

Liberal Virtue

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With a few notable natural law exceptions, normative legal philosophy has been dominated for a generation by intricate debates between deontological and consequentialist theories. This debate has ignored those holding the quite common view that law guides our ethical well-being. Limiting the conversations to a binary clash between various liberal justifications, Kantian deontology and various consequentialist models, has prevented engagement (except in opposition) with those who believe that nurturing virtue is an important justificatory feature of law. The relatively recent rebirth of virtue ethics – or, as applied to law, virtue jurisprudence – presents an important alternative view of the normative justification of law and, in some ways, fills this gap. Proponents of virtue jurisprudence, particularly neo-Aristotelian variations, argue that a virtue-centred theory of law better justifies and explains important parts of law. Ignoring virtue theory-based intuitions cripples our ability to make progress on pressing legal questions. This is particularly evident in the disconnect between the conversation in the legal academy surrounding vice crimes, where common intuitions about the justified use of law are most viscerally tested. One particularly heartbreaking example is the American prohibition of prostitution which results in the legal isolation of tens of thousands of the most vulnerable women.

Academic work on prostitution is worth noticing for two remarkable features. The first is the breadth and the depth of academic positions advocating the decriminalisation of

prostitution. Important intellectuals since John Stuart Mill have persistently argued for the decriminalisation of prostitution. That is not to ignore important voices raised in counter-argument – particularly one facet of modern feminist jurisprudence. Still, the bulk of scholarship highlights the harms of the legal prohibition of prostitution in America.

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

The problem with the arguments of liberal reformers, mirrored in the unwillingness of liberal theories to engage with virtue jurisprudence, is that they run counter to the deeply-held moral intuitions of many. What decriminalisation arguments miss is that there are sound moral reasons to believe prostitution is wrong, reasons that speak to me deeply. At home and particularly when travelling to countries where prostitution is public and endemic, I have always deeply felt it would be flatly immoral to accept the solicitations of sex workers. Indeed, to lay my cards on the table, even in penning this piece, I am occasionally gripped by moments of doubt. Unlike those who have total confidence that philosophical conclusions settle the matter, I find it unsettling to write a piece on decriminalisation of prostitution. In

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this case, the political is personal. The belief that prostitution is morally wrong is a considered and deeply held one. At best, the current arguments seeking to reform prostitution laws ask people to do the very difficult, to set aside their sense of right and wrong or cabin them from the business of running a society. At worst, such arguments treat deeply held moral criticism dismissively.

Arguments that seek to convince others to discard long held moral commitments are, of course, not only acceptable but often essential scholarly projects. Much academic work pursues and advocates the most powerful arguments to convince others of one's position. Nor could a complex and heterogeneous society last long without boundaries between each person's personal morality and the requirements of law. Still, to the extent that theories of decriminalisation ask others to disregard core intuitions, one is unlikely to convince anyone who did not already agree with the position.

This is not a promising method for generating legal reform in the real world. While such debates generate great philosophical heat, one even hopes advancement, they are unlikely to garner the consensus needed to change the law. The problems surrounding prostitution seem intractable precisely because moral intuitions seem deeply divided. Thus, any progress which requires people to ultimately be convinced of the correctness of a unique set of philosophical views is unpromising, to say the least.

This is not merely a matter of abstract concern, a neat philosophical puzzle to be solved. The power of the state finds its most visceral form in the police bursting through doors, the power of arrest and imprisonment. Put bluntly, our inability to find a way to make progress on prostitution banishes tens of thousands of women from the protection of the law, condemning them to beatings at the hands of pimps and leaving them defenceless in a shadow world of sex slavery.

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

Without illustrating that one can support legal reform of our prostitution laws despite its immorality, reform efforts are a non-starter, leaving thousands of women abandoned by the law. Thus, it is critical to see that one can support the decriminalisation and regulation of prostitution despite viewing prostitution as immoral. Even virtue theorists, who are committed to the idea that law fundamentally serves to foster moral virtue in society, can take

notice of the damage wrought by the current law and support reform. Again, from a wide range of moral starting points, one can support decriminalisation of prostitution even while convinced that prostitution is immoral.

I. A Moral Prohibition

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

If one cannot prove that moral objections motivate the current criminal prohibition, one can reveal the unconvincing nature of the ostensible empirical justifications. When one inspects the commonly offered rationales for the ban on prostitution, what stands out is the difficulty of gathering precise empirical evidence given the illegality, secrecy and stigma that surrounds prostitution.¹ The problem is further complicated by the difficulty of disentangling the problems inherent in prostitution from those that arise because it is illegal.² Because sex workers are placed outside the legal system, their work may be pushed into close proximity with other illegal acts and actors. This uncertainty undermines confidence in justifications

¹ Law (2000: 535).

² *ibid*; Constant (1999: 103).

premiered on particular controversial 'facts' about prostitution. Indeed, if the known research is accurate, it is startling how many of the commonly offered justifications for the ban on prostitution fail.

Let us start from the gravest of issues surrounding prostitution. Across the world, numbers of young women and others are coerced into becoming sex slaves, threatened, tortured and killed.³ In America, where we too often imagine ourselves immune, numbers of illegal residents and underage girls are held against their will and forced into prostitution.⁴ Anyone exposed to these heartbreaking stories of human suffering needs no academic musing to understand their tragedy.

As critical as this is, there is no clear reason to believe that making prostitution illegal reduces instances of human trafficking. It is certainly worrisome that decriminalisation could increase human trafficking.⁵ Yet, it is possible that the current model of American prohibition contributes to human trafficking.⁶ Indeed, one might believe it increases human trafficking by placing sex workers outside of normal legal channels.⁷ This problem is made worse by the widespread sexual abuse of sex workers by police officers.⁸ The isolation and frayed trust makes it even more difficult to garner information from sex workers on activities of vital

³ Clements (1996: 52-53, 58).

⁴ Law (2000: 532-35). Though the numbers are hard to access, COYOTE (Call Off Your Old Tired Ethics), the most visible organisation advocating for the rights of prostitutes, estimates that 15% of women are forced into prostitution: Jenness (1993: 32).

⁵ de Marneffe (2010: 37).

⁶ *ibid* 37-38.

⁷ Law (2000: 581-85).

⁸ Silbert and Pines (1981: 387); Erbe (1984: 618).

importance, such as human trafficking.⁹ Further, that prostitution is illegal may force sex workers into close proximity with other criminal behaviour, particularly drug-laden spaces.¹⁰ Lastly, isolating sex workers forces them to find means of private enforcement, creating a vacuum for violent pimps.

