel and A Modest American Story*, VIII *ARENA* xi-xii (June, 1893).

66. S. CRANE *supra* note 63, at xliii-lii.

67. R. KAUFFMAN, *THE HOUSE OF BONDAGE* (1910), (The Gregg Press ed. 1968).

68. *Id.* at 466-480. Riegel, *Changing American Attitudes Towards Prostitution, 1800-1920*, 29 *J. OF HIST. OF IDEAS* 437-452, 450 (1968) (stating that by 1900 many people saw prostitution as big business, the Standard Oil of vice).

#### D. *The Purity Movement*

Social realism fell to the censors. Purity reformers were guarding the family against knowledge of the streets. Paul Boyer in his study of late nineteenth and twentieth century censorship notes that the purity movement was supported by feminists, social reformers, and progressives who saw literature as having a national spirit which would form our ideals and morals. The Comstock Law, which prohibited obscene materials from being sent through the mails, was the legal means of censorship, but publishers enforced their own internal censorship as well. Prestigious organizations such as the New England Watch and Ward Society were backed by prominent literary families, and fear of both moral and legal retribution was sufficient to deter publication by reputable firms.<sup>69</sup>

David Pivar<sup>70</sup> in his study of the purity crusade against prostitution, pornography, and alcohol notes that the movement was able to unite temperance, political reform, social hygiene, white slavery abolition, and women's rights movements because of its emphasis on reconstructing America through children and the family.<sup>71</sup> There was an obvious conflict in the goals of rehabilitation and protection. The crusade sought the protection of children and rehabilitation of fallen women. In order to be rehabilitated, the "fallen woman" had to be reintegrated into society to some extent, but her presence in society would taint the "purity" of the family and bring home the very elements from which children needed protection. *The House of Bondage* neatly portrays the conflict when Miriam, the socialite reformer, won't let Violet, a teenager rescued from a house of prostitution, attend the girls' club classes. Violet cannot be allowed to corrupt pure young girls.<sup>72</sup>

America's emphasis on purity necessitated rejecting European based models of regulation and medical reform of prostitution as a legal trade. The proponents of this model felt that the public would be protected but that prostitutes would be free from legal harassment and able to re-enter society. But regulation, medical or otherwise, would entail acceptance of a trade reformers sought to suppress. The mere existence of prostitution, however, was antithetical to the philosophy of family protection. Post-Civil War purity crusade efforts to resist medical regulationists were led by the old abolitionists, temperance leaders, and suffragettes, who saw women as leading the country to a new moral standard.<sup>73</sup>

Purity and political reformers as well as business leaders wanted to socialize urban working class women and saw the problem of prostitution as one created by corrupt city politicians who profited from controlling

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69. P. BOYER, *PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA*, at 5-17 (1968).

70. D. PIVAR, *PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868-1900* (1973).

71. *Id.* at 7-9.

72. R. KAUFFMAN *supra* note 67, at 336.

73. D. PIVAR, *supra* note 70, at 50-73, 157-74; B. HOBSON, *supra* note 15, at 6-7.

vice traffic. Business leaders refused to acknowledge the problem of prostitution as one of low economic status, even though novels like *Sister Carrie* and *The House of Bondage* vividly portrayed the city department store and the garment factories which depended on low-paid women. Study after study reported that employers deliberately paid women low wages, assuming they would live as family dependents, working on a short-term basis before marriage. The reality was that many women were the sole support of families or of themselves.<sup>74</sup>

The purity crusade grew out of a perception of social disorganization and brought together many disparate groups, all looking for a new vision of America—or an old myth of America—as family. Pivar believe that the crusade channelled the women's movement into conservative social objectives and buried the freedom of women in the greater reform movements. The adoption of the purity crusade by reformers of the political system led to secularization of purity reform because of reliance on government to control our social environment. The purity reformers were Puritans, but the political reformers were pragmatists who fell in line with political, economic, and social theories of the moment.

As new theories of sex education, population control, and family planning supplanted earlier programs of strict censorship and sexual continence, purity reformers lost control of the movement. Changing theories of economic and social deprivation altered the treatment of juveniles and women in the criminal justice system. Changing economic and social circumstances, and the dislocations brought about by world war altered attitudes to censorship and social control.<sup>75</sup> Publishers and writers began to have second thoughts about being the literary censors of America and retreated from their earlier support of thought control. Paul Boyer's *Purity in Print* documents the strong support anti-vice activists received from publishers, writers, and librarians which then turned to opposition as censorship critics recognized the government was gaining the ability to control freedom of expression.<sup>76</sup>

#### E. *The Literature of the Cult of True Womanhood*

The struggle against vice did not end, but the players and the goals changed. In the 1930's and 1940's sexuality became a symbol of true American womanhood and manhood. Cultural exploitation of sexuality replaced censorship as an economic and political goal.<sup>77</sup> Several commen-

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74. D. PIVAR, *supra* note 70, at 204-227; F. CORDASCO & T. PITKIN, *THE WHITE SLAVE TRADE AND THE IMMIGRANTS: A CHAPTER IN AMERICAN SOCIAL HISTORY* (1981) (Appendix, Sen. Rep. No. 196, 61st Cong., 2d. Sess. 1909, Importing Women for Immoral Purposes).

75. D. PIVAR, *supra* note 70, at 257-267; B. HOBSON, *supra* note 15, at 163-183.

76. P. BOYER *supra* note 69, at 207-221, 249-273.

77. Butler, Flora, *The Passive Female: Her Comparative Image by Class and Culture in Women's Magazine Fiction*, 33 *J. OF MARRIAGE AND THE FAMILY* 435-44 (1971); K. FISHBURN, *WOMEN IN POPULAR CULTURE*, at 125-135 (1982); HEARTH AND

tators have pointed to the use of mass media magazines and television to create a cult of femininity through advertisements, fiction, nonfiction fashion and "how to" become or stay married stories (themselves advertisements in another form). The stories all stressed women as passive sex objects defined by male values. The most telling controversy over sexuality in the 1950's was the attempted censorship of a book that portrayed the sexual commercialization of American girl children and women as the reality of the modern cult of the family.

The controversy over Vladimir Nabokov's *Lolita* was representative of the new morality. *Lolita* was a symbol of the so-called sexual revolution: the commercialization of female sexuality from childhood to womanhood. Nabokov later noted how four American publishers were shocked by *Lolita* and refused publication,<sup>78</sup> when in fact, the novel was free from lewd descriptions of sex that peppered pulp novels of the same era. George Baker in "Saturday Review" noted that readers would be disappointed if they wanted obscenity; rather, the book was filled with comic horror.<sup>79</sup> Even the U.S. Customs Office found the book, finally published in Paris, unobjectionable. Although some journals (e.g., "The Chicago Tribune" and "The Christian Science Monitor") refused to review *Lolita*, most critics were obsessive in finding high literary content hidden in the text.<sup>80</sup> Some saw it as a myth of decadent Europe disappointed in immature America. Others saw it as a satire on America's commercialism.<sup>81</sup>

Most of the reviewers were interested in the male seducer's psyche and not in the adolescent girl's victimization, even to the point of finding her juvenile sexual experiments proof of her fallen status and Eve-like depravity.<sup>82</sup> Many reviewers thought the book was a comic spoof on American life. A few critics, however, saw the reality that comic horror allows us to experience. Donald Malcolm noted this quality and compared Nabokov's approach to Mark Twain. Malcolm said the book was not "wonderfully or wildly funny".<sup>83</sup> The reader should be horrified by a scene where, knowing the captive sexual relationship Humbert holds Lolita in, we hear the school principal talking to Humbert of the school goals to educate girls to adjust to dating, sex, and marriage.

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HOME: IMAGES OF WOMEN IN THE MASS MEDIA, at 19-20, (including on annot. bib. on television and women,) at 275-319 (1978).

78. V. NABOKOV, *LOLITA*, at mcmlv (1955, Greenwich House ed. 1982).

79. Baker, '*Lolita*': Pornography or Literature, 40 SAT. REV. 18 (June 22, 1957).

80. Rolo, *The Reader's Choice*, 202 ATLANTIC 78-80 (Sept. 1958).

81. Hicks, *Lolita and Her Problems*, 41 SAT. REV. 12, 38 (Aug. 16, 1958).

82. Molnar, *Matter-of-Fact Confession of a Non-Penitent*, 69 THE COMMONWEALTH 102 (Oct. 24, 1958). See J. HART, THE CONCISE OXFORD COMPANION TO AMERICAN LITERATURE, at 231 (1986) (where this same table of male innocence still holds true; Professor Hart states that Humbert plans to seduce Lolita "only to be seduced by her, for she is no longer a virgin.").

