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### Sexuality and Law

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## ARTICLES

# A SENATE OF FIVE: AN ESSAY ON SEXUALITY AND LAW

*Paul D. Carrington\**

### I. EXPOUNDING ON SEX: THE AUTHOR'S QUALIFICATIONS

I don't know a lot about sex.<sup>1</sup> That is part of my point.

Despite my lack of qualifications on this important subject, I was asked to address it in 1986. The request came from a group of federal judges whose ignorance of the subject was approximately equal to my own. Their ignorance is also part of my point.

I agreed to speak and I now write on the subject of our mutual ignorance because, after all, on the subject of sex if no other, any writer or speaker can hope to hold an audience for at least a little while. And, on this subject if no other, one can freely assume that a reasonable reader will not expect any author to know very much about his or her subject.<sup>2</sup>

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\* Chadwick Professor of Law, Duke University. B.A. (1952), University of Texas; LL.B. (1955), Harvard. This Article is a revised and annotated version of the John A. Sibley lecture delivered at the University of Georgia School of Law on November 16, 1988. I am grateful to Katherine Bartlett, Robert Burt, Kenneth Karst, Robert Post, and Carl Schneider for comments on earlier drafts. I am also grateful for the reference help of Mary Carrington Coutts of the Kennedy Institute of Ethics at Georgetown University. Persons interested in the subject of this paper may be served by the information that the Institute provides reference help to all; for help, call 800-MED-ETHX. Research support was provided by the E.T. Bost Fund of the Duke University School of Law.

<sup>1</sup> This lack of expertise creates a dilemma with respect to the documentation of this paper. Heavy documentation makes a paper by such an author seem falsely to be the product of scholarship that has been long-sustained, broad and deep. On the other hand, light documentation risks passing off as original ideas that have been fully developed by others. I have tried to take a middle course, hoping that the reader will keep in mind that the author is, on the subject of sex, decidedly amateur. The purposes of most of the citations are merely to acknowledge prior work and to make it available to the interested reader, and not to cloak any of the conflicting views presented with the authority of other authors.

<sup>2</sup> Perhaps especially so if the author is a lawyer. After all, only lawyers would think of using their automobile bumpers as an approach to a sexual encounter. Has anyone really

It was also a part of my willingness to address this subject that when I was a child, I was not permitted to discuss sex in public. It may be this experience that scarred my character with repressed needs. Perhaps, I thought, my repression might be relieved and my character healed by a belated self-indulgence. One treatment seemed not to help, but I persist in the hope.<sup>3</sup>

Despite this disclaimer of general expertise, I would not like readers to think that I am wholly without qualification to address my subject. I do have professional experience in the field that should be disclosed not only as a qualification but also as a possible disqualification, because when you read of it you may conclude that this paper is not the product of disinterested scholarship. What you must be told is that I am indeed a major expert on one aspect of the law of sexual morality.<sup>4</sup>

In 1969, a troop of players brought a play to Ann Arbor under the auspices of the Michigan Union. The tour was suffering from an unfortunate lack of attendance until, on the eve of their arrival in Ann Arbor, they informed the public that future performances would be staged in the buff. They succeeded in attracting thus a sizeable audience in Madison, Wisconsin and also the attention of the Ann Arbor prosecutor, who informed the student hosts and their faculty advisor that he would arrest any nude players appearing on the stage of the Michigan Union. I was summoned as a civil liberties lawyer to the urgent conference conducted prior to the performance. At that conference, the producer of the company

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hugged their lawyer lately?

<sup>3</sup> Moreover, I have now had two years to think about what I should have said when first asked about sexuality and law. As a law student, I was prone to reflect on the good answers to examination questions that occurred to me a day late. Likewise, as a lawyer, my best arguments usually occur to me after the decision has been rendered. It is only as a lecturer that one sometimes has the chance to make use of such belated reflections, and so, for this reason, too, I chose to revisit the topic on the occasion of the Sibley Lecture.

<sup>4</sup> In claiming expertise on the basis of a single experience, I adhere to a family tradition. When my father started practicing law in Dallas in 1919, there was a neighboring lawyer who was identified by the sign in his window as an expert on piano law. The lawyer explained the sign with the datum that he had repossessed more pianos than any lawyer in Texas. Very soon, my father was called upon to repossess twenty pit toilets that were designed and manufactured for public use by some northeastern firm that had not been paid their price. The toilets had been sold to and installed in the City of Port Arthur, which was dissatisfied with their quality and so had refused to pay for them. These being the only such manufactured pit toilets ever sold, much less repossessed, in Texas, my father ever after presented himself to appropriate audiences as the greatest pit toilet lawyer in the history of Texas.

challenged me and the even more portly faculty advisor; he said that if the community of Ann Arbor had any respect for artistic freedom, then the two of us should be willing to prove it by going on the stage nude with the players. I need not tell you that I advised him that such an act would compromise my professional disinterest, and that I must therefore decline, entirely out of respect for my profession, of course. I did, however, in lieu of the requested form of support, undertake to write a brief in his behalf were he to be prosecuted. He was prosecuted, and I did write that brief. After three years of close study of my brief,<sup>5</sup> the court dismissed the prosecution against him and seventeen members of the cast.

And so here I present myself as the most successful nudity lawyer in the history of Michigan, winner of dismissals for eighteen defendants, those eighteen being almost all the defendants ever prosecuted in Michigan for public nudity.