The point is not that human trafficking is not a grave concern. Rather it seems unlikely that if one's motivation is to reduce human trafficking, a legal prohibition which isolates sex workers, forces them into the arms of pimps and cuts them off from the help of the police is a productive regime.¹¹

A weaker version of the argument that prostitutes are forced into sex work focuses not on the total lack of consent seen in human trafficking but rather indicts the quality of the 'consent' given by prostitutes.¹² Here our aversion to prostitution does not seem to centre simply around the question of ensuring voluntary choice. The law routinely handles difficult issues of ensuring that agreements are voluntary in other contexts such as contract law. This no doubt indicates that much of what makes such bargains 'unconscionable' is that it is viewed as morally impermissibly. There is a visceral rejection of the idea that some women might willingly choose prostitution as a livelihood.¹³ Put another way, I suspect our current laws on prostitution do not truly take consent seriously.

⁹ de Marneffe (2010: 35, 37-38); Law (2000: 581-85).

¹⁰ Richards (1982: 92).

¹¹ Law (2000: 584).

¹² de Marneffe (2010: 5-7).

¹³ Shrage (1989: 437).

Some view legal permission as a misguided attempt to permit choice. There are Marxist or Feminist critiques that deny that any choice to submit to prostitution can be considered authentic given the social power imbalance which (de)values women as merely sexual objects.¹⁴ Others might think that given our knowledge that a disproportionate number of sex workers suffered sexual abuse in their youth, we should be sceptical of their 'choices'.¹⁵ Still others will be rightfully concerned about economic pressures that leave some women with few options, thus undermining the voluntariness of their decision.

These are serious concerns which deserve more attention than can be afforded here. While I take seriously the point that structural inequalities inevitably inform the character of our choices, I am sceptical of the most extreme of Marxist and Feminist views which would eviscerate the possibility of authentic choice.¹⁶ Indeed, there are powerful arguments that a view which makes women unable to choose what to do with their bodies borders on condescension. I do not attempt to settle this debate here. However, besides doubting the plausibility of the most extreme version of this critique, the fundamental structures of our law and our views of personal agency would have to undergo significant change to incorporate a view of structural inequality so deeply into legal consent.

Similarly, while prior sexual abuse may rightfully cause one to be concerned about the soundness and healthiness of a person's choice, it is harder to describe the choice as inauthentic. To do so is to construct an ideal counter-historical person whose choices stand as

¹⁴ Jagger (1980: 259, 265-69); Shrage (1989: 442). I am also indebted to clarify treatment on this point in Havelková (2010).

¹⁵ Dalla (2000: 348); Matthews (2007: 98); de Marneffe (2010: 98).

proxy. The law certainly does not undo the many unsound choices normal adults make as a result of their inner demons and broken pasts. Nor is the law normally willing to disable consent to engage in less-than-ideal work on the basis of economic circumstances.¹⁷

A couple of other contentions should be addressed briefly. The first issue is the public health dimension of prostitution. Those who came of age during the AIDS epidemic (and perhaps we all came of age during that fraught time) will not lightly shake the feeling of gravity that accompanies the public health dimension of prostitution. Though it is unclear the extent to which sexually transmitted diseases ('STDs') are disproportionately linked to prostitution in America, it would clearly be irresponsible for any government to ignore the serious concern.¹⁸ Yet again, it is hard to believe that legal prohibition which submerges the immense sex trade tackles rather than exacerbates the problem. Indeed, successes in controlling STDs in the domestic pornography industry and the few jurisdictions that permit prostitution are attributable to the rigorous health monitoring of an open industry.¹⁹

The last issue to which we need to attend is the 'public nuisance' aspects of prostitution. The moral status of these behaviours is controversial, particularly, whether behavior which simply offends others is properly considered harmful. Additionally, as previously mentioned, some question the extent to which certain public nuisances that attend prostitution are a result, rather than the basis, of its legal prohibition. Nonetheless, if the goal

¹⁶ Jagger (1980: 265-77).

¹⁷ That is not to say that there can be no legally disabling or coercive circumstance, eg unconscionable bargains struck under duress. Indeed, I have argued elsewhere that in certain circumstances, some offers may be considered coercive. Yankah (2008: 1229); Zimmerman (1981: 144-45).

¹⁸ Law (2000: 545-52); Center for Disease Control (1998); Campbell (1991).

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

There are other reasons why one might worry about a regime of decriminalised prostitution. Perhaps the availability of commercial sex threatens the integrity of marriages and families. Surely there are other unlisted concerns. However, it is hard to believe that many of these concerns are truly greater dangers in a world of decriminalised commercial sex than in our present world where commercial sex is equally widely available but legally prohibited. Thus we have reason to be sceptical that it is merely the social problems attendant to prostitution that have led to legal prohibition. What then explains the deeply held antipathy towards the decriminalisation of prostitution?

Whenever one encounters deeply held convictions, the strength of which vastly outrun the underlying empirical claims, it is well to search for principle or prejudice. Since the proffered reasons to prohibit prostitution are unconvincing and insufficiently supported by the sketchy empirical data, we are led to the unsurprising conclusion that there is something else at work. Specifically, the criminalisation of prostitution seems based in large part on a social conclusion that prostitution is a morally repugnant choice.

II. Moral Harm

¹⁹ Jordan (2005).

Others who have drawn attention to the fact that social norms underlie the current legal regime quickly dismiss the moral indictment of prostitution as misplaced, antiquated or parochial. In contrast, I believe the commonly held intuition that prostitution is morally wrong is based on sound moral reasoning. Unlike past authors, I will argue that one can understand the immorality from a range of moral positions; one need not be committed to any particular moral framework to believe prostitution is morally wrong. Nor does the immorality of prostitution simply supervene on the extrinsic problems that surround prostitution. Rather, it is in the very nature of the act itself. The common underlying sentiment that prostitution inflicts an objective moral harm on both the buyer and seller of sex is eminently sound and, more importantly for our purposes, supportable from nearly any philosophical tradition.

While the idea of an objective moral harm is not alien, at first blush it may strike some as perplexing. The intuition behind this puzzlement is this: if someone enjoys doing something which hurts no one else and does not regret it, how can this have harmed the person? Yet I am arguing that some actions constitute objective morally cognisable harm. Though it may be impossible in this brief section to convince those deeply committed to a purely relativist or sceptical view of moral wrongs, I hope the picture will be plausible enough for progress.