83. Which was the viewpoint of the reviewer in *The Lolita Case*, TIME 102 (Nov. 17, 1958); *Lolita In Tunbridge Wells*, TIME 72 (March 2, 1959).

Anyone who tried to label Lolita the nymphet Eve, should have been silenced by Humbert's confession that,

"At the hotel we had separate rooms, but in the middle of the night she came sobbing into mine, and we made it up very gently. You see, she had absolutely nowhere else to go."<sup>84</sup>

Like Carrie and Maggie, Lolita had nowhere else to go.

Malcolm noted that Nabokov's style allowed the reader to approach the narrative with human sympathy and then be horrified by a world where the narrator can say,

"Unless it can be proven to me - to me as I am now, today, with my heart and my beard, and my putrefaction - that in the infinite run it does not matter a jot that a North American girl-child named Dolores Haze [Lolita] had been deprived of her childhood by a maniac, unless this can be proven (and if it can, then life is a joke), I see nothing for the treatment of my misery but the melancholy and very local palliative of articulate art."<sup>85</sup>

What, then, is the truth about the moral revolution that changed our views of sexuality? Why did *Lolita* both upset and titillate the public? Granville Hicks thought it was the purity reformers at work again, protecting our culture by demanding silence about what we all know about.<sup>86</sup> A "New Republic" editorial may be more to the point in saying that comic horror fails in its purpose when the critics and the public take it as simply comic satire and overlook the real Lolita who exist in darkness all of their lives.<sup>87</sup> But the controversy over *Lolita* is the question of what does the modern sexual revolution mean for women? A new way to control women by making their sexuality a subject of films, ads, and books which create a role for women as sales items?<sup>88</sup>

#### F. *Feminist Response to the Sexual Revolution*

Feminist literature in the 1980's stresses the interaction of pornography, prostitution, and rape as constituting violence and subjugation of women. The entrepreneur can now increase sales with cigarette ads of women swathed in gold lame or in classic prostitute poses of the billowing, short skirt, stiletto heels propped up against a tenement wall. Pornographic films and magazines feature sadomasochism, child abuse and male physical dominance over women. And although the sexual revolution supposedly decreased the social need for commercial prostitution, the literature reveals that prostitution still flourishes under new and ever more op-

84. Malcolm, *Lo, The Poor Nymphet*, THE NEW YORKER, Nov. 8, 1958, at 196.

85. *Id.* at 199.

86. Hicks, *supra* note 81, at 38.

87. *Lolita and the Critics*, NEW REPUBLIC, Oct. 27, 1958, at 3.

88. M. FERGUSON, FOREVER FEMININE: WOMEN'S MAGAZINES AND THE CULT OF FEMININITY 7-14, 187-88 (1983).

pressive conditions. In many instances, it has become an outlet for aggressive abuse and, as labelled by one writer, cultural sadism.<sup>89</sup> Kate Millett argues that the so-called "sexual revolution" means women have been given the freedom to cooperate in their own sexual subjugation.<sup>90</sup>

Many feminists have warned, however, that recent political reform activity against pornography and for supporting the decriminalization or legalization of prostitution seems to mirror the past. Commercialized vice is perceived as just one part of the larger issue of male control over female sexuality. Male degradation of women is seen as the issue.<sup>91</sup> But the difference between earlier female critics of the treatment of prostitution in America and today's critics is the former group's faith in government as a positive force for reform. Today's skeptical feminists recognize that discrimination in the justice system is a product of inequality in our culture and that equality through government is only as successful as the regulators want it to be.<sup>92</sup>

Those feminists reformers who seek more restrictive state control over prostitution or male exploitation of women may fall into the trap of their predecessors. On the one hand, all feminist critics of inequality see the cultural perception of women's passive role as a yoke which enforces stereotypical roles in law and society and thus seek freedom from sexual repression in gender specific laws (e.g., prostitution, homosexuality, etc.) But the critics of inequality who look to governmental interference to protect women from male exploitation of female sexuality may find that if the government, like society, operates by the same old stereotypes it cannot truly protect much less free women from this yoke. The same repression that resulted from earlier social purity movements may well destroy current reform efforts.<sup>93</sup>

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89. L. LEDERER, TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 15-20 (1980), see, e.g. Lederer, *An Interview with a Former Pornographic Model*, 57-70, and Rush, *Child Pornography*, 71-82; K. BARRY, FEMALE SEXUAL SLAVERY (1979); Snitow, *Mass Market Romance: Pornography for Women is Different*, 245-263, in A. B. SNITOW, C. STANSELL, AND S. THOMPSON, eds. POWERS OF DESIRE: THE POLITICS OF SEXUALITY (1983).

90. K. MILLETT, SEXUAL POLITICS 23-58 (1970). V. GORNICK AND B. MORAN, WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS (1971).

91. K. MILLETT *supra* note 90, at 3-22 (discusses the uses of images of inferiority of women, domination over women, and cruelty to women as being sexual in the novels of Norman Mailer and Henry Miller. She relates this to the history of male attitudes towards women as sexual objects of gratification). C. MACKINNON, *supra* note 2, at 127-228. (The MacKinnon/Dworkin antipornography ordinance, which was struck down in *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.* 106 S. Ct. 1172, *reh'g denied*, 106 S. Ct. 1664 (1986) defined pornography as "the sexually explicit subordination of women, graphically depicted, whether in pictures or words," which depicted women as "sexual objects," "commodities," in "postures of submission," or as "whores by nature".

92. Musheno and Seeley, *Prostitution Policy and the Women's Movement: Historical Analysis of Feminist Thought and Organization*, 10 CONTEMPORARY CRISES 237-255 (1986).

93. Walkowitz, *The Politics of Prostitution*, 6 SIGNS: JOURNAL OF WOMEN IN CUL-

### III. THE USE OF LAW TO CONTROL WOMEN'S SEXUALITY AND SEX ROLES

#### A. *Early American Controls*

Colonial America was settled by a diverse group of European migrants. We associate New England and Mid-Atlantic migration with religious reform and moral puritanism. The Southeastern colonies were established as economic ventures, but legal codes still emphasized strict social and moral controls. Most of the colonists equated moral law, based on the strictures of biblical sources, with the secular legal system.<sup>94</sup>

David Flaherty in his discussion of law and morals in early America asserts the main contribution of moral law to secular codes was equating sin with crime. Fornication was labeled both as a crime in the community and a shameful sin.<sup>95</sup> The colonists, however, resisted English ecclesiastical courts of the established church and left the enforcement of morals up to civil government.<sup>96</sup>

Although both religious and secular authorities believed in the ideal moral order, they were all too aware of lapses in behavior. Moral wrongdoers were likely to be forced into marriage or required to support an illegitimate offspring. Only a married woman was subject to severe penalty for sexual intercourse outside of marriage; a married man was punished for the lesser offense of fornication, unless it was with a married woman who was not his wife. Flaherty sees an increasing indifference on the part of the public despite official attempts to improve behavior as the reason for a shift from enforcement of morals to protection of the public purse. But that does not explain why authorities continued to use the same laws to punish women for their moral transgressions.<sup>97</sup>

The rationale behind moral regulation began to change in eighteenth century America from moral to social control over the lower classes. Secular authorities were concerned about the behavior of the growing number of indentured servants and laborers imported to the United States. The structure of America was changing from colonists seeking a new moral order to immigrants and settlers seeking commercial success and the pleasures they had known in Europe. Statutes either specifically referred to occupations and classes or enforcement was limited to the working class.<sup>98</sup>

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TURE AND SOCIETY 123 (1980).

94. DAVID H. FLAHERTY, ed., *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* (1969); See also, Smith, *supra* note 19; Moran and Vinovskis, *The Puritan Family: A Critical Reappraisal*, 39 *William & Mary Q.* 29-63 (3d Ser. 1982).

95. Flaherty, *Law and the Enforcement of Morals in Early America*, 5 *PERSPECTIVES IN AMERICAN HISTORY* 203, 208 (1971).

96. *Id.* at 209.

97. *Id.* at 214; Cott, *Eighteenth Century Family and Social Life Revealed in Massachusetts Divorce Records*, at 107-135, in N. COTT AND E. PLECK, *supra* note 16.