## II. THREE IMPULSES

I come to the subject of sexuality and law with at least three related but sometimes conflicting impulses, each of which is probably at least sometimes shared by most readers. Indeed, I suggest that these three impulses are shared, albeit in varied mixes and sometimes in combination with others, by most Americans.

My first impulse, and the one that most often predominates when I am confronted by other persons' sexuality, is to mind my own business. Like many readers, I sometimes practice voyeurism, but I never approve of it, and I aspire to respect the privacy and autonomy of other individuals. Whatever pleases other folks ought, if possible, be permitted them. This impulse surely derives in part from my membership in a society driven by market capitalism that celebrates individual autonomy and the pursuit of private interest in the making of market decisions. It is an impulse intensified by the awareness that modern science has created, and will continue to create, extraordinary new options for individuals. The morning-after pill<sup>6</sup> is only the most recent of a series of developments that

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<sup>5</sup> It may be pertinent to note that the successful brief advanced no constitutional arguments, but only a close reading of the Michigan statute which made it possible to distinguish between intrusive nudity and an exposure to an appreciative audience.

<sup>6</sup> For a brief description of the drug, an anti-progesterone, see Gianelli, *RU 486, Drug*

have heightened our awareness that many of our ideas about sex are merely quaint. Individuals now have choices heretofore denied us, and we ought generally to exult in new freedoms.

A second impulse, perhaps no less worthy than the first, is a revulsion at exploitation. I do not like to see the strong take unfair advantage of the weak in any context, even though I confess I might have taken an advantage or two in my time. This impulse is surely linked to my membership in a society deeply influenced by values inculcated by the Judeo-Christian faiths.

Perhaps on account of my Protestant-Victorian upbringing, taking advantage of strength is especially revolting to me when the object of the exploitation is a sexual favor. The linkage of power and money with sex is not simply an offense to the autonomy of the weaker partner. Sexual exploitation is also a corruption of the spirit of the exploiter, cheapening not only the sacred mysteries of life, but also the values of fidelity and integrity that are required for community and national life.

My third impulse is to acknowledge that in matters of sex, there are secondary and tertiary consequences of conduct to which participants are often especially insensitive, being even more than usually preoccupied with self and partner as they are. In fact, sexual relations are no more independent of external consequences than are employment relations. Our sexual conduct, even when it is wholly consensual and well hidden from nonparticipants, can have substantial effects. These effects may be felt by other sexual partners, past, present or future. They may be felt indirectly by other members of the society of which we are a part, whose relationships may be weakened or strengthened by what we do. Especially are the effects felt by children, primarily but not exclusively by our own children.

My attention to these external consequences of sexual conduct derives not from my political, economic, or religious predilections and associations, but from a longstanding interest in the diversity of human culture. While societies have differed greatly in defining "normal" conduct, there appears to be no culture that has not regarded sex as a proper and necessary subject of regulation.<sup>7</sup>

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*Used to Cause Abortion, Stirs Debate*, AM. MED. NEWS, Jan. 9, 1987, at 51, col. 1.

<sup>7</sup> Even the Samoans are not without many strong sexual taboos. See D. FREEMAN, MARGARET MEAD AND SAMOA: THE MAKING AND UNMAKING OF AN ANTHROPOLOGICAL MYTH (1983).

The reason for the universality of sexual mores is that there is a universal need to inculturate or socialize our most powerful and potentially most destructive emotions, in order to limit or direct the external effects of the sexual conduct of members of a society. It is an insight that has been universally shared by men and women on all continents and of all cultures that sexuality must be channelled for the good of all. Accepting this reality, I must approve at least in principle the idea that some social constraints on sexual conduct are necessary and proper even for our own culture.

Respect for privacy, revulsion at exploitation and recognition of the need for constraints do not always sit well together. In daily life one can integrate them, generally minding one's business while lending support to those who are overborne by others, and making occasional moral judgments that are limited to measuring right conduct at particular times and places and that are not held to account for consistency.

When one attempts to think about sexual mores as legal subjects, integration is more difficult. If one is to justify or criticize the criminalization of abortion, prostitution, sodomy or rape by a spouse, one is required to address issues more broadly, with more finality and subject to closer accountability than is comfortable. That is also true when one considers the legal aspects of sexual relations at the workplace, surrogate motherhood, no-fault divorce, and making fathers pay. Indeed, the sexual lawmaker must consider a set of factors that need not intrude on curbstone pontifications, such as the prospects for obedience, the cost and effectiveness of enforcement, and the possibilities of even-handed administration.

Hence, as I prepared to address this subject, I have found myself trifurcating.<sup>8</sup> My opinions divide irreconcilably along three lines and I imagine three quite different legislative programs, each reflecting one of my impulses, and each also rooted deeply in our culture. I visualize three wise state senators, each concerned not only with her own re-election, but also with freedom, with social justice, and with the future welfare of the society she serves.<sup>9</sup>

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<sup>8</sup> That is not, if any under-employed prosecutors are among the readership, a confession of illicit sexual activity.

<sup>9</sup> I have limited myself to lengthy discussion of only three ideological senators. Obviously, there could be many more. As it happens, these three seem sufficient to disclose the uncer-

These imaginary senators are all ideologues and advocate conflicting ideologies, with a purity strongly suggesting that they hold "safe seats." These politicians compete within my mind for my allegiance. I find myself in agreement sometimes with one, sometimes with another. Because these ideologies are in conflict, I am not myself able to maintain a coherent view of the subject.