A moment for a bit of intramural clarification. In current philosophical discourse, a distinction is often made between moral duties, which govern the duties we owe to each other, and ethical duties, which are often self-regarding standards governing the construction of a good and valuable life. Roughly speaking, one has a moral duty not to unjustifiably kill

others. One has an ethical duty to not waste one's life away only watching television.²⁰ While I often find this distinction valuable, I will not make use of it here. Because the philosophical systems at issue here take varying positions on being able to distinguish these two realms of morality, it is useful to not be distracted. Indeed, it is important to note that the idea of committing an immoral act need not be connected to a straightforward idea of 'harm' at all rather than one's failing a moral duty.²¹ Here I will use the term moral harm to describe failing a wide range of moral or ethical duties.

A. Kantian Duties to Self

For Kant, the possibility of inflicting a moral harm on oneself is easy to recognise. In some of Kant's most accessible language, the great philosopher instructs us on the duties we owe to ourselves. This is not the place to begin a full exploration of Kant's sophisticated moral theory of duties. The upshot is that for Kant moral duties are grounded in *a priori* reasons, that is, reasons that are metaphysically true.²² These duties are based on the fact that human beings have autonomous wills able to recognise reasons in the world.²³ These moral duties can be distilled into three formulations – categorical imperatives – which Kant assures us are equivalent, and only the second of which attracts our attention at the moment. The second formulation of the categorical imperative is, roughly, that people must be treated as ends in and of themselves and never as a means. If an easy example is needed, making someone a

²⁰ There are, of course, complications to this rough and ready divide. As we will see, Kant conceived of some duties as self-regarding duties: Kant (1996: 149-52).

²¹ I am grateful to Michael Moore for pressing this clarification.

²² Kant (1996: 9-18).

²³ *ibid* 17-19.

slave is to treat them as a means – an instrument for your purposes – and not as a person with unique ends.²⁴ Thus, for Kant, human beings have an innate and inviolable dignity.

With that on the table, Kant argues that moral duties are not only owed to others but they are owed, indeed especially so, to ourselves.²⁵ Violating our moral duties to ourselves threatens our ability to fulfil our moral duties to others (and of the ability of others to count on our fulfilling our moral duties).²⁶ More importantly, violations of our self-regarding moral duties rob us of our inherent moral dignity.²⁷ Where we fail to pay ourselves the inherent dignity we deserve, we lose our self worth and make ourselves the object of scorn and contempt.²⁸

Kant is unsparing in his criticism of prostitution. In fact, for Kant, it is fair to say that the whole topic of sex is challenging. Remember that the second formulation of the categorical imperative forbids using another merely as a means. Kant of course recognises that people in some sense play instrumental roles in our life; for most part the relationship with your plumber centres entirely on his instrumental value in sorting out your sink.²⁹ Unlike the slave, however, your hiring the plumber does not prevent him from planning a life, building a career and aiming that life at the ends he finds valuable.

²⁴ Kant (1998: 36-38).

²⁵ Kant (1930: 117-19).

²⁶ *ibid* 118, 123.

²⁷ *ibid* 118, 124.

²⁸ *ibid*.

²⁹ *ibid* 163-68.

So why is sex different? Kant argues that sexual appetite is qualitatively different from other instrumental desires. When you desire someone only sexually you do so apart from any of the other things about their personhood, you objectify them, you desire them only as a thing.³⁰ I do not wish to make Kant sound overly cynical; Kant of course understood that sex could be mixed with love and other deep emotions.³¹ But we should be adult enough to admit that Kant is on to something. All sexually mature persons recognise that in sex and sexual desire, there are moments of sheer and lustful physicality; moments when our partners are very much bodies we simply want – to hold, to press, ... well you get the idea. And to desire someone only as a body is to use them as a thing and ignore their inherent human dignity.³² Sexual desire, ‘taken by itself and for itself, ... is nothing more than an appetite’ and once sated, the object of desire may be cast aside as ‘a lemon sucked dry’.³³

The deeply sceptical will find all of this old-fashioned. If the contention is that sex is ultimately no different from any other service, it settles nothing to assume from the beginning that sex is different. This is the argument forwarded in a thoughtful article by Martha Nussbaum.³⁴ Nussbaum argues that in using their body for pay, the prostitute is

³⁰ *ibid.* Here Kant uses some of his prettiest language:

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

³¹ *ibid* 166-67.

³² Russell (1958: 121-22).

³³ Kant (1930: 166-67).

³⁴ Nussbaum (1998: 693-96, 700-07).

indistinguishable from a range of other workers, say a philosophy professor or a masseuse.³⁵ Once these similarities are seen, she argues, there is little left of our stigmatisation of prostitution other than antique prejudices against working for money and cultural anxieties surrounding the female body now fashionably repackaged as commoditisation.³⁶ The dangers surrounding prostitution – coercion, the use of children and lack of other choices – are universally intolerable and should not, by themselves, make us think that the exchange of sex for money is different.³⁷

There is no point tiptoeing around it. Kant's argument is that sex is fundamentally different. It is undeniable that sex and sexuality play a large role in human development. One's sexuality is among the core features of one's identity. Physical assault is traumatic but rape is a particular horror because we intuitively perceive the centrality of sexual integrity. Further, sexual desire is complex and can bring in a range of emotions (or not, it is hard to know which is worse), baggage and risks. Sexual desire, like few other desires, runs the risk of objectifying its object. This very point is noticed by none other than Nussbaum herself in an earlier piece.³⁸ In this sophisticated piece, Nussbaum carefully teases out the many subtle ways in which sexuality can lead to objectification. Nussbaum wonderfully illustrates that not every instance of objectification is harmful, some in fact reaffirm our physicality.³⁹ Some forms of objectification, however, can ignore our full person and be deeply damaging to one's sense of self.⁴⁰

³⁵ *ibid* 700-707.

³⁶ *ibid* 696-700.

³⁷ *ibid* 721-23.

³⁸ Nussbaum (1995); Primoratz (1993).

³⁹ Nussbaum (1995: 398-404).

⁴⁰ *ibid* 404-05.

What Nussbaum notices in her earlier piece is that sexual desire is susceptible to objectifying persons in a way that is, if not unique, rare in other areas.⁴¹ One rarely fixates on the plumber. Just as importantly, sexuality is central to our identity in a way comparable to few other things. Work and family are critical to successful lives but few things are as potent a mixture of friendship, romance, attraction, self-esteem, love and desire as captured in sexuality. When sexual desire goes wrong, the damage to a person is unique. It is the moral importance of valuing one's sexual integrity and its susceptibility to objectification that is the foundation of the common moral perception that both prostitutes and 'Johns' debase themselves. It is this insight that is at the heart of the Kant's critical appraisal of sexual desire.⁴²

So would Kant have us be celibate our whole lives? From where will all the little Kantians come? Of course not. Kant argues that sexual desire is attached to mutual concern for the person as a whole only through marriage.⁴³ Quite romantic, in its way. Sadly, how to get desire exactly right is not our topic. For our purposes the important point is that there are moral duties in the world owed to oneself and they include never treating another or allowing oneself to be treated as a means or a thing. This aspect of sexuality, while objectionable in any relationship, is brought into starkest relief in the typical case of prostitution where a

⁴¹ *ibid* 393-94.