98. Flaherty, *supra* note 95, at 216-217, citing C. Van Doren, BENJAMIN FRANKLIN (1938); L. B. WRIGHT AND M. TINLING, eds., *THE SECRET DIARY OF WILLIAM BYRD*

Legal norms and actual behavior differed between the upper and lower classes.<sup>99</sup> Social customs in the southern slave states openly permitted illicit relationships between masters and slaves. Enforcement of moral codes in the South was limited to interracial relationships between free black and indentured white servants. In these cases, punishment was severe and could include substantial periods of servitude.<sup>100</sup> But, on the whole, the law in the eighteenth century was turning away from punishing immorality as a moral harm to the community towards punishing bastardy as an economic loss to the public coffers. In most cases, prosecution was not undertaken if a source of support was available.<sup>101</sup>

This is not to say that there were not frequent moral revivals which attempted to use the law to enforce morals. In the seventeenth century, Cotton Mather sought to destroy whorehouses in Boston.<sup>102</sup> The Puritans created tythingmen in the mid-1670's as a neighborhood moral watch, but the system quickly died from lack of enforcement.<sup>103</sup> Law, however, turned away from enforcing private morality, and most commentators see this time as a major shift from an identification of sin with crime to the protection of property.<sup>104</sup>

Flaherty notes that Thomas Jefferson argued that "the legislative powers of government extend to such acts only as injurious to others."<sup>105</sup> This statement, of course, simply leads to the original problem of what does the social order believe is injurious to others? Early Puritans believed sin was visited on the community. Victorian America conceived of property as the subject of legal protection. Both equated control over women and women's sexuality as grounded in the necessity to protect the community, whether the reason was to prevent sin or to protect property. Thus Jefferson's conception of law as the prevention of harm to others did little

OF WESTOVER, 1709-1712 (1941), and *THE LONDON DIARY 1712-1721, AND OTHER WRITINGS* (1958); Cott, *supra* note 16, at 170, (states that a content analysis of nine New England magazines between 1777-1794 shows that, although the characters advocated male punishment for illicit sexual relationships, it was always the female who was ostracized and punished).

99. Flaherty, *supra* note 95, at 214-234.

100. *Id.* at 237-240; W. D. JORDON, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO, 1550-1812*, at 136-78 (1968); C. Degler, *supra* note 40, at 111-143, *Under Stress: Families of Afro-Americans and Immigrants*, G. Lerner *supra* note 11, at 63-82, *Black Women in the United States: A Problem in Historiography and Interpretation*, and 94-111, *Black and White Women in Interaction and Confrontation*.

101. Flaherty, *supra* note 95, at 230, 246-49.

102. *Id.* 235, citing W. C. FORD, ed., *DIARY OF COTTON MATHER*, Massachusetts Historical Society Collections, 7th Ser., VII-VIII (Boston, 1911-12).

103. Flaherty, *supra* note 95, at 221-225.

104. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 455-457, 461-462 (1967); Riegel, *supra* note 68, at 437-52, 437-39.

105. Flaherty, *supra* note 95, citing, T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, 159-61 (W. Penden ed. 1955).

to change the social mores; it only relabelled or redefined the reasons for control.

### B. *Nineteenth Century Reform of Family Law*

Reformers sought not only the podium and print to enforce their standards of social control but also the law. Nineteenth century America saw a tightening of moral strictures both on the legislative and judicial levels. Ironically, it was the use of the state to promote individual rights in commerce, property, and labor that began the rural to urban migration and a loss of small town social control over individuals. Moreover, in many instances, the social purity reformers and the advocates for women's rights, abolition of slavery, and economic freedom were the same individuals. Studies of the major individuals associated with various reform groups reveal a surprising cross-fertilization among anti-pornography, pro-women's rights, and business interests.<sup>106</sup>

A review of major nineteenth century legal change that took place in the law of the family is important to any study of women's sexuality and sex role, because the concept of the family governed American institutional life, and the law was intended to maintain family control. In the quest for individual rights, early republican theory had moved away from imposing a subservient status on family dependents.<sup>107</sup> But mid-century legal commentators attempted to move marriage and family back to a status relationship. Legislatures might pronounce marriage to be a civil contract, but courts and commentators maintained its sacred social status as essential to the balance of Victorian separate spheres.<sup>108</sup>

#### 1. Marriage Reform

Reformers sought to legislate their vision of public and private morality through marriage and the family. Since adolescence was now con-

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106. C. SMITH-ROSENBERG, *supra* note 6, at 78-89; M. CONNELLY, *THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA* (1980); D. PIVAR, *supra* note 70, at 281-298.

107. M. GROSSBERG, *supra* note 36, at 19; M.B. NORTON, *LIBERTY'S DAUGHTERS, THE REVOLUTIONARY EXPERIENCES OF AMERICAN WOMEN, 1750-1800*, at 234-235 (1980); Gundersen and Gampel, *Married Women's Legal Status in Eighteenth Century New York and Virginia*, 39 *WILLIAM & MARY Q.* 114-134 (3d. Ser. 1982). Boylan, *THE LAW OF THE HEARTH*; GROSSBERG, *Governing the Hearth: Law and the Family in Nineteenth Century America*, 14 *REVS. IN AMER. HIST.* 382-86 (1986).

108. M. GROSSBERG, *supra* note 36, at 20-21; N. BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK* 120-121, 222-227 (1982) (notes that married women's property reform support came from male advocates of debtor reform, members of the new middle class seeking protection of property rights, and foes of the old equity trust system which was perceived as a tool of the wealthy. These same supporters were careful to note that political rights were not involved and that the basic unity of the family would remain intact. Basch also notes that the courts consistently narrowed the application of the reform statutes to restrict rights given to women under the Married Women's Property Acts).

sidered the time that young men and women should be educated for successful performance of their public or private role, reformers advocated against early marriage. Early nineteenth century law permitted, in most cases, marriage at twelve for girls and fourteen for boys. Even though legislative reform to increase the age for marriage was successful, the courts upheld common law policy against legislative attempts to restrict marital freedom. Real social practice was an increase in the age of middle class marriage and a continuance of young marriages or cohabitation for the lower classes. Critics of early marriages were finally successful in the beginning of the twentieth century when youthful indiscretion was linked with the campaign against white slavery and prostitution and the need for family control and state protection of the young.<sup>109</sup>

The campaign against nonmonogamous marital practices was a much more successful campaign for a cultural and legal definition of the family. Mormons were condemned as destructive of America; polygamy was called slavery. The Mormons fled to Utah to escape what they saw as religious persecution, but Congress declared polygamy illegal in American territories. Finally the Supreme Court held that religious freedom did not include the right to destroy the American way. Chief Justice Waite called polygamy an odious practice, holding the U.S. could outlaw and punish seditious acts whether or not labelled as religion. Justice Waite denied any claim of first amendment religious freedom and held the civil government had the right to determine the social life of the people under its control. Religious freedom could not subvert the law of the land.<sup>110</sup>

The Edwards Act of 1882 which punished multiple cohabitation as well as multiple marriage was upheld in *Cannon v. United States*.<sup>111</sup> The final blow against the Mormons was the Edwards-Tucker Act which an-

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109. M. GROSSBERG, *supra* note 36, at 105-107.

110. M. GROSSBERG, *supra* note 36, at 120-129; *U.S. v. Reynolds*, 1 Utah 226 (1874); 1 Utah 319 (1876); *Reynolds v. U.S.*, 98 U.S. 145, 162-67 (1878). (Chief Justice Waite explored the history of the first amendment, which he traced to Jefferson's Act for Establishing Religious Freedom passed by the Virginia legislature (12 Hennings' Stat. 84.) Chief Justice Waite stated, for what responsibilities property belong to church and state. ". . . [T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty," and, "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Chief Justice Waite noted that polygamy had been punished as an offense against society under the common law, and that by the statute of 1 James I (c. 11) the offense was punishable in the civil courts by death, which was reenacted in Virginia, after the act establishing religious freedom and after Virginia recommended a similar amendment to the United States Constitution (12 Hennings' Stat. 691). Polygamy had been an offense against society in every state in the Union since that time. There could be no doubt in the mind of the Court that the constitutional guarantee of religious freedom was not intended to prohibit legislation regarding marriage).