In making my senators female, I do not presume to make them spokespersons for feminism. Gender justice is an important subject, but it is not the subject of this paper.<sup>10</sup> My topic is not gender; it is sex. The two are obviously linked, but they are not the same.<sup>11</sup>

### III. THE LIBERTARIAN

Let my first imaginary Senator be known as a member of the Sexual Libertarian Party. She is animated by a keen concern for the rights of individuals to make their own choices. She derives many of her thoughts from John Stuart Mill,<sup>12</sup> and perhaps indirectly from Jeremy Bentham<sup>13</sup> and Adam Smith.<sup>14</sup> With Mill, she

tainties in my own mind. Moreover, it is not my purpose to cause any reader to adopt the platform of any of these three senators, but only to induce greater respect for their differences and for the legal consequences of those differences.

<sup>10</sup> My own views of gender justice are close to those expressed in D. KIRP, M. YUDOF & M. FRANKS, *GENDER JUSTICE* (1986). The authors of *GENDER JUSTICE* take the view that public policy and gender are tightly intertwined and that gender influences policy making at all levels of each branch of government.

<sup>11</sup> Indeed, I do not intend by imagining my senators to be women to suggest that their views are those of any particular women. In addressing my topic, all my imaginary senators must form their thoughts in the mind of a male person, one born in Texas in 1931, a Democrat, a law professor, and an Episcopalian at that, supported and sometimes managed through thirty-six years of marriage by a very able and tolerant wife, a parent to seven children and children-in-law and grandparent to four. Given this limitation on the world view of my senators, they must be forgiven if each is less than true not only to feminism, but even to the views of any identifiable subgroup of women. Yet my hope in supposing them to be women is that they will each be perceived to have at least some preferences that are those of at least some thoughtful women. I strive as best I can to present a view that is not centered on my own male experience of fifty-seven years.

<sup>12</sup> Especially J.S. MILL, *ON LIBERTY* (1859).

<sup>13</sup> See generally J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Methuen ed. 1982).

<sup>14</sup> See generally A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSE OF THE WEALTH OF NATIONS* (R. Cambell, A. Skinner, & W. Todd eds. 1976) (6th ed. 1791); *MORAL AND POLITICAL PHILOSOPHY* (H. Schneider ed. 1948) (6th ed. 1790). Cf. G. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975) and *THE ECONOMIST AS PREACHER, AND OTHER ESSAYS* (1982); see also R. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

believes that the only justification for the use of official power is to prevent harm to individuals.<sup>15</sup> She accepts the recently celebrated argument of Charles Murray<sup>16</sup> that government intervention has caused much of our society's ills, both economic and social.

The Libertarian is skeptical of the claims of those who profess to see in sexual conduct a threat of harm to others. She suspects that persons expressing such fears are merely disguising in a cloak of benign purpose their desire to impose their prejudices on their fellows; she regards them as moral imperialists. In this, she shares the premise of much modern psychoanalysis that guilt and duty are forms of tyranny over the minds of individuals that should be dispelled as quickly and thoroughly as possible.<sup>17</sup>

In conflict with sexual moralists, she believes that our own decisions are best for each of us. Further, individual decisionmaking serves the public interest, which is best discerned through the unseen hand of the market of ideas and values, and which unfolds in the flowering of billions of individual choices.

The Libertarian is prone to reinforce these views with the assertions that law is largely impotent to deal with matters of sexual morality,<sup>18</sup> and that the effects of such laws are to diminish respect for the law,<sup>19</sup> waste the energies of law enforcement institutions,<sup>20</sup> and make the management of proscribed sexual activities more profitable.<sup>21</sup> She therefore believes keenly in "de-criminalization" of sexual conduct.

The Libertarian's conception of good sex was formed while reading Margaret Mead's description of sexual relations in *Coming of*

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<sup>15</sup> J.S. MILL, *supra* note 12, at 74-75.

<sup>16</sup> C. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980* (1984). The author argues that we tried to provide for the poor but produced more poor instead, and that in trying to remove the barriers to allow escape from poverty, we inadvertently built a trap.

<sup>17</sup> On the degree to which the language of therapy has shaped American expectations about interpersonal relations, see R. BELLAH, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 128-39 (1985).

<sup>18</sup> For an expression of this premise and others of libertarianism from another age, see Carrington, *The Moral Quality of the Criminal Law*, 54 Nw. U.L. Rev. 575 (1959).

<sup>19</sup> "If we make criminal that which people regard as acceptable, either nullification occurs or, more subtly, people's attitude toward the meaning of criminality undergoes a change." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 359 (1968). See also Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968).

<sup>20</sup> Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, 161 (1967).

<sup>21</sup> N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 5 (1970) (discussing misguided conception of capacity of criminal law to influence people).



*Age in Samoa*, where, according to Mead, men and women freed of the sexual hangups customarily imposed by western cultures enjoyed one another's bodies freely without incurring emotional entanglements.<sup>22</sup> The Sexual Libertarian imagines the no-entanglements, one-night stand as the zenith of gratification and therefore the favored form of sexual activity.