⁴² *ibid* 118-19, 162-64.

⁴³ *ibid* 166-67.

client need not exhibit any care for the prostitute's sexual needs, desires, pleasures or well-being.⁴⁴

This is not some abstract idea. Take an example reported by a woman who worked briefly as a sex worker in Amsterdam. When a client's condom broke and she expressed concern to him about contracting AIDS, he simply laughed at her. 'The worst part of it was that the guy was so fucking unconcerned – he just laughed and said I was a good fuck.'⁴⁵ Sexual desire stripped of aspects of other-regarding love or concern can quickly and intensely obliterate our concerns for others - to be cast aside as a lemon sucked dry. The very passionate intensity that makes sexual desire an important facet of human life heightens the danger that concern for the other's well-being is swept away. To submit to another whose passion is empty of regard for your pleasures, well-being and humanity is to violate Kant's duties to self and thus constitutes a moral harm to self. It is happily clear to all who have had rewarding sexual experiences that this need not be the case. The important thing, just for the moment, is not that sexual desire can be done right but that one can get it wrong.

B. Aristotle and Aretaic Theories on Moral Wrongs

The aretaic theory exemplified by Aristotle is a natural one in which to locate a view of moral wrongs to oneself. Unlike Kantian deontological theories concerned with right action, Aristotle begins by asking what the highest achievable human goods are; what ends are the

⁴⁴ Nussbaum (1998: 394-96); Russell (1958); but see Primoratz (1993: 462-66).

⁴⁵ Chapkis (1997: 116); de Marneffe (2010: 20).

most worthy choices.⁴⁶ Aristotle concludes that this highest good is *eudaimonia*, uncomfortably translated as ‘happiness’, which more precisely translates to a life well-lived or a life of human flourishing.⁴⁷ Because humans are unique in being rational, *eudaimonia* consists of reasoning well in accordance with the human excellences over the course of a full life.⁴⁸ Such theories are also described as aretaic theories, stemming from the Greek word for good or excellence.

In this framework the many moral virtues are exemplified as a mean between two vices.⁴⁹ To be paralysed by fear when lightly threatened is to be cowardly. To be insufficiently cognisant of danger is to be rash. To be courageous is to act in accordance with the appropriate mean between these vices.⁵⁰ Because vices impede one’s ability to live an excellent life and fulfil human capacity, they are morally harmful. The claim here is not overly abstract. People who explode in anger at the smallest provocation (or never get angry no matter how poorly they are treated) rarely do well overall in life.

It is easy to see how this model produces a coherent view of committing a moral wrong unto oneself. The rash mountain climber who embarks on a trip certain to result in

⁴⁶ Aristotle (1941a: Bk I, ch VII).

⁴⁷ I set aside for the moment the long-running intramural debate surrounding Aristotle’s shift to contemplation as the ultimate end of persons in Book X of the *Nicomachean Ethics*.

⁴⁸ Aristotle (1941a: Bk I, ch VII-X).

⁴⁹ Aristotle (1941a: Bk II, ch VII-ch IX).

⁵⁰ Aristotle (1941a: Bk II, ch VII, 1107a27-1107b3). To be sure, the virtues are dispositions rather than defined states. For greater precision on these thoughts, see Yankah (2009: 1174 -75).

grave injuries that prevent her from other productive human pursuits fails to properly respect the place physical integrity has in fulfilling other human capacities.⁵¹

Given its affinity with natural law doctrines, one might think that Aristotelian virtue-based theories would easily align with viewing prostitution as a moral wrong. Yet there is reason to think Aristotle himself would not have found prostitution greatly objectionable. Various forms of prostitution, from the streetwalkers who occupied the bottom of the hierarchy to young boys of poorer families and higher status courtesans, were well known in ancient Athens.⁵² To Aristotle, some poorer people were slated to live as prostitutes because he believed that many were incapable of developing to the same level as the Athenian upper class.⁵³ If those from the class of prostitutes could not have developed higher level capacities, they lost nothing in living a life of prostitution.

Obviously, this will not do. Without argument, I will set aside the position that the prostitution of poor women is harmless because the poor lack the natural capacity for better lives. We need to rescue the insights of Aristotle, unabashedly updated for our time.⁵⁴ Luckily, this is not difficult. We need only inspect Aristotle's ideas for those he believed possessed full human capacity. What then did Aristotle believe of the moral consequences of prostitution for the addressees of the *Nicomachean Ethics*?

⁵¹ Aristotle (1941a: Bk IV 1119b20–1120a20).

⁵² Aristotle (1941b: Bk II, 1272a22–24); Ellis (1910: 218–54); Bollough (1964: 9–15); Richards (1982: 88–89).

⁵³ Aristotle (1941b: Bk I, ch IV–VIII, Bk III, ch IV).

On the subject of prostitution Aristotle is, well, demure. Aristotle notes that pleasures of the flesh, in which he includes eating, drinking and sex, are worthwhile in themselves but must be pursued in moderation.⁵⁵ Thus, if one's appetite for any particular pleasure is excessive, it becomes a vice; self-indulgence or licentiousness.⁵⁶ Assuming, however, that licentiousness is not the only reason one would hire a prostitute - say a man who enjoys the services of a prostitute once in a great while - one hardly shows the sort of incontinence Aristotle argues is a moral vice.

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

If engaging in prostitution corrupts one's proper understanding of the value of sex, this detracts from the fullest form of flourishing.⁵⁷ There is nothing strange about the

⁵⁴ There are those who see such updating as a squeamish inability to accept Aristotle's theory. I have never found such arguments persuasive. Theories need not be frozen in the past, and ideas grow. One can be attendant to the historical nuances of a theory without being saddled with its mistakes.

⁵⁵ Aristotle (1941a: Bk III, ch X-XI).