111. 116 U.S. 55, 68 (1885). (The statute legitimated all children born of polygamous marriages prior to January 1, 1883 and authorized amnesty to all offenders for acts prior to its enactment).

nulled the Mormon articles of incorporation and confiscated their property.<sup>112</sup> Finally Utah, the Mormon stronghold, was admitted as a state in 1894 with a constitutional provision prohibiting polygamy. Thus the full force of the law—federal legislature and judiciary—was employed to uphold the American concept of the family as one husband, one wife, and their children.<sup>113</sup>

## 2. Reproductive Control

Nineteenth century theories of separate public and private spheres divided male and female roles into production and reproduction, respectively. The battle over abortion was a part of the campaign to control female sexuality and women's reproductive rights. Abortion was first perceived as a threat when it moved from being a practice of lower class women to the middle class. It caused fear among the purity reformers because it threatened to shift traditional male control of the family into the hands of women. Early legislation and court decisions were ambivalent over the use of abortion in early term and as a therapeutic measure; moreover, women, unlike the abortionists, were not seen as criminally responsible but as passive instruments of doctors or quacks. Recent commentators on the history of abortion argue that the criminalization of abortion was spearheaded by physicians as an attack on medical quackery, but social purity reformers took the opportunity to advocate control over women as well as punishment for the abortionist.<sup>114</sup>

Contraception also fell to the reforms of the 1860's social purity groups. The Comstock Law of 1873, which prohibited the circulation and importation of obscene materials through the mail, became the major weapon of purity reformers over the next several decades. Anthony Comstock, a lobbyist and advocate for social purity groups, was appointed a special postal agent. Several state legislatures passed statutes explicitly barring the sale, advertisement and manufacturing of contraceptives. Connecticut banned the use of contraceptives as well.<sup>115</sup> The federal courts upheld prosecution for the distribution of contraceptives. Such distribution was found to be obscene and therefore against the law. The Supreme Court upheld the Comstock Law as the right of Congress to use the federal regulatory power to "refuse its facilities for the distribution of matter deemed injurious to public morals."<sup>116</sup>

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112. *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). (Upholding the constitutional power of Congress over its territories (Art. 4, Sec. 3, cl. 2) to abrogate the corporate charter of the Church of the Latter-Day Saints and confiscate property granted under that charter).

113. M. GROSSBERG, *supra* note 36, at 125.

114. G.J. BARKER-BENFIELD, *supra* note 11, at 61-90; M. GROSSBERG, *supra* note 36, at 157-195.

115. L. GORDON, *supra* note 51, at 47-71. M. GROSSBERG, *supra* note 36, at 175-178.

116. *U.S. v. Popper*, 98 F. 423 (N.D. Cal. 1899); M. GROSSBERG, *supra* note 36, at

### 3. Moral Reform

The reform campaigns against prostitution and pornography, which were seen as stemming from the growing laxity of moral standards resulting in male incontinence and female freedom outside of the home, were equally vigorous. The medical profession initiated a battle against prostitution based on its growing understanding of the cause of venereal disease. Moral reformers, however, were appalled by medical efforts to regulate the activities of prostitutes through health measures and demanded the total suppression of prostitution. Contraception, abortion, obscenity, and prostitution were seen as part and parcel of a growing wave of moral corruption infecting America.

Numerous commentators have discussed the connection among the old abolitionists and the new purity reformers and between supporters of censorship, temperance, suppression of prostitution, reform of the juvenile justice system, women's rights, and family purity. They have also noted the willingness of industrialists and philanthropists to advocate moral reform and social control of the working classes rather than deal with the economic reasons for social disintegration and urban poverty. At the turn of the century, middle class America was distraught over increased immigration, wide-spread political corruption, and the increase of organized crime in the cities. The middle class were beneficiaries of entrepreneurial individualism but were unwilling to admit there were major problems in America of economic inequality and social injustice.<sup>117</sup>

Women's rights groups were active in the struggle. They viewed temperance and purity as part of the higher ideal of a new world where women held their rightful place as upholders of American values.<sup>118</sup> The women's rights groups were unanimous in resisting legal regulation of prostitution and demanded programs of suppression and reform. But they differed over legislative and judicial control of family planning. Consequently women were divided over issues of contraception, abortion, and the use of obscenity laws to ban use or distribution of family planning materials.<sup>119</sup>

The male-dominated reform groups continued to perceive women's sexuality as a negative force and women as inherently incapable of independent development. All women's rights movement rejected this theory and advocated reforms based on education, economic reform, and rehabili-

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188-195.

117. Freedman, *Sexuality in Nineteenth Century America: Behavior, Ideology, and Politics*, 10 REVS. IN AM. HIST. 196-215 (1982); D. Pivar, *supra* note 70, at 169-180.

118. Walkowitz, *The Politics of Prostitution*, 6 SIGNS: J. OF WOMEN AND CULTURE IN SOC. 123-135 (1980).

119. L. GORDON, *supra* note 51, at 186-245; Conway, *Women Reformers and American Culture, 1870-1930*, 5 J. OF SOC. HIS. 164-177 (1971-72), (comments that the separate spheres theory of women reformers created a stereotype of female inequality. Reform efforts were accepted as preserving the family and female domesticity and making no changes in women's equality).

tation. But both male and female dominated groups joined in advocating for legislative and judicial controls to end urban political corruption, to prevent juvenile delinquency and the white slave traffic, and to protect the family as the ideal American social organization. The reform movement reflected an imperfect amalgamation of cultural and moral concepts of reform.

### C. *The Criminal Justice System*

#### 1. The Vice Reform Movement

Uniting to combat what they perceived as a single force destroying the social fabric of America, some quite disparate groups joined together in the campaign to destroy prostitution and save family institutions. The campaign included reform of corrupt urban politics, control of population through restrictive immigration laws, and stabilization of the family through education, juvenile law reform, as well as, if needed, substitution of the government or private agencies for the family. The advocates of reform ranged from liberal urban progressives seeking better government to settlement house workers. The movement was supported by Comstockers and temperance advocates who saw in commercialized vice the outlets for liquor and printed filth as the cause of social impurity. Influential churchmen and corporation heads saw the need for capturing control of urban political power and for ameliorating the plight of industrial workers in urban ghettos.<sup>120</sup>

For all of these groups, social purity and the suppression of commercial vice became a major focus of agreement. For conservative groups, it represented family stability because it focused on the plight of dependent females driven into prostitution. They thought that if prostitution could be eliminated then their goals could be more easily realized. The women's rights groups, with their vision of women as bringing a higher order of morality to American life, were also attracted by the idea that the plight of prostitutes was a product of their economic dependency.

It fit in with the racist theories of nativists who labelled recent immigrants as degenerates, even though the reports on commercialized vice showed that the majority of prostitutes were native to America, not foreigners. Moreover, entry into prostitution was not usually a product of organized crime but more often a choice between low wage jobs at long hours in unhealthy conditions and a chance for some degree of luxury. As Theodore Dreiser portrayed the world of *Sister Carrie* in Chicago, it was drudgery versus a chance to share in the American dream.<sup>121</sup>

Ruth Rosen, in her study of prostitution and the progressives, asserts that the effect of suppression of a previously open trade was merely to place prostitution in the hands of organized crime and remove it from the

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120. B. M. HOBSON, *supra* note 15, at 139-54.

121. J. ADDAMS, *supra* note 54; W. RECKLESS, *supra* note 9, at 189-192.

control of women. Although the early studies of parlor houses managed by women seem to indicate more absentee male landlord control of prostitution than Rosen's theory would warrant, the general assertion does appear to be valid. The outcomes of reform were to further degrade a prostitute by increasing her dependency on pimps and police protection and diverting women into a gender-biased criminal justice system.<sup>122</sup>

## 2. Women, Crime, and Justice

Women in the criminal justice system were not a significant issue until late nineteenth century America. Recent criminology literature explains the reason for this neglect was a cultural conception of women as biologically different, inherently less criminal than men and socially conditioned to conformity.<sup>123</sup> Whether the causes were biological or social, it was believed that women had a lower participation in crime and lived on a higher level of morality than men. Deviation from this higher level of morality provided a subcategory of crimes applicable only to women.<sup>124</sup> Francis Lieber, in his introduction to de Beaumont and De Tocqueville's *On the Penitentiary System*, stated that men's crimes were more rational than women's crimes. A fallen woman had denied her own pure nature and would sink to the depths of sinfulness. Prostitution was labelled the woman's crime.<sup>125</sup> For the female, sexual activity outside of marriage

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122. R. ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918*, (1982); R. ROSEN AND S. DAVIDSON, eds., *THE MAIMIE PAPERS* (1977).