From such premises, the Sexual Libertarian reasons in support of the further liberalization of marriage law. Each individual in a relationship should be acknowledged to control it, and this means termination at will. She subscribes to the dictum of Kenneth Karst that relationships are enriched by the freedom to leave them as one may please, for this adds meaning to "the decision to stay."<sup>23</sup>

The Sexual Libertarian is mindful of the work of psychologists who urge that women may tend to have less need and desire for individual autonomy than men.<sup>24</sup> But she is inclined to think that any such feminine impulse to share and nurture is a product of culture, not nature, and that its cure can be found in the right kind of psychoanalysis, perhaps coupled with more sex. She views the desires of many women to encumber themselves with children as benign indications of weakness.<sup>25</sup>

If people wish to incur obligations to one another by contract,<sup>26</sup>

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<sup>22</sup> Mead's work was published in 1929. The modern reader should be wary of this work. It was Mead's doctoral dissertation and bears the stamp of work designed to please her mentor, Franz Boas, who sent his students around the world in search of proof that nurture, not nature, is all. For a critique of the book, see D. FREEMAN, *supra* note 7. For a review of the social "science" literature which Boas and his students aspired to rebut, see S. GOULD, *THE MISMEASURE OF MAN* (1981).

<sup>23</sup> Karst, *The Freedom of Intimate Associations*, 89 YALE L.J. 624, 638 (1980).

<sup>24</sup> E.g., L. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976); C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

<sup>25</sup> Commentators have asked whether it is not unjust to be a woman. Given that feminine disabilities are derived from reproduction, and given that reproduction can be done artificially, is it not unjust that new technologies are not made available to all women? Parenting could be left to those who want to do it. See FIRESTONE, *THE DIALECTICS OF SEX* (1970) for an elaboration of this view. See also A. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988):

What gives human life its special value is that it can be an experience in which persons find happiness and satisfaction through self-directed participation and contribution. Lives spent bearing and rearing children and without adequate solitude and seclusion from others are stunted lives. . . . [S]uch lives may be lives of sacrificial contribution, but they are lives that fall short of those that might otherwise have been.

*Id.* at 96.

<sup>26</sup> See Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70

the Sexual Libertarian would allow it even though she might question their wisdom in forbearing future pleasure. But she would be disinclined to enforce long-term obligations implied from short-term relationships. Making fathers pay for a couple of decades<sup>27</sup> on account of a year or two of enjoyed intimacy seems to her an unjustified imposition on the right of individual fathers to dispose of their money according to their own impulses.<sup>28</sup>

Women who want long-term support should, in her view, bargain for it in prenuptial agreements, or even in contracts made with their husbands who want them to accommodate male desires, such as the desire for children. Such contracts she would enforce as market decisions freely made.

Likewise, she sees nothing wrong with surrogate motherhood,<sup>29</sup> but instead sees it as a triumph of modern science that enables unhappily childless couples to escape childlessness and the surrogate mothers to perform a service that is valuable to others. Indeed, she would encourage surrogate motherhood services for women who wish to be parents but who do not wish to be burdened by pregnancy.<sup>30</sup> Absent some duress in the negotiation, she regards a contract of surrogate motherhood as having the same moral claim to enforcement as any other exchange of promises. To deny enforcement of a surrogate motherhood contract freely made is, in her view, a degradation of the autonomy and rights of the surrogate mother, a form of patronization that was abandoned for men in the fourteenth century.

The Sexual Libertarian of course favors the legalization of sodomy and prostitution and any other form of "safe" sexual conduct—conduct that is not immediately and demonstrably harmful

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CALIF. L. REV. 204 (1982); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974); cf. G. BECKER, A TREATISE ON THE FAMILY (1981) (examining the family through a theoretical economic framework).

<sup>27</sup> See generally D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT (1979).

<sup>28</sup> Cf. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1626-34 (1982) (discussing possible changes in compulsory child support laws).

<sup>29</sup> Accord *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987). This current topic has evoked a considerable amount of literature. See, e.g., Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, HASTINGS CENTER REP., Oct.-Nov. 1987, at 31 (1987); Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986); Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986).

<sup>30</sup> See *supra* note 25.

to those who engage in it, including even perhaps controlled sexual violence between consenting adults or sex with animals. That money is involved is not a concern to the Libertarian for she can accept prostitution as one means of fighting the war on poverty; prostitution is welfare that the state does not pay.<sup>31</sup> Whatever pleases individuals or brings them recompense sufficient to over-balance their displeasure is by her lights deserving of protection, not constraint, unless other persons are demonstrably harmed or put at risk by the activity in question.<sup>32</sup>

The Sexual Libertarian also, of course, favors the right of the mother to an abortion and the introduction of the morning-after pill. These seem to her necessary recognitions of the right of women to individual autonomy.

The Sexual Libertarian is a bit ambivalent about sex in the workplace or the academy. Her reservations derive from concerns about secret and unjust preferences in otherwise open competitions and reductions in the productivity of labor caused by workplace romance.<sup>33</sup> Fairness to competitors in the marketplace and attention to the obligations of employment are all that she would ask; given these, she has no objection to dalliance among colleagues, or between teacher and student. She supposes that Heloise was probably made a better student by the special attention she received from her teacher, Abelard.<sup>34</sup>

The Sexual Libertarian is not an absolutist, of course; she would favor certain limited protections against sexual use of children too young to consent. She would protect adolescents from the inducements of the pimp or the baby-seller. She might also favor a prohibition of polygamy as a kind of sexual antitrust law. She does not necessarily approve of all of the sexual conduct which she would protect. While she might not approve of *Hustler* magazine, she will fight for the right of women to make their own decision to pose for

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<sup>31</sup> A. ALLEN, *supra* note 25, at 172. See generally R. SYMANSKI, *THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES* (1981).