⁵⁶ *ibid.*

⁵⁷ This need not be reduced to an extreme picture - one encounter with prostitution leaves one permanently unable to experience genuine romantic well-being (Nussbaum (1998: 713-14)). We need only note that prostitution may distract or corrupt one's views of the value that sex can play in the richest of lives.

contention that prostitution commonly takes away from the lives of those engaged in both sides of the practice. Working as a prostitute commonly injures the formation of psychological fitness and healthy character in just the ways those concerned with the promotion of virtue fear.⁵⁸ By its nature, prostitution associates sex with feigning emotions for gain and inculcates emotional manipulation and pretence. Worse, prostitution makes the development of capacities critical to human development more difficult - the formation of deep friendships, intimate and supportive relationships.⁵⁹ Lastly, engaging in prostitution often derails sex workers from paths in which one normally develops their capacities through discipline, such as schooling.⁶⁰ Similarly, those who purchase sex from prostitutes learn to relate to sex as something to be purchased and enjoyed for their pleasure only. In doing so, 'Johns' harm their ability to appreciate the proper role of sexual intimacy and risk retarding or undermining their ability to form intimate relationships.⁶¹

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

⁵⁸ de Marneffe (2010: 13-15).

⁵⁹ *ibid* 13-15, 22-26, 120-22.

⁶⁰ *ibid*.

⁶¹ *ibid* 120-122.

Of course, such corruption is not necessarily limited to prostitution. The libertine who comes to regard sexual partners as shallow and interchangeable pleasures risks similar injury.⁶² Still, the archetype of this devaluation, this moral injury, finds purest expression in prostitution; even the playboy must charm his affairs, engage with them and treat them as more than mere commodities.⁶³ The buyer of sexual services almost entirely dispenses with that, disconnecting sex from any other values (flirtation, friendship, mutual caring or love) that it plays in the landscape of a flourishing life. When viewed in conjunction with Aristotle's views regarding the value of friendship, one can see that prostitution constitutes a moral harm-to-self.

I do not expect to have convinced all of the unassailability of objective moral claims. Important philosophical views – scepticism, relativism and others – and further permutations of the views represented here remain unexplored. Each of these philosophical branches has developed in myriad and sometimes conflicting ways. But in both philosophical systems explored, one recognises that prostitution constitutes an objective moral harm-to-self. While the agreement is not dispositive, for Kant and Aristotle agreed on much we would no longer affirm, the arguments above do, I hope, make the concept of an objective harm-to-self plausible.

III. Moral Wrongs and the Law

⁶² *ibid* 48.

⁶³ *ibid*.

The next step in our argument is a crucial one. Notwithstanding that Kantian deontology and Aristotelian virtue-based theories consider prostitution morally harmful, it does not follow that the law ought to prohibit it. Plainly, I am not the first to argue for a separation between immoral acts and legal prohibition; many take this to constitute one of the foundational tenets of liberalism. Still, even among liberals, there are some interesting distinctions that the conversation highlights. Most notably, the conversation frames the debate differently from the mainstream justification for liberal tolerance, which turns on uncertainty and pluralism about forms of the good life. Rather, the conversation above presupposes the immorality of prostitution. The claim explored here is in many ways a deeper claim than that which grounds much of modern liberal theory.⁶⁴

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

⁶⁴ A less common rationale for legal toleration of moral wrongs focuses on an interesting mix of instrumental goods protected by the securing of legal space. It may be that allowing such space creates a social ethic of toleration which will solidify our tolerance towards genuinely good forms of living (Wall (2003: 242)). Secondly, it may be that 'people must live by their own lights' in order to be happy (Dworkin (1989: 486); Kymlicka (1995: 81); Waldron (1993)). Though these 'instrumental autonomy' views are certainly closer, even they do not fully capture the justification I want to explore.

For some this argument proves much too little. Many reformers argue that the perception that prostitution is immoral is mistaken or antiquated folk superstition. Alternatively, the mainstream of liberal political theory asserts that liberal neutrality requires the separation of many deep moral commitments from law. Why should anyone be attracted to an accommodationist argument that seeks agreement over metaphysical truth or comprehensive political theory?

There are two reasons to prefer the accommodationist model, one, itself, ironically accommodationist in flavour. First, those interested in reforming the current criminal law regime need not agree that prostitution is immoral. For those who believe prostitution is morally innocuous or are committed to a view of liberalism that cabins personal moral judgement from law, it will be enough to agree that we have reasons to reform the current failed legal regime.⁶⁵

The second reason is more meaningful and reverberates in both practical and philosophical reasoning. The practical rationale is quite straight-forward. Much ink has been spilled by liberal reform-minded theorists attempting to persuade us that prostitution is morally non-problematic. It is unlikely that much progress on reform will be made by convincing large numbers of those who deeply believe that prostitution is immoral to change their minds and hearts in the short term. And why should they? As we have explored, it is morally sound to believe prostitution is immoral. Requiring others to give up their deeply held and well thought-out convictions in favour of a very particular philosophical framework

makes great philosophical and political discourse; it does not, however, make for a promising path to political action.

But if this seems like just a practical problem – a matter of opinion polling and playing to prejudice – it belies a deeper philosophical claim. The fact that the body politic contains a wide range of philosophical and political commitments is not a mere inconvenience. That very fact is the morally relevant landscape with which theories of governance must contend. As Rawls and Waldron, among others, have explored in different ways, a diverse range of fundamental philosophical commitments *is* the problem of politics.⁶⁶ Theories that begin with the presumption that all must be committed to particular philosophical starting points may be enlightening political philosophy but they are not theories of governance.

To be clear, I am not decrying the important project of pure philosophical debate. In different moods, I too attempt to marshal arguments to persuade others of my particular metaphysics.⁶⁷ Many political advances owe some part to relentless pressing of claims of equality and rigorous inspection and discarding of unsupportable ideas. Nonetheless, any theory of governance, as opposed to pure political philosophy, that does not make space for reasonable disagreement, itself borders on being unreasonable and is certainly doomed to

⁶⁵ Greenawalt (1984); Sunstein (1995); Rawls (1985).

⁶⁶ Rawls (1993); Waldron (1999).

⁶⁷ For a contrast, see Yankah (2009), arguing for a rigorous commitment to Kantian and Hegelian deontological theories in law.

failure.⁶⁸ The inability to notice fundamental areas of philosophical consensus when seeking to govern is all too often unreasonableness masquerading as high-minded rigour.

With this in mind, we are in a position to inspect the core argument. Despite the fact that deontologists and virtue theorists have ample reason to view prostitution as immoral, it is remarkable that each theory gives reasons to pause before translating the moral conclusion into law. Inspecting both theories leads us to the startling conclusion that nearly all of us, starting from a wide range of fundamental moral theories, can agree on fundamental reform.

A. Kant, Criminal Law and Freedom

For Kant the moral worth of an action turns not only on whether one obeys the moral duties but that one does so with a pure will.⁶⁹ Thus, being forced to comply with your moral duties, indeed, doing so out of any prudential reasons, robs an action of moral worth.