123. Provine, *Gender, Crime, and Criminal Justice: Edward's Women on Trial*, AM. BAR FOUNDATION RESEARCH J. 571-583 (1986); C. LOMBROSO AND W. FERRERO, *supra* note 16, at xi, xv, and 109-113 (was the major European exponent of biological or social explanation for delinquency. Lombroso and his followers advocated different sentencing of males and females for the same offense because of their inherently different natures. Women, he believed, were less developed than men on the evolutionary scale and, thus, more atavistic. They tended to be conformists, and, since men usually refuse to breed with deformed women, women did not tend to differentiate through time. Women were, therefore, occasional criminals rather than habitual criminals. Their crimes were associated with hysteria, passion and insanity. Prostitution was the classic female crime because it was the result of degenerative atavism. The prostitute was a primitive, undeveloped human). *Also see*, Klein, *The Etiology of Female Crime: A Review of the Literature*, in L. CRITES, ed, *THE FEMALE OFFENDER* 5-31 (1976).

124. O. POLLACK, *THE CRIMINALITY OF WOMEN* at xvi-xvii, 58-76, 120-148 (1950). *Also* Bibliography, at 162-175. (The theories in the United States have mixed biological and social conditioning. The biological theorists see masculine traits in women as leading to criminality. The social theorists posit that lack of opportunity, social conditioning, and nature of occupations are responsible for low crime participation and say that women's entry into the workforce and women's liberation have led to greater participation in crime). E. FREEDMAN, *supra* note 13, at 13-14 (notes that higher crime rates for women from the 1860's onward reflected the transformation of the economy from family to market and rural or overseas migration to urban areas which resulted in loss of control of traditional institutions of church, family, and community. But women's crimes reflected the limited economic opportunities available to them and their sexual role in the community).

125. B.M. HOBSON, *supra* note 15, at 110, citing F. LIEBER, INTRODUCTION TO

meant deviance and is prohibited by the state. What for the male was normal was for the female deviant and criminal.<sup>126</sup>

### 3. The Treatment of Female Juveniles in Criminal Law

In the twentieth century, the emphasis in criminology changed from detention to preventative social services. Reformers stressed the difference between male and female natures and sought specialized treatment for female offenders. In many states, specialized courts were created for women and for juveniles. The treatment of females in juvenile courts explicitly dealt with their sexuality as a special offense applicable only to women. Girls were referred to juvenile courts for running away, ungovernability, larceny and sex offenses. On the contrary, boys were committed for larceny, burglary and theft.<sup>127</sup>

Juvenile law, in efforts to socialize the young into good citizenship, covers both criminal and noncriminal behavior that is socially disapproved and includes a moral judgment about behavior.<sup>128</sup> Reformers in the early 1900's who crusaded for juvenile courts and protective custody relied heavily on the biological theories of sexual differentiation, labelling the female offender as an unadjusted, amoral delinquent.<sup>129</sup>

In 1923, W.I. Thomas published *The Unadjusted Girl*, a pioneer study in the psychology of women who failed to adapt to socially acceptable behavior. Thomas stated that, "Civilized societies. . . have endowed the young girl with a character of social sacredness. . . 'Virginity' and

GUSTAVE DE BEAUMONT AND ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES, AND ITS APPLICATION IN FRANCE xiv-xvi (1833). E. FREEDMAN, *supra* note 13, at 14-21 (asserts that nineteenth century sexual ideology cast the fallen woman as a pariah. Women imprisoned for sexual offenses were crowded together, abused, and isolated to prevent communication with male prisoners. Male prison reformers explained the differential treatment to be a result of women's sexual natures).

126. E. SCHUR, LABELING WOMEN DEVIANT: GENDER, STIGMA, AND SOCIAL CONTROL 5 (1984). (In William Acton's seminal study of prostitution, male reasons for sex outside of marriage were perceived as normal, biological, and based on trends toward late marriages in Victorian England. Female prostitutes were mental and moral degenerates from whom males needed medical protection. Because there would always be a demand, Acton was a proponent of regulation of prostitution, although he preferred early marriage, better sex education, and continency). See, W. ACTON, PROSTITUTION CONSIDERED IN ITS MORAL, SOCIAL AND SANITARY ASPECTS (1857, 1969); E. FREEDMAN, *supra* note 13, (states that a few women reformers attempted to discredit the Lombrosian theories of criminal types but, at the same time, new theories of hereditary defects that caused delinquency became popular explanations for crime and prostitution).

127. C. VEDDER AND D. SOMMERVILLE, THE DELINQUENT GIRL 16-18 (1970).

128. *Id.* at 31-32; E. FREEDMAN, *supra* note 13, at 110-111.

129. W.I. THOMAS, THE UNADJUSTED GIRL 98 (1923, Torchbooks 1967 ed.). (This theory has been propounded by many criminologists. All theorists, whether they rely on biological or social explanation label male delinquency as aggressive and female delinquency as sexual, passive, and self-destructive). C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 5-23 (1982) (notes that Freudian theorists from Piaget to Erickson have followed this theory in describing child development).

'Purity' have almost a magical value. . . The girl as a child does not know she has any particular value until she learns it from others, but if she is regarded with adoration she correspondingly respects herself and tends to become what is expected of her. And so she has in fact a greater value. She makes a better marriage and reflects recognition on her family."<sup>130</sup>

Thomas saw female sexuality as female "capital" used in exchange for obtaining other wishes.<sup>131</sup> He wrote that prostitution was becoming an individualized and transitory occupation, which was contrary to the nineteenth century view of prostitution as destroying women's lives and the early twentieth century view of prostitutes as white slaves. Rather Thomas saw casual prostitution as the major problem of social disorganization.<sup>132</sup>

Female demoralization was considered to be a product of family disorganization. Thus the solution was to remove these delinquent girls from their parents to institutions where societal rules would be enforced. But Thomas did not see this solution as responsive to the problems facing America in terms of changes in social and economic structures and values and the growing trend towards individualization rather than social cohesion. In short, no longer were there good girls and fallen women, only individuals making choices on how to use their capital.<sup>133</sup>

130. W.I. THOMAS, *supra* note 129, at 98 and Introduction by Michael Parenti at ix.

131. *Id.* at 98-108. M. DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTIONS OF POLLUTION AND TABOO* (1966) (discusses impurity taboos of primitive cultures in relation to their sexual customs. She notes that purity and control of female sexuality is especially important in societies that make a commodity of sex through sale of the female in marriage, slavery, or concubinage as a part of inter or intra tribal relations. There is, indeed, small difference between the sale of property in women through marriage or slavery and the sale of women through sexual intercourse). See generally Davis, *The Sociology of Prostitution*, 2 AM. SOC. REV. 744 (1935) (Modern feminists have asserted that the only difference between prostitutes and respectable women is hypocrisy). See, Millett, *Prostitution: A Quartet for Female Voices*, at 60-125 in V. GORNICK AND B. MORAN, eds., *supra* note 90. G. LERNER, *supra* note 4, (traces the history of early societies in which women were an important commodity of trade and barter and thus subject to strict regulation in order to protect their value).

132. W.I. THOMAS, *supra* note 129, at 109. (Thomas believed that human behavior was guided by four "wishes":

1. The desire for new experience.
2. The desire for security.
3. The desire for response.
4. The desire for recognition.

Thomas accepted the theory of women's passive sexuality).

133. *Id.* at 116-125, 230. (Thomas gave an insightful review of the Chicago Vice Commission Report on Prostitution). See CHICAGO VICE COMMISSION, *THE SOCIAL EVIL IN CHICAGO*: (Reprint ed. 1970). (The report clearly stated it would make no discoveries nor recommendations that did not conform to society's standards, "[the Commission] has kept constantly in mind that to offer a contribution of any value such an offering must be, first, moral; second, reasonable and practical; third, possible under constitutional powers of our courts; fourth, that which will square with the public conscience of the American people." But Thomas noted that the method sought to enforce and justify a stated norm

The prevailing mood of American public policy towards female juveniles was the dependency stereotype which permitted preventive intervention and coercive supervision. Reformatories for girls began in the mid 1800's. They were primarily run by philanthropic organizations and focussed on the wayward girl or the fallen woman. The late 1870's saw a growth of girl's clubs, YWCA activities, and settlement houses aimed at providing wholesome activities for the newly emerging factory populations of urban areas. The juvenile court was a product of the Progressive Era reform, intended to remove for re-education delinquent youth from bad families and socially impoverished communities. Delinquent girls were sexually deviant, and the courts acted to control social norms and protect young males by removing deviant females from society.<sup>134</sup>

Girls were never perceived as tractable in adolescence. Prevailing theory held that boys could be shaped in adolescence for economic independence through appropriate training, whereas girls were completely developed at puberty. Female reformatories isolated sexually deviant women. They retrained and conditioned the inmates in skills of domesticity and prepared the juvenile for entry into the "marriage market" or, at least, domestic employment. There was little or no effort to train women for the economic market place: domesticity, not economic independence, was the countervailing value to deviance.<sup>135</sup>

One rather frightening goal of the reformatories was discouraging or preventing further procreation by "unfit races." The eugenics movement was a prominent part of the Progressive Reform movement, and many leading Progressive Reformers were equally active in birth control, juvenile court reform, vice control, and eugenics. Permanent institutionalization or sterilization of the unfit was a stated goal of the eugenicists.<sup>136</sup> This point is somewhat ironic since the original impetus for the women's movement on prostitution was to fight the medical community who advocated regulation and inspection of prostitutes rather than prohibition.