<sup>32</sup> Cf. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979) (presenting moral argument as opposed to efficiency-based argument for decriminalization of prostitution).

<sup>33</sup> The problems are usefully enumerated by Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 843-61 (1988) (examining sexual relationships at school and work).

<sup>34</sup> The story is told in *THE STORY OF ABELARD'S ADVERSITIES: A TRANSLATION WITH NOTES OF THE HISTORIA CALAMITATUM* (J. Muckle trans. 1964).

it.<sup>35</sup>

The Sexual Libertarian position celebrating individual autonomy as the superior value is surely consistent with many of our most deeply shared values. She would better the world by allowing sexual relations to be governed by individual selection in much the same way that we propose to enrich ourselves by opening our markets to the free flow of goods. This is a morality that is congruent not only with capitalism, but also with the political traditions of democracy, embracing both individual freedom and equal rights to self-advancement.

#### IV. THE SOCIALIST

Let my second Senator be known as a Sexual Socialist. She likes to make her own choices as much as the rest of us. But she recognizes individualism as a possible shield for brutality and exploitation, and almost always as an apology for greed. As part of this recognition, she regards her Libertarian colleague's constituents as characters from *The Bonfire of the Vanities*.<sup>36</sup> She draws intellectual nourishment from Marx,<sup>37</sup> but also from such diverse artists as Jane Austen<sup>38</sup> and Henrik Ibsen.<sup>39</sup> With Edmund Burke, she is unwilling to celebrate freedom of choice until she knows what people will do with their freedom.<sup>40</sup> If she must choose, as Tocqueville foretold,<sup>41</sup> between the values of individualism and egalitarianism, she votes for equality.

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<sup>35</sup> Cf. REPORT OF THE PRESIDENTIAL COMMISSION ON OBSCENITY AND PORNOGRAPHY 51 (1970); EMERSON, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130 (1984) (expressing concern over Professor MacKinnon's proposal to deal with pornography by invoking the power of government to suppress it).

<sup>36</sup> Thomas Wolfe's 1987 novel depicts a city of individuals animated almost wholly by greed and Hollywood sexuality. The antiheroes do manifest occasional sympathies for their own children.

<sup>37</sup> Or, perhaps it is Engels. See generally F. ENGELS, *THE ORIGINS OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (1884). See also H. MARCUSE, *EROS AND CIVILIZATION, A PHILOSOPHICAL INQUIRY INTO FRAUD* (1955).

<sup>38</sup> Reference to the relationship between sexuality and power can be found in *EMMA* (London 1816), *MANSFIELD PARK* (E. Rhys ed. 1906) (2d ed. 1816), *PRIDE AND PREJUDICE* (E. Rhys ed. 1906) (3d ed. 1817), and *SENSE AND SENSIBILITY* (E. Rhys ed. 1906) (2d ed. 1813). See generally I. BROWN, *JANE AUSTEN AND HER WORLD* (1966).

<sup>39</sup> Ibsen was much concerned with abuse of power in sexual relations. See especially *A DOLL'S HOUSE* (1890), *GHOSTS* (1881), and *HEDDA GABLER* (1879).

<sup>40</sup> *SELECTED WRITINGS OF EDMUND BURKE* 346 (W. Bate ed. 1975).

<sup>41</sup> II A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 94-98 (P. Bradley ed. 1945) (12th ed. n.d.).

The Sexual Socialist, like the Sexual Libertarian, is essentially optimistic, but she believes that improvement in the human condition comes not from the unseen hand of the market but from wise intervention by the democratic state.<sup>42</sup> She believes in the possibility of a social order in which sexual relations, like other relations, can be genuinely improved for the benefit of almost all, and that the law has a significant role to play in achieving this betterment of the human condition.

The Sexual Socialist is inclined to see traditional family law as a means by which male-dominated cultures disable married women. In this respect, she, too, celebrates John Stuart Mill, but as the champion of the rights of married women.<sup>43</sup> She sees traditional suburban motherhood as a prison for women. She is inclined to agree with Simone de Beauvoir<sup>44</sup> that the law should force women out of these relationships and out of the home in order to protect them from exploitation. With Kate Millett,<sup>45</sup> she takes the willingness of some women to submit to suburban motherhood and housekeeping as mere proof of the conditioning that blinds them to their own exploitation.

She believes that many of our less attractive characteristics such as greed and excessive ambition are nurtured by traditions of sexuality that emphasize and reward the wrong impulses.<sup>46</sup> With Christopher Lasch,<sup>47</sup> she thinks that sex is better in a just society peopled with sensitive persons who are not in perpetual pursuit of self-interest. In these ways, sex and politics are related.

She therefore earnestly hopes to construct a society which features sexual relationships that are benign. To this end, she would abandon the forms of family relationships that she finds repres-

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<sup>42</sup> She may get her economics from A. PIGOU, *THE ECONOMICS OF WELFARE* (First American Press Inc. ed. 1978) (1st ed. 1832). In any case, she shares Senator Moynihan's negative views of the wisdom of Charles Murray, *supra* note 16. See D.P. MOYNIHAN, *FAMILY AND NATION* 128-44 (1986).