For the unfamiliar, the distinctions between Kant's moral and legal theory may seem sharp. As mentioned earlier, Kantian moral duties could be recognised by reasoning from *a priori* truths. Thus to truly fulfil your moral duty is to act only in light of recognising the reasons that ground your duty. If you act for other reasons, for example, to avoid punishment, you are not acting purely in light of the moral value of your duty. In Kantian language, to act

⁶⁸ Rawls (1985).

⁶⁹ Kant (1996: 13-14).

for moral reasons alone is to act autonomously, whereas to act from prudential reason is to act heteronomously.

The nuances between Kantian autonomy and heteronomy could provide a career's worth of exploration. Only the basic distinction is necessary for this project. If moral duties depend on acting with a pureness of will for moral reasons alone, then law, which for Kant is constituted by coercive sanctions, is not the stuff of moral duty.

In Kant's framework law is not a matter of moral duty but concerns itself with violations of the external freedom of others; in Kantian language, law is not a matter of morality but of justice.⁷⁰ Criminal conduct is not founded in the purity of will that determines the moral worth of one's acts but rather is centred on external action.⁷¹ The nature and justification of state law is to enforce perfect duties to others, the duties of external performance that interfere with the rights of others.⁷² In this way criminal law belongs to the realm of justice which differs from Kantian duties of morality.⁷³

Even as Kant highlights the significance of our self-regarding moral duties, he repeatedly reminds us that moral duties, especially those owed to oneself, are not a matter of justice and cannot be proscribed by law.⁷⁴ Kant explains, 'My duty to myself cannot be

⁷⁰ *ibid* 13-14, 19-21, 139; Kant (1965: 231); Fletcher (2007: 208).

⁷¹ Kant (1930: 116-17, 157); Kant (1965); Kant (1996: 13-14). George Fletcher attempted to capture this important distinction as one between the *Wille* and the *Willkür* (Fletcher (1987); Fletcher (2007: 208)).

⁷² Kant (1930: 116-17, 157); Murphy (1987: 519); Binder (2002: 353).

⁷³ Binder (2002: 355-56).

⁷⁴ Kant (1930: 116-17, 157).

treated juridically; the law touches only our relations with other men; and whatever I do to myself I do to a consenting party; I cannot commit an act of injustice against myself.⁷⁵ He repeats elsewhere, '[j]urisprudence should concern itself only with man's duties to his neighbor, with what is lawful and unlawful, but not with duties towards oneself ...'⁷⁶

It is this separation between the legal and moral which has led a generation of legal theorists to build their models of liberal legal rights on Kantian foundations.⁷⁷ So it is surprising that Kant causally concludes that prostitution, a violation of a duty to oneself, is appropriately outlawed.⁷⁸ How could so many Kantian liberals in the academy have been led so wrong? A closer look at Kant's brief reasoning leaves room to doubt that Kant based a prohibition of prostitution on any deep commitments. To quote, Kant argues, '[i]t is important to provide for public decency, for if the feeling for decency (*sensus decori*) – considered as negative taste – is not benumbed by the prevalence of beggars, excessive street noises, offensive odors, and public prostitution, all of which violate the moral sensibilities, then the business of ruling the people through laws is made considerably easier for the government.'⁷⁹

Only two things need be noticed regarding the separation between law and morality. The first is that prostitution is placed in a list including beggars, excessive noise and offensive odours. This hardly speaks of a deep moral violation. Rather, Kant focuses on the

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ Richards (1982: 84-127). Here the word autonomy is used in its lay rather than purely Kantian sense.

⁷⁸ Kant (1965: 92).

⁷⁹ *ibid.*

nuisance aspects of crimes familiar to decriminalisation advocates who focus on harm reduction. Secondly, the only justifying feature Kant highlights is maintaining public morals in order to govern more effectively. If these are the only reasons, other regulation that controls public nuisance aspects of prostitution would meet Kant's burden. In any case, it is clear that Kant's argument for the prohibition of prostitution is not deeply founded on a view of moral harm.

Given that the public nuisance of prostitution can be more effectively handled by regulation, we have good reason to mind Kant's contention that the realm of law should concern violations of others' rights and not self-regarding duties.

B. An Aristotelian Theory of Law

Though it would seem that Aristotle's claim that law ought to promote human flourishing through virtuous behaviour would be easy to translate into a prohibition against prostitution, it once again turns out to have important nuances. Legal philosopher Lawrence Solum has recently explored the shape of a legal system built on Aristotle's virtue of justice.⁸⁰ Though Aristotle viewed law as having a role in inculcating virtue, he also took into account the special role law serves in securing a flourishing human society. Given this goal, it may seem that lawmakers and judges ought to aim at promoting ethical lives. The problem, of course, is that there is persistent and deeply held disagreement about what constitutes an ethical life.

Thus, if each lawmaker were to act on her own conception of the good, it would lead to endless clashes, ironically undermining the conditions for human flourishing.

An aretaic system of law then ought not to allow lawmakers to render legal decisions based on their first-order views of what is moral.⁸¹ Rather, Solum proposes that the virtue of justice in an aretaic theory is governed by Aristotle's virtue of lawfulness – a judge's recognition and internalisation of the publicly-reached decisions on public controversies.⁸² These public conclusions need not be only law but may include the widely-held stable norms and customs of the society as well. Lawmakers in such a model have deeply internalised the shared norms of the community; in Aristotle's language they are *nomimos*. Further, laws on this model are only truly laws if they comport with the society's norms, the *nomoi*.

For Solum, the aretaic justification is integrated in two ways into his model. First, the *nomos* must themselves be aimed at promoting human flourishing. Thus, to the extent that social norms are directly opposed to human flourishing, they may not qualify as true *nomos*.⁸³ Moreover, the virtue of justice is only one part of human flourishing. To the extent that lawfulness conflicts with human flourishing, the aretaic lawmaker must re-examine the value of lawfulness in her society. The aretaic lawmaker must, above all, be sensitive to the

⁸⁰ Solum (2006). There are, of course, other strategies one might take to build an aretaic theory. Kyron Huigens, for example, has developed an aretaic theory of punishment over many years which, while originally Aristotelian, parts from Aristotle in many ways. See Huigens (2002).

⁸¹ Solum (2006: 87).

⁸² *ibid* 89-91.