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and ignored the ongoing social evolution).

134. Schlossman and Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*. 48 HARV. ED. REV. 69-79 (1978); E. FREEDMAN, *supra* note 13, at 129-30; (states that juvenile courts and women's courts usually had no jury trials. In most women's courts, physical inspection was mandatory, no complaint was filed until after arrest, and the case was postponed pending the results of the physical examination).

135. Schlossman and Wallach, *supra* note 134, at 72-73. (In Chicago 59% of boys and 37% of girls were placed on probation and one half of girl delinquents as opposed to one fifth of boy delinquents were sent to reformatories. In Milwaukee twice as many girls as boys were incarcerated. This was despite the fact that girls were usually sent to court for status offenses while boys were there for criminal charges).

136. *Id.* at 75-84. (Girls were not given probation because prevailing theory of adolescence held women were weak, impressionable and emotional. They were thus less susceptible to informal change mechanisms. Adolescence for boys was a testing time but girls were formed at puberty. Moreover family degeneracy was usually blamed for sexual deviance, and domesticity was deemed essential to rehabilitation). See also, Black and Reiss, *Police Control of Juveniles*, 35 AM. SOC. REV. 63 (1970).

Early women's rights advocates saw medical regulation of prostitutes as a rights infringement only perpetrated upon women because of their status as nonpersons under the Constitution. Twentieth century reformers were more enthralled by pseudoscientific theories of race degeneracy and thus able to justify intrusion into the individual's privacy in order to save society.

The goals of the progressive reformers ignored Thomas' insights on social evolution. Progressive reformers accepted the stereotype of passive dependency and thus created a myth of innocent white slaves, preyed upon by mercenary immigrants. This myth appealed both to Victorian morality and nativist fears of new immigrants. The women reformers pointed to economic impoverishment, but they did not make any connection between reform of the system and the sale of women as a commodity. Rather they joined with corporation heads and churchmen to link economic deprivation to being easily preyed upon by men. Reformers did not look at social disorganization and wonder how to meet new conditions, instead they tried to step backwards in time and recreate the myth of small town, homogeneous America through social purity, political reform, and placing women in the higher moral sphere essential for correct family development.<sup>137</sup>

#### D. *The Sexual Revolution*

The modern trend in legal literature is to oppose the criminalization of prostitution; however, opinion differs on whether legalization or decriminalization is preferable. Feminist critics of existing law assert that legalization is only another means of official oppression of women and decriminalization is the only alternative. Legalization entails registration, segregation, possible police harassment, and commercial exploitation of women. Nevada is a case in point where prostitution is permitted on a local option basis. The regulation includes redlight zoning, medical inspection, and licensing. Here it is once again taken out of women's control and turned into a major tourist trade operated by the state and big business.<sup>138</sup>

Decriminalization, it is asserted, would free women of police harassment and, at the same time, make it unnecessary for women to seek unofficial protection from pimps and police. It would also permit women to leave prostitution without the fear of a police record which could prevent them from obtaining another job.<sup>139</sup> To the contrary, proponents of legali-

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137. D. PIVAR, *supra* note 70.

138. Symanski, *Prostitution in Nevada*, at 126-154, in L. BOWKER, ed., *WOMEN AND CRIME IN AMERICA* (1981).

139. Bennetts, *Prostitution: A Non-Victim Crime? Women Endorsing Decriminalization*, 8 *ISSUES IN CRIMINOLOGY* 137-162 (1973); Milman, *New Rules for the Oldest Profession: Should We Change Our Prostitution Laws?* 3 *HARV. WOMEN'S L.J.* 1-82 (1980); Millett, *supra* note 131. (Kate Millett's attempts to link the plight of the oppressed and prostitutes may be misplaced. At the same time prostitutes are labelling their status as a

zation argue that prostitution should be regulated because of the public health issues, which now include AIDS as well as venereal diseases; the relationship between prostitution and other crimes; and the threat to property values caused by streetwalkers and houses of prostitution, although evidence linking crime and prostitution is not substantial.

Public opinion, however, continues to support legal suppression of prostitution.<sup>140</sup> There has not been a significant change in public or judicial attitudes towards prostitution since the beginning of the twentieth century when the Supreme Court upheld statutes criminalizing prostitution and interstate transportation of prostitutes as essential to stamp out a major social evil, dangerous to the family.<sup>141</sup> Prostitution statutes have survived equal protection and privacy attacks in the face of a sexual revolution where legislation banning contraceptive devices, abortion, and obscene materials has been struck down as unconstitutional infringement of our right to privacy.<sup>142</sup> The statutory offense of prostitution is usually defined as the exchange or barter of sexual services.<sup>143</sup> Soliciting, pandering, and pimping are offenses associated with males, but most courts have held that males cannot be convicted of hiring a prostitute, although the sale is a two-way contract.<sup>144</sup> Even when laws have been reformed to penalize both the buyer and the seller, studies show that arrests of male

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business, feminists are seeking to expose the underlying patriarchy that creates commodization of the female body. It is probably unrealistic to expect solidarity on this issue. Once again middle class America seeks to impose its understanding of the world on its less-well endowed inhabitants). See e.g., B. HOBSON *supra* note 15, at 215-223 (on prostitute's organizations in the United States and in Europe). Boyle and Noonan, *Prostitution and Pornography: Beyond Formal Equality*, 10 DALHOUSIE L. J. 226 (1986).

140. Roenbleet and Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373-427 (1973).

141. *United States v. Bitty*, 208 U.S. 393, 401 (1908) (Upheld statute prohibiting importation of any girl or woman for purposes of prostitution); *L'Hote v. New Orleans*, 177 U.S. 587 (1900) (Upheld city ordinance prescribing redlight district outside of which no women of "lewd character" could live). See, B. M. HOBSON, *supra* note 15, at 211-214. (Hobson notes that cases that have upheld gender as being an appropriate classification in prostitution laws are based on a false dichotomy of private sexual acts (pornography) which are held to be constitutionally protected and public sexual acts (prostitution) which are not). See, e.g., *Hawaii v. Kam*, 56 U.S.L.W. 2429 (Hawaii Sup. Ct. 11861, 1/8/88), (Striking down Hawaii statute banning sale of pornography as infringing right of privacy, in which the court stated, "*Hawaii v. Mueller*, 671 P.2d 1351 (1983) is distinguishable. Mueller upheld the legislature's authority to prohibit prostitution even in the privacy of one's home. It resolved that inasmuch as the right to privacy does not protect prostitution, the state was not required to show a compelling state interest").

142. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Invalidated statute prohibiting use and prescription of contraceptive drugs or devices as violation of right of privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Invalidated statute prohibiting distribution of contraceptives to unmarried individuals); *Roe v. Wade*, 410 U.S. 113 (1973) (Invalidated Texas abortion statute); *Stanley v. Georgia*, 394 U.S. 557 (1968) (Invalidated Georgia obscenity statute which intruded in individual's privacy in own home).

143. Milman, *supra* note 139, at 2. For a listing of state statutes see, Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 LAW & INEQUALITY 609, 624 (1984).

144. E. SCHUR, *supra* note 12, at 164-167.

buyers do not rise appreciably. Cultural perceptions still guide official actions.<sup>145</sup>

But, perhaps, this continuing stigma of commercialized sex represents an ambivalence in our attitudes toward the real meaning of sexual revolution for women. We fail to acknowledge the parallel between commercialized prostitution and other forms of sexual service.