<sup>43</sup> J.S. MILL, *THE SUBJECTION OF WOMEN* (S. Coit ed. 1911) (1st ed. 1869).

<sup>44</sup> *Sex, Society and the Female Dilemma: A Dialogue Between Simone de Beauvoir and Betty Friedan*, *SATURDAY REVIEW*, June 14, 1975, at 12, 18.

<sup>45</sup> Quoted in Howe, *The Middle Class Mind of Kate Millett*, in *READINGS ON THE PSYCHOLOGY OF WOMEN* 181, 184 (J. Bardwick ed. 1972).

<sup>46</sup> I take this as one theme of C. MACKINNON, *FEMINISM UNMODIFIED* (1987); cf. Bartlett, *MacKinnon's Feminism: Power on Whose Terms?*, 75 *CALIF. L. REV.* 1559 (1987) (reviewing *FEMINISM UNMODIFIED*); see also R. SAMPSON, *THE PSYCHOLOGY OF POWER* (1965).

<sup>47</sup> C. LASCH, *HAVEN IN A HEARTLESS WORLD* (1977) and *THE CULTURE OF NARCISSISM* (1979).

sive. She favors radical reform of marriage laws as a means to protect married women against the drudgery imposed upon them by their overbearing husbands who accept the benefits of family but not the burdens. She would replace the hierarchical family with new kinds of groupings that feature equal rights. She would in a word, "say yes to sex and no to power."<sup>48</sup> She hopes that the social order thus created will be so civil, so gentle, so mutually gratifying, that the society nurturing such relationships will be the envy of the world, causing other societies to modify their unhappy sexual mores to emulate our superior ones, perhaps even producing a world more unified and less given to destruction and violence. To use Carol Gilligan's metaphor<sup>49</sup> she hopes to better the world by making it more a web and less a ladder.

The Sexual Socialist has a quite different vision of the kind of sexual relations she wishes to favor. She regards the Libertarian's sexual hopes and expectations to be a product of Hollywood imagery of romantic sex, an imagery that is itself the product of commercial greed. She favors sexual relations between peers of equal status and authority in the relationship, neither of whom derives anything from the relationship but sexual gratification.<sup>50</sup> She is, of course, indifferent to the gender of the sexual partners.

She would prohibit all sex between persons having a hierarchical relationship, for the reason that such sex is inevitably exploitative. Similarly, she would readily punish the use of physical force in connection with sexual acts, even if those who experience force or violence consent and are gratified by it. Submission to hierarchical sex is, to her, a sin.

Thus, this Senator vigorously seeks the complete abolition of the marital exception to the crime of rape.<sup>51</sup> Even if largely for rhetorical flourish, she joins Martha Chamallas<sup>52</sup> in questioning whether a wife should not be entitled to revoke consent to a particular sexual

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<sup>48</sup> Cf. M. FOUCAULT, *THE HISTORY OF SEXUALITY* 157 (1978).

<sup>49</sup> C. GILLIGAN, *supra* note 24, at 62.

<sup>50</sup> Cf. B. EHRENREICH, *RE-MAKING LOVE: THE FEMINIZATION OF SEX* (1986); see also Chamallas, *supra* note 33, at 835-43 (examining an egalitarian ideal of sexual conduct).

<sup>51</sup> Most states immunize husbands unless there is a legal separation or violence or a threat of violence. I. ELLMAN, P. KURTZ, & A. STANTON, *FAMILY LAW, CASES, TEXT, PROBLEMS* 131-47 (1986) (discussing liability for spousal violence); see also Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 *HARV. L. REV.* 1255, 1258-60 (1986) (discussing continued vitality of marital rape exemption).

<sup>52</sup> Chamallas, *supra* note 33, at 816-18.

act, and thus expose her husband to criminal sanctions if he should fail to withdraw in mid-coitus if ordered to do so.<sup>53</sup>

The Sexual Socialist feels no constraint about making fathers pay. Because the father usually enjoys a higher income, and especially because that higher income may result from unjust advantages derived from biology as well as culture, she favors strong action to compel redistribution to needful mothers, and even some not so needful as long as the effect is to equalize the living conditions of the absent father and his offspring.

She perceives homosexuality to be a disadvantaged status like that of being a woman or a black. She therefore regards the suppression of homosexual activity to be unjust. She strongly supports equal rights for gays and lesbians.

The Sexual Socialist strongly opposes prostitution,<sup>54</sup> pornography<sup>55</sup> and surrogate motherhood<sup>56</sup> as inescapably exploitative relations between the strong and the weak. With respect to prostitution, she favors criminal punishment of the male consumers of services so degrading to the providers.<sup>57</sup>

The Sexual Socialist is especially concerned with sex at the workplace and sex in the academy. In her view, a work supervisor or teacher who enjoys sex with a supervisee or student is engaged in a thinly disguised transaction of prostitution.<sup>58</sup> Because such sex is exploitative, it does not matter to the Sexual Socialist who initiates the sexual contact. Sexual harassment and sexual bribery are

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<sup>53</sup> Cf. *R. v. Kaitamaki*, [1984] 1 N.Z.L.R. 385 (holding that the question of whether a woman consented to intercourse is not to be determined solely with reference to time of penetration). *But cf.* *People v. Vela*, 172 Cal. App. 3d 237, 218 Cal. Rptr. 161 (1985) (when female initially consents to act of sexual intercourse, but thereafter withdraws consent, each subsequent uncontested penetration accomplished by force or fear will constitute an act of rape).