⁸³ *ibid* 97-98.

conditions that allow for human excellence. In Aristotle's language, a virtuous law-giver must display practical wisdom or *phronesis*, he must be *phronimos* as well as *nomimos*.⁸⁴

While the details are complex, the upshot is intuitive. The ultimate question on this picture is not whether each law requires virtuous behaviour. Rather, it is to what extent a legal regime nurtures virtue and a flourishing society. Say alcohol is viewed as detracting from a life of virtue, a claim which if not universally true certainly applies to a significant range of cases. If the prohibition of alcohol leads to generalised disrespect for the law among the public, millions of dollars for criminal syndicates and a reign of widespread violence and terror, then surely the law of prohibition cannot be considered robustly supported by a virtue-centred theory of law. A view that focuses only on the prohibited acts and ignores all other effects of a law on the health, virtue and flourishing of a society is too narrow to be a plausible view of virtue-centered governing.

The question for an aretaic system of law is not simply whether prostitution is a moral wrong that retards virtue in a person – we have reasons to believe it is. The question is whether outlawing prostitution will contribute on the whole to a flourishing society. It is possible that criminalising prostitution prevents people from making important decisions about the role of work and sexuality in their lives, something which is necessary for one to develop into a successful person.⁸⁵ Perhaps sound practical reasoning requires the ability on occasion to exercise poor reasoning.⁸⁶ While this position is plausible it strikes me as

⁸⁴ *ibid.*

⁸⁵ de Marneffe (2010: 32-35).

⁸⁶ *ibid.*; Waldron (1993).

inconvenient from Aristotle's point of view. Aristotle, after all, made front and centre the role of law in shaping the ability of citizens to learn virtuous behaviour.⁸⁷

More plausibly, the intrusive methods necessary to criminalise and enforce prostitution laws may be too damaging. Similarly, the effects of criminalisation on the success of a society must be taken into account. The criminalisation of prostitution marginalises commercial sex workers. This marginalisation forces prostitutes into proximity with other illegal behaviour, particularly drug dealing, thus increasing the risk to the workers themselves.⁸⁸ Further, prostitutes must secure private enforcement mechanisms, in a word, pimps.⁸⁹ This means that the legal regime greatly contributes to the violence visited on sex workers. Adding not just insult but injury to injury, the legal marginalisation of prostitutes leaves them not just feeling outside of the protection of the law but perversely the victims of police violence. Prostitutes often feel, with good reason, that they cannot report instances of sexual violence to the police. Prostitutes report widespread sexual and physical abuse by police officers.⁹⁰ Surely the fact that both prostitutes and police perceive sex workers as criminals contributes to this high rate of victimisation.⁹¹ Tragically, the marginalisation and distrust between sex workers and police surely make gathering information to combat the tragedy of human trafficking more difficult.⁹²

⁸⁷ Aristotle (1941a: Bk X, ch IX, 1179b32-1180a4).

⁸⁸ de Marneffe (2010: 8, 35); Richards (1982: 92).

⁸⁹ de Marneffe (2010: 41).

⁹⁰ Thukral (2005).

⁹¹ *ibid* 10, 13, 35-36.

⁹² de Marneffe (2010: 35, 37-38).

There are less dramatic effects of the legal prohibition on prostitution which nonetheless undermine a flourishing society. The prohibition on prostitution makes the health monitoring of prostitution difficult, posing a public health risk. Further, because prostitution can neither be regulated nor eradicated, the current regime makes it difficult to control public exposure to sexual solicitations. Those living in major metropolitan areas are familiar with the 'bulge' effect of prostitution; increased policing in one area does little other than to shift streetwalkers to different neighbourhoods.⁹³

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

To put it much too lightly, even given that prostitution is immoral, it is not obvious that the current legal regime contributes to a virtuous society.⁹⁴ Thus, there is no need to assume that an aretaic theory would necessarily outlaw prostitution – at least not in its current

⁹³ *ibid* 31.

⁹⁴ Pearl (1987); Law (2000: 527, 532-35, 584-85).

form.⁹⁵ Even those who believe it is the duty of law to nurture virtue, those who reject liberalism, can agree that the current prohibition of prostitution fails to promote a flourishing society.

I have no wish to pretend to have found a way to universal agreement. Theories based on Millian utilitarianism, though I believe they would be in accord, have not been explored here. For those who are committed to a divine theory of law, a belief that God has forbidden prostitution may foreclose any agreement on the grounds above. I have serious doubts that at least Christians, whose example in Christ personified unbounded care for the weak and disenfranchised, including the harlots of his time, can turn their back on the suffering inflicted by the current regime. But beyond my own religious upbringing, I am unqualified to pursue this topic in full. Further, as I have mentioned, there is an important debate among feminists about the status of prostitution, with some feminists contending that the ban against prostitution infantilises women and reflects male ideals of purity.⁹⁶ Other feminists powerfully argue that in a society dominated by male power, prostitution is an extension of male domination, a form of violence against women or an inauthentic choice. Those deeply committed to this latter view may be unconvinced by the arguments above.

⁹⁵ As far as I am aware the only time Aristotle seems to allude to prostitution is a quite oblique reference to dancing girls for a festival, implying that the guards should ensure they are paid no more than their contracted salaries. Whether it is best understood as a toleration of a certain unavoidable level of prostitution or an attempt to make sure it does not occur is not entirely clear (though it seems to intimate sexual services as a part of the contract): see Aristotle (1984: 96).

⁹⁶ Law (2000: 542-45); Nussbaum (1998: 708).

Still, the arguments above have shown that the idea that prostitution could be legalised is not as controversial as one might initially assume. Despite their very different commitments, Kantian deontological thinkers and Aristotelian virtue theorists all have a concept of self-inflicted moral harm. It is of course important to remember that each system conceives of this harm in different ways; Kant focused on the moral duties owed to oneself in light of human dignity and Aristotle on the ethical demands of living a good life and engaging the human capacities. Nonetheless, the core idea of an objective moral harm-to-self can be located in each system.

Despite agreeing that prostitution results in self-inflicted moral harms, both philosophical systems are cautious about translating this moral wrong into a legal prohibition. Kant actually encouraged the prohibition of prostitution but, as we noted, grouped this prohibition along with public noise and odour. Prostitution was viewed as a public nuisance contributing to disorder. Outside of that concern, Kant reminds us that moral duties owed to oneself are immune from legal enforcement. For Aristotle, the ultimate value of law was the role it played in sustaining a flourishing community. That there is agreement between these vastly different philosophical systems, so often used as foils for each other, is remarkable. Nor should one easily dismiss the separation of law and morality as an old liberal trope. The reason this accord is so remarkable is because it is across the range of philosophical systems. It is not strictly limited to liberalism; even those who reject liberalism can support the reform of the current prostitution laws.

If one is philosophically inclined and finds the preceding arguments convincing, surprise may quickly turn into disappointment. How can these major philosophical systems be in agreement regarding the legal permissibility of prostitution and yet the law be nearly universally opposed? Does no one listen to philosophers?!? It is to the problem of translating philosophical commitment to law that we now turn.