### E. *Sex Roles, Sexuality, and the Sexual Marketplace*

Prostitution is but one species of sexual services. In an essay on market inalienability, Margaret Radin analyzes the sale of sexual services as part of the classic liberal view of all rights as property, transferrable in the marketplace.<sup>146</sup> Our society, however, does not permit certain rights of personhood to be commodified. We express moral or social intolerance to the marketability of body organs, children, or sexual services, which are associated with cultural values such as marriage or family. What the legal economists refer to as externalities.<sup>147</sup>

Radin looks at the prophylactic reasons for prohibiting alienability of personhood as applied to prostitution, baby selling, and surrogate mothering and suggests that although inalienability oppresses women who are not otherwise able to increase their wealth as market traders, commodification legitimates and enforces gender oppression.<sup>148</sup> She suggests a partial solution of incomplete commodification of prostitution, similar to regulation of labor, through decriminalization of the sale of sexual services but prohibition of an organized market by banning brokerage, recruitment, and advertisement. The solution might lower potential sales but maintains sexuality as an inalienable right of personhood.<sup>149</sup>

The analyses of surrogate mothering and baby sales point up some difficulties of such partial solutions. In baby sales, the problem is commodification of the child as opposed to the right of the mother and father to alienate their own reproductive rights. In the surrogate mothering contract, one legal theory espoused is that the mother is selling sexual services, not the child, and the father is the owner of the child. The surrogate transaction is commodification and gender hierarchy.<sup>150</sup> Even incomplete

145. C. VEDDER AND D. SOMMERVILLE, *supra* note 127.

146. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

147. *Id.* at 1863-1870.

148. *Id.* at 1915-1921.

149. *Id.* at 1921-1925. See e.g., B.M. HOBSON, *supra* note 15, at 235-36, ("To view prostitutes as working women is an indictment of the hypocrisy in a society that charges with a criminal offense prostitutes in a multimillion dollar, visible industry . . . A society that institutionalizes prostitution as a work option for the poor makes a statement about its position on inequality . . . Changing the course of prostitution history will require beginning with a recognition that prostitution is not a private contract between consenting adults but an issue that is intrinsically bound up with long-term agendas for social and sexual equality").

150. *In re Baby M*, 13 FAM. L. REP. (BNA) 2001, 2018 (N.J. Super. Ct. Ch. Div.) (discussed *infra* note 163 and accompanying text. The ABA Family Law Section passed a

commodification by permitting each party to rescind the surrogate contract does not change the fact that women are marketed as reproduction machines and children can be traded or abandoned in the marketplace. These half-way solutions of an imperfect society only point up the reality of class and gender oppression that cannot be changed by attempted fixes of just one part of the existing legal and cultural system.<sup>151</sup>

Kingsley Davis asks why prostitution is so thoroughly disapproved of in western society and yet so vital an institution and answers,

The basic element in what we actually call prostitution—the employment of sex for non-sexual ends within a competitive-authoritative system—characterizes not simply prostitution itself but all of our institutions in which sex is involved, notably courtship and wedlock. Prostitution therefore resembles, from one point of view, behavior found in our most respectable institutions. It is one end of a long sequence or gradation of essentially similar phenomena that stretches at the other end to such approved patterns as engagement and marriage. What, then, is the difference between prostitution and these other institutions involving sex?

The difference rests at bottom upon the functional relation between society and sexual institutions. It is through these institutions that erotic gratification is made dependent on, and subservient to, certain cooperative performances inherently necessary to societal continuity. The sexual institutions are distinguished by the fact that though they all provide gratification, they do not all tie it to the same social functions. This explains why they are differently evaluated in the eye of the mores.

Of the numerous functions which sexual institutions subserve, the most vital relate to the physical and social reproduction of the next generation. If we ask, then, which sexual institutions in a society receive the greatest support from law and mores, we must point to those which facilitate the task of procreating and socializing the young. It follows that

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Model Surrogacy Act which makes surrogacy contracts enforceable and overrides the common-law presumption that a mother is the woman who bears the child. 74 ABA J. 137 (March 1, 1988). The term, surrogate mother, is demeaning. The mother of the child is the mother, not a stand in, and using the term, "surrogate" takes away her personhood, her connectedness to her child).

151. See, Taub and Parles, *Amicus Brief: In the Matter of Baby M*, 10 WOMEN'S RIGHTS L. REP. 7, 9-11 (1987) (discusses cases applying prohibitions against the sale of children in adoption or related proceeding to the surrogacy contract). *Doe v. Kelly*, 106 Mich. App. 169, 307 N.W. 2d 438 (1981) (upheld a statute prohibiting the exchange or sale for money or other considerations of children in adoption and related proceedings as applied to a surrogate contract. In the Michigan case, the Court stated the child's rights were protected by the statute). To the contrary, *Surrogate Parenting Associates, Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W. 2d 209 (Ky. 1986) (held a statute prohibiting the sale or purchase of a child for sale or purchase through adoption did not apply to a surrogate contract. The reasoning of the Court in the Kentucky case seems inappropriate to the issue of the child's rights of personhood. The court held the contract revocation feature protected the mother's right of choice).

sanctioned sexual relations are generally those within these (or auxiliary) institutions, while unsanctioned relations are those outside them.<sup>152</sup>

The literature suggests that prostitution is not an aberration of our culture or our criminal law. Rather it is a method of dealing with women's sexuality and sex role. It depicts the role of woman in society. Women are presumed to be inferior in every way, but when it comes to sex, the entire responsibility is placed on them. Men are allowed free sexuality with no moral or social limits. Women are controlled through the family and through punishment for deviation from social or legal norms about sexuality and sex role.

## F. Conclusion

### 1. Stories

In an essay on historical methodology by R.G. Walters, "Sexual Matters as Historical Problems: A Framework of Analysis," the author set forth guidelines for researching the sexual history of prostitution. Walters asserted that sex roles—prescribed social behavior—and sexuality—erotic impulses expressed through behavior or rhetoric—were two separate phenomena, although interaction between the two might be the key to historical interpretation. He suggests that sexual history should be placed in a historical context of cultural values, norms, and practices.<sup>153</sup>

In the context of prostitution, Walters set forth six different questions, each relating to sex roles or sexuality as well as to a value, a norm, or a practice. Walters suggested the differences in a society among values espoused by a society, its legal norms, and actual practices would be much sharper than the differences between sex roles and sexuality. For example, nineteenth century female hysteria could be linked both to a restricted sex role and a repressive sexual morality. Walters also suggested that looking at larger societal values such as the nineteenth century value of redirecting sexual energy to economic production allows us to note instances where a value such as thrift or parsimony may have been a major reason for counseling sexual restraint rather than the narrower value of sexual repression.<sup>154</sup>

Sexual matters are a part of social structure, and it must be determined how different societies use sexuality and sex roles to define power relationships. For example, it is clear that nineteenth century sexual mo-

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152. Davis *supra* note 131, at 746-747.

153. Walters, *Sexual Matters as Historical Problems: A Framework of Analysis*, 6 SOCIETAS 157-175, 158 (1976); To the contrary, R. BLEIER, *supra* note 2, at 167-68 suggests that there is nothing about desire or arousal that comes naturally. Instead we are conditioned from childhood to respond sexually to certain stimuli, whether that stimulus is a person or a physical experience such as violence or pornography. This suggests that sex roles and sexuality are cultural constructions in which we play out issues of control, dependency and vulnerability through sexual responses based on preconditioned sex roles.

154. Walters, *supra* note 153, at 159-163.

rality and sex roles limited women to the home and excluded them from the male dominated world of economics and politics. But one must also ask the question, Walters stated, of whether sexual control or more general values such as power, authority, and civilization were at stake. If so, then a transformation of sexual attitudes or a change in sex roles will not change the status of women.<sup>155</sup>

The literature I have surveyed tells a different story about the history of sexual matters. Sexuality for women has been what men have wanted as sexual gratification or as a sexual ideal.<sup>156</sup> Walter's questions on prostitution describe a male model of prostitution based on female responses to male demands.<sup>157</sup> More problematically, it presumes the actions of free agents and does not take into account domination and subjugation. Walters' model does not ask the right question, which is, who is doing what to whom and why do they have that power?<sup>158</sup>

I would argue that the literature shows sexuality and sex roles not to be separate or to merely interact but, rather, to be one and the same. Women's sexuality is defined by what men expect as sex and a woman's sex role is defined and restricted by a male dominated society. Gender is a little bit of biology and a lot of social construction. Researchers have taken Walter's lead and looked at a specific city, segmented the classes within that area, determined what male groups frequented prostitutes and what female groups became prostitutes. All of the research tells much of the same story. Women primarily became prostitutes for lack of viable alternatives to economic independence. Women's sex role restrictions and male-defined sexuality have made prostitution a women's economic alternative in the marketplace, albeit the underground or shadow economy.