<sup>54</sup> *Accord Arrington, On Respect*, J. OF VALUE INQUIRY 1 (1978).

<sup>55</sup> See MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); R. TONG, *WOMEN, SEX AND THE LAW* (1984); cf. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986) (discussing problem of pornography and desirability of maintaining neutral viewpoint in first amendment adjudication).

<sup>56</sup> Cf. S. O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C.L. REV. 127 (1986) (rejecting argument that state prohibition of surrogacy violates parties' constitutional right of privacy).

<sup>57</sup> See generally M. O'BRIEN, *ALL THE GIRLS* (1982) (series of stories concerning one man's relationships with various prostitutes).

<sup>58</sup> See generally C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN — A CASE OF SEX DISCRIMINATION* (1979); B. DZIECH & L. WEINER, *THE LECHEROUS PROFESSOR* (1984).

equally submissions of sexual favors for favors of another kind, and so they offend her egalitarian principle of sex for its own sake for all concerned. She would even-handedly punish both partners, the strong one who exploits and the weak one who submits or bribes. She regards the castration of Abelard and the banishment of Heloise to a nunnery as harsh sanctions, but not misdirected.

#### V. LIBERTARIANISM V. SOCIALISM

Both the Sexual Libertarian and the Sexual Socialist are essentially optimistic about the coming improvement of the human condition, and both emphasize the value of the individual. The Socialist's emphasis on equality is consonant with individualism in assuring its benefits for those likely to be victims of unconstrained self-advancement. If not quite congruent with market capitalism, her values have nevertheless long coexisted with market capitalism as features of our culture.<sup>59</sup>

While the Sexual Libertarian and the Sexual Socialist share long-term ends, their preferences with regard to means are not reconcilable. The Libertarian's prescription for the Socialist's preoccupation with exploitative sex is more sexual freedom. The Libertarian also has a lingering sense that all hierarchy is not necessarily bad, and that an exchange of sex for wealth could in some circumstances, as in the marriage of a very attractive female to an elderly but wealthy male, be a very fair bargain.

Several matters divide these Senators sharply. They divide on the legalization of prostitution and pornography. The Libertarian supports surrogate motherhood; the Socialist opposes it. The Socialist is hot in pursuit of fathers who are fugitives from parental responsibility; the Libertarian is laggard. Their approaches to the regulation of sex in the workplace and the academy are divergent and inconsistent.

At the same time, the Libertarian and Socialist Senators are comfortably allied on several matters. Both are strong in their rejection of religion as a consideration. They agree that marriage relations should be easily terminable, and that wives are entitled to protection against rape by their husbands. They agree that the

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<sup>59</sup> D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 223 (1976) (arguing that a socialist market economy is feasible and could possibly run more efficiently than the traditional market economy).



choice to have an abortion is that of the mother alone. They agree that sexual preference is not a fit subject of regulation. Thus, while coming to their conclusions from quite different routes, their positions often coincide.

## VI. THE TORY

I describe my third Senator as a Sexual Tory. She, too, has read and admired the work of Adam Smith<sup>60</sup> and John Stuart Mill<sup>61</sup> and Karl Marx, but on matters of sex and morals, she is more taken by the writing of anthropologists, especially of Bronislaw Malinowski<sup>62</sup> and Margaret Mead.<sup>63</sup> She is also influenced in important respects by the work of Sigmund Freud.<sup>64</sup>

The Tory supports individual freedom, but regards the Libertarian as blind to many indirect and long-term adverse consequences resulting from unconstrained sexuality. The Tory also supports so-

<sup>60</sup> Smith, it may be recalled, held his chair in moral philosophy, of which economics became a branch. A taste of Smith's morality was expressed in *THE THEORY OF MORAL SENTIMENTS* 28 (D. Raphael & A. MacFie eds. 1976) (6th ed. 1790): "Though naturally the most furious of all passions, all strong expressions of [the passion by which Nature unites the two sexes] are upon every occasion indecent . . ."

<sup>61</sup> The Tory especially admires Mill's later work, in which he became an advocate of family values. *E.g.*, *THE AUTOBIOGRAPHY OF JOHN STUART MILL* 117-18 (1873). In maturity, Mill rejected the "felicific calculus" of Bentham; he became persuaded that happiness was best achieved through sacrifice for others. For a career, he commended "some art or pursuit, followed not as a means, but as an ideal in itself. *Id.* at 106. *Cf.* J.S. MILL, *ON SOCIAL FREEDOM* (D. Fosdick ed. 1941). *See generally* B. SEMMEL, *JOHN STUART MILL AND THE PURSUIT OF VIRTUE* (1984).

<sup>62</sup> B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926); *THE FATHER IN PRIMITIVE PSYCHOLOGY* (1927); *FREEDOM AND CIVILIZATION* (1944); *SEX AND REPRESSION IN SAVAGE SOCIETY* (1927); *SEX, CULTURE AND MYTH* (1930) (hereinafter B. MALINOWSKI, *CULTURE*).