IV. An (In)decent Proposition

What are we to do in light of these conclusions? Put another way, were I king, would I snap my fingers and legalise prostitution? Of course not. Does that make me disingenuous? Well, no. Philosophical conclusions, even if true, do not apply themselves. Though theory necessarily takes facts into account, one of the great benefits in submitting a question to philosophical examination is the ability to stipulate facts in order to arrive at important conclusions (I mean, has any one ever seen a veil of ignorance?). Once reached, however, philosophical tenets must be applied to the unruly world, where facts and complications spill one over another, refusing to behave. Much more would have to be known about the facts of prostitution on the ground before a wise statesman would decide to legalise prostitution. To borrow a phrase, philosophy does not get us all the way down. Or there are more things in heaven and earth than are dreamt of in philosophy, if you prefer. This does not mean, however, that the preceding is academic fancy. If the gravity of the issues counsel the wise to move deliberately, it is important to realise how our philosophical conclusions can guide us.

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

The gravest issue we explored surrounding prostitution is the tragedy of human trafficking. No one could support lifting a ban on prostitution that resulted in the exacerbation of people being forced into prostitution. Not surprisingly, no one we have examined does. Unjust coercion is paradigmatic of the violation of external freedom that grounded law in Kant's legal model. Similarly, the Aristotelian justification for law was its special role in securing the conditions for human flourishing. No one could argue that a legal regime which abetted in people being forced into sexual slavery was a form of flourishing. Thus, the justification of this regulation remains dependent on its ability to combat coercion in the sex industry.

Another issue that related to prostitution is its public health dimension. Once again, there is a plausible philosophical accord on this issue. A Kantian will view the spreading of disease as an invasion of another's external freedom. This is because the public health threat is in large part that a disease will pass beyond those who knowingly subject themselves to the risk.⁹⁷ Similarly, aretaic theories of law, focused on the flourishing of society, will be

⁹⁷ One can recognise a different level of risk assumed by a person who has multiple sexual partners, including prostitutes, and a person who has a single long-term partner who, unbeknown to them, has had a sexual liaison with a prostitute. The deceptive partner would violate the right of the duped.

especially concerned with the unregulated spreading of dangerous and debilitating disease among the population. It takes little argument to understand that serious illness can uniquely harm the ability of persons to live a life of excellence and fulfil their human capacities. As explored, the decriminalisation of the sex industry better allows for health monitoring.

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

Here too we see that the philosophical positions explored above are in harmony. Kant is explicit in his concern for the public nuisance facets of prostitution. As earlier explored, Kant placed prostitution with excessive noise and odour, focusing on its public nuisance aspects.⁹⁸ It is the extent to which the public nuisance of prostitution made society harder to govern that justified legal regulation. Likewise, aretaic law that focuses on the flourishing of society cannot ignore the unregulated confrontation of sexual information on children who may not yet be ready to understand and contextualise it. Indeed, the moulding of the young so that they could independently choose virtuous behaviour was of particular importance to

⁹⁸ Kant (1965: 92).

Aristotle.⁹⁹ Additionally, allowing avoidably unruly exchanges surrounding sexual services to create a public nuisance is in tension with an orderly and flourishing community.¹⁰⁰ Again, we have noted that regulation allows for more effective management of public nuisance.

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

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

A. Choosing Moral Harm

⁹⁹ Aristotle (1941a: Bk X, ch 9, 1179b32-1180a4).

¹⁰⁰ I do not wish to imply that everything that is unruly is opposed to a flourishing community.

As opposed to our current regime of criminalisation, regulation takes consent seriously. Its principal legal distinction is that it permits consenting adults to exchange sexual services for money. It does so despite the firm conviction that doing so is a self-inflicted moral harm. For the multiple reasons that we have explored, people have the right to choose to do wrong. Regulation preserves the choice of a person despite our view that they commit a self-regarding wrong.

It is important to see how our consensus differs from the current run of decriminalisation proposals and more fully addresses broader concerns of virtue theories. Because regulation is not based solely on liberal autonomy, it remains sensitive to the need to secure the conditions of a flourishing society as represented here by Aristotle.

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

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

One last concern deserves some attention. Even if consensus succeeds, it is worth asking if the moral costs to a society are too high. Prostitution is a moral wrong and decriminalising may have the moral cost of legitimising it as a plausible way of life. Secondly, a regulatory regime, if successful, would change the way prostitution currently occurs. In particular, an ancillary goal of the rise in price of sexual services would create a society with a particular unattractive feature; a society where the wealthier are free to purchase the sexual services of another and indulge in expensive immoral behaviour others cannot afford. There is a way in which such a regime makes sin a luxury item.

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

Conclusion

Let me conclude by returning to the philosophical project. In concluding, it is as important to point out what I am not arguing as it is to be persuasive for what I am proposing. Let us begin with what I am not arguing.

I have, like many liberals, argued elsewhere that people have a right to commit certain wrong acts, acts that do not harm others. Prior work has focused on the intersection of analytical jurisprudence and criminal theory, arguing that the shape of law and its inherent coerciveness places certain political restraints on the state.¹⁰¹ That set of arguments concluded that for reasons grounded in the relationship between autonomy, moral agency and identity, virtue is inappropriate as a basis of legal duty.¹⁰² In this article, however, I have

¹⁰¹ Yankah (2009); Yankah (2008b); Yankah (2008a).

¹⁰² Yankah (2009) 1208-11; Yankah (2008a: 1254-55).

steadfastly avoided basing the argument for decriminalising prostitution on any deep commitments to unique philosophical premises. I have not argued, as much of mainstream liberalism does, that decriminalisation should be based on the notion that there are plural forms of the good life which citizens should be free to pursue. Similarly, I have not taken the related and familiar tack of arguing that moral uncertainty means the law cannot appropriately legislate.

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

Nor are my arguments based on any particular liberal view of the bounds of the state's legitimate actions. Indeed, the very point argued is that the agreement exists regardless of whether one holds a liberal view of the state or not. I do not wish to overstate this; the reasons each philosopher suggests for restraint are importantly different. Yet it is striking how much accord can be found amidst differences which can be soundly extrapolated even to details. It is remarkable on how much those who take starkly different starting points as to first principles can agree. It is also worth noting that while prostitution has been the focus here,

there are other places where philosophical accord can provide powerful guidance to the law. There will surely not be agreement on every problem, even on everything that represents a moral harm-to-self. But rather than consistently prosecuting a body of law rooted in one controversial philosophical view, progress may be made by seeing where there is overlap.

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

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