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155. *Id.* at 169-172. (The question, however, should be why is women's domination seen as a less general value than authority or civilization? Why should civilization be dependent on women's domination or on domination at all?). See, e.g., R. BLEIER *supra* note 2, at 115-136 (on flawed theories of evolutionary "man as the hunter" scenarios used to justify women's domination).

156. C. MACKINNON, *supra* note 2, at 6-10.

157. Walter's analytical model divides prostitution into a study of sex roles and sexuality and asks six questions about values, norms, and behavior concerning sex roles and sexuality with reference to prostitution. The sex role questions are:

- a. Values: How does promiscuity affect a woman's or man's social standing.
- b. Norms: Whether it is condoned for males to go to prostitutes.
- c. Behavior: What groups of men are most likely to frequent prostitutes and what groups of women are most likely to become prostitutes.

The sexuality questions are:

- a. Values: Whether it is commonly regarded as moral to engage in sexual activity with people who are relative strangers.
- b. Norms: Whether prostitution is socially sanctioned.
- c. Behavior: Whether prostitution is a frequent source of gratification for males. See, Walters, *supra* note 153, at 159-163.

158. C. MACKINNON, *supra* note 2, at 6-10.

Legitimate and illegitimate sexual activity divides women into accepted and stigmatized classes. It keeps us in our place.<sup>159</sup>

## 2. More stories

"My great-great-great grandfather Austin Miller, a thirty-five-year-old lawyer, bought my eleven-year-old great-great-grandmother, Sophie, and her parents (being "family Negroes," the previous owner sold them as a matched set.) By the time she was twelve, Austin Miller had made Sophie the mother of a child, my great-grandmother Mary. He did so, according to family lore, out of his desire to have a family. Not of course, a family with my great-great grandmother, but with a wealthy white widow whom he in fact married shortly thereafter. He wanted to practice his sexual talents on my great-great-grandmother. In the bargain, Sophie

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159. See West, "Jurisprudence and Gender," 55 *UNIV. OF CHI. L. REV.* 1 (1988) for a thoughtful analysis of masculine and feminist jurisprudence. Professor West contrasts the dominant masculine liberal legal theory of jurisprudence which is based on a minimalist state that ensures order and autonomy (represented by Rawls, R. Dworkin, Ackerman, Nozick) with the masculine critical legal theory of a longing for community (Kennedy, Unger, Gabel). Both, Professor West contends, are based on the separation thesis, which holds that all humans are distinct and not essentially connected with each other.

Feminist jurisprudence holds a contrary vision of human existence premised on the material fact that women are actually or potentially connected to other human life. The dominant feminist theory, cultural feminism, stresses connectedness as engendering nurturing and the ethic of care (Gilligan, Chodorow, Sherry) whereas radical feminist theory sees connectedness as penetration and invasion (A. Dworkin, MacKinnon, Estrich). Thus neither the dominant worlds nor the radical worlds can ever meet. Liberal males value autonomy while liberal females value connectedness. Critics value association which radical feminists see as oppressive invasion.

In an exchange over these contrary visions of the social order, Professor West compared Professor Richard (now Judge) Posner's liberal economic order to the literature of Franz Kafka. West, "Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner," 99 *HARV. L. REV.* 384 (1985); Posner, in turn, attacked West's reading of Kafka as reductionist and her world view as critical legal theory, a romantic world of Dionysian disorder, opposed to the liberal Apollonian Rule of Law. Posner, "Significance of Free Choice: A Reply to Professor West," 99 *HARV. L. REV.* 1431 (1985); R. POSNER, *LAW AND LITERATURE* 176-205 (1988).

Not so. Perhaps women, as readers, bring a different perspective to Kafka. *THE HUNGER ARTIST* and *THE TRIAL* may remind us of ourselves—or lack of self. We are in a world we do not control. We are asking "to be", not the liberal autonomy or association desired by males, who know they "are". But as denizens of this world, we are also seeking otherness, because we must have something. And so the hunger artist cries out that she would eat if only she could find the food she liked. The bulimic and anorexic struggle between fear of invasion and fear of nothingness. In *THE TRIAL*, we struggle to find out what is going on, how to survive in a world not of our own making. But Posner sees K, and thus all of us, as equal aggressors seeking autonomy. Posner dismisses the washer-woman's rape as opportunistic flirtation and deception of K, just as the critics dismissed Lolita as a prepubescent fallen woman.

Posner ends by stating, "But if she [Professor West] believes these things [that we can be attracted to punishment] then she lives in a different world than yours and mine. And we say, yes we do, your "yours" excludes us.

bore Mary, who was taken away from her and raised in the Big House as a house servant, an attendant to his wife Mary (after whom Sophie's Mary, my great-grandmother, had been named) and to his legitimated white children."<sup>160</sup>

"The third argument is that to produce or deal with a child for money denigrates human dignity. To that premise, this court urgently agrees. The thirteenth amendment to the United States Constitution is still valid law. The law of adoption in New Jersey does prohibit the exchange of any consideration for obtaining a child. The fact is, however, that the money to be paid to the surrogate is not being paid for the surrender of the child to the father. And that is just the point—at birth, mother and father have equal rights to the child absent any other agreement. *The biological father pays the surrogate for her willingness to be impregnated and carry his child to term. At birth, the father does not purchase the child* (Italics added). It is his own biological genetically related child. He cannot purchase what is already his."<sup>161</sup>

"This court holds therefore that in New Jersey, although the surrogacy contract is signed, the surrogate may nevertheless renounce and terminate the contract until the time of conception. She may be subject then for such monetary damages as may be proven. Specific performance to compel the promised conception, gestation, and birth shall not be available to the male promisor. However, once conception has occurred the parties rights are fixed, the terms of the contract are firm and performance will be anticipated with the joy that only a newborn can bring."<sup>162</sup>

"Now having found that the best interest of the child will be enhanced and served in paternal custody, that there is no evidence of fraud overreaching or violation of any other principle of equity by Mr. Stern, [the biological father] this court having evaluated the equities finds them weighted in favor of Mr. Stern. Enforcing the contract will leave Mr. & Mrs. Whitehead [the "surrogate" biological mother] in the same position that they were in when the contract was made. To not enforce the contract will give them the child and deprive Mr. Stern of his promised benefits. This court therefore will specifically enforce the surrogate parenting agreement to compel delivery of the child to the father and to terminate the mother's parental rights."<sup>163</sup>

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160. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 418-19 (1987).

161. *In re Baby M*, *supra* note 150, at 2018.

162. *Id.* at 2019.

163. *Id.* at 2026. The New Jersey Supreme Court, *In re Baby M*, 56 U.S.L.W. 2442-2443 (Sup. Ct. A-39, 2/3/88) reversed in part and affirmed in part the lower court decision. (The Supreme Court invalidated the surrogacy contract as conflicting with statutes prohibiting the use of money in connection with adoption, statutes requiring proof of unfitness or abandonment before termination of parental rights, and statutes making surrender of custody revocable in private placement adoptions. The Court, however, upheld the custody decision of the lower court as in the best interests of the child but remanded for reinstatement of the mother's visitation rights).

“In reviewing those powerfully impersonal documents, [the contract of my great-great-grandmother Sophie’s sale] I realized that both she and the fox [in *Pierson v. Post*]<sup>164</sup> shared a common lot, were either owned or unowned, never the owner. And whether owned or unowned, rights over them never filtered down *to* them; rights to their persons never vested in them. When owned, issues of physical, mental and emotional abuse or cruelty were assigned by the law to the private tolerance, whimsy, or insanity of an external master. And when unowned—i.e., free, freed, or escaped—again their situation was uncomfortably precarious, for as objects to be owned, they and the game of their conquest were seen only as potential enhancements to some other self. They were fair game from the perspective of those who had rights, but from their own point of view, they were objects of a murderous hunt.<sup>165</sup>

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164. *Pierson v. Post*, 3 Caines 175 (N.Y. Sup. Ct. 1805). (In *Pierson v. Post*, the issue was who was the rightful owner of the dead fox, the hunter of the fox who cornered it or the killer of the fox).

165. Williams, *supra* note 160, at 420-421.