<sup>63</sup> M. MEAD, *CHILDHOOD IN CONTEMPORARY CULTURES* (with M. Wolfenstein, 1955); *CULTURAL DISCONTINUITIES AND PERSONALITY TRANSFORMATION* (1954); *CULTURE AND COMMITMENT: A STUDY OF THE GENERATION GAP* (1970); *FAMILY* (with K. Heyman, 1965); *GROWING UP IN NEW GUINEA* (1930); *MALE AND FEMALE, A STUDY OF THE SEXES IN A CHANGING WORLD* (1949); *see also* R. BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE* (1946) (hereinafter R. BENEDICT, *CHRYSANTHEMUM*); and *PATTERNS OF CULTURE* (1934).

<sup>64</sup> Freud's writing illuminates the relationship between individual sentiments and external influences. *See, e.g.*, S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (J. Starchey ed. 1961) (1st ed. 1930). In practice, however, Freud's influence has often been anathema to this senator, for psychoanalysis has contributed to the development of a widely shared view that guilt is unhealthy, that one should not be judgmental, and that parents should pursue their own happiness at whatever cost to their children. *See* M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 107-08 (1987) (discussing relationship between no fault divorce laws and psychology of divorce).

cial justice, but regards the Socialist as blind to biology and the needs of the social order to regenerate itself. If required to choose amongst the three, the Tory reluctantly favors the values of the family over those of individual freedom and social justice.

#### A. A Tory View of the Libertarian and Socialist Positions

The Sexual Tory is skeptical about applying theories of individual rights in the context of sexual relationships to foster a spirit of sexual license. She cautions those who may mistake solitude and isolation for freedom,<sup>65</sup> for she regards Libertarian sexuality as likely to be a lonely and unsatisfying indulgence. More importantly, she holds that individual freedom implies the right to make long-term commitments that will be respected and protected by the social order.<sup>66</sup> Freedom thus also implies individual responsibility, not only by the individual actor, but also by others. It is not, in her view, an appropriately protected exercise of individual rights to participate in the destruction of the relationships of others.

While not unconcerned with happiness here and now, the Tory favors deferred gratification in the form of sexual forbearance to be repaid in the future happiness of our offspring.<sup>67</sup> She accepts the teaching of J.D. Unwin that "civilization" has never been achieved except by the sacrifice of individuals willing to forebear gratification of their sexual as well as their other desires in order to secure the public good.<sup>68</sup> To put her sexual policy in the economic terms often employed by Libertarians, she favors a program of investment to one of consumption.

The Sexual Tory also believes with the Socialist in social justice

<sup>65</sup> *E.g.*, A. WESTIN, *PRIVACY AND FREEDOM* 31-32 (1967).

<sup>66</sup> In this, she respects the educational function of the law: commitments not enforced are prone to become commitments not respected by the society. *See* M. GLENDON, *supra* note 64, at 6-7, 107-08.

<sup>67</sup> An economist might view this as a form of sexual investment. The Tory's preference in this regard brings her into sharp conflict with Justice Blackmun, whose views she regards as hedonist: "[W]e protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households." *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (dissenting opinion).

<sup>68</sup> J.D. UNWIN, *SEX AND CULTURE* (1934). Patrick Moynihan shares the view that the "way in which [Unwin's] work has been ignored 'sometimes seems positively sinister.'" D.P. MOYNIHAN, *supra* note 42, at 192 (quoting D.R. Johnston); *see also* S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (J. Starchey ed. 1961) (1st ed. 1930); M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 166-67 (T. Parsons trans. 1930).

and equality. Her special concern, however, is social justice for the weakest members of our society: our children. Equal rights for adults that come at the expense of our children come, in her view, too dear. She is willing for adults to experience not only sexual repression, but also other disadvantages, if that is what it takes to assure effective nurture of children.

The Sexual Tory's world view is more dour than those of her senatorial colleagues. She does not share the Libertarian faith in the capacity of the unseen hand of the market to produce social and sexual relationships which are optimal. Neither does she suppose with the Socialist that better men and women are likely to be produced if only our society were more just, or engaged in more redistribution of money or power. To the contrary, Tory thinking begins with the premise that men and women are more like other animals than they are like angels, and that careful attention is needed to bring out their better instincts, if indeed this can be done at all. The Sexual Tory is thus less concerned with the remote possibility of uplifting human nature and establishing new and higher moral standards for the world than she is with protecting those we have.

The Tory's world is one that is well-stocked with terrors, one in which not merely civility but civilization is a temporary and fragile condition that can be maintained only at considerable risk and sacrifice.<sup>69</sup> She believes that a primary aim of any social order must be its own survival, and that even the values of the Sexual Libertarian or the Sexual Socialist are not likely to be preserved for a society that does not protect and replenish itself.

The best and perhaps essential institution for preserving and transmitting any culture and its values is, in the Tory view, the family. It is in the family, she believes, that children learn most of what they need to know in order to cope with social life, to appreciate the values of their culture, to cherish and protect it. Although supportive of public education and child care, she has little confidence in the ability of public institutions to compensate for shortfalls in the performance of families in this regard.<sup>70</sup>

The Tory would therefore deploy the law to reinforce the insti-

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<sup>69</sup> Cf. W. DURANT & A. DURANT, *THE LESSONS OF HISTORY* 91-94 (1968) (examining the growth and decay of civilization).

<sup>70</sup> On the issues of child care, see D. FALLOWS, *A MOTHER'S WORK* (1986).

tutions and relations of family to the end of preserving a culture in which individual rights and social justice can flourish. Because her program is less frequently recognized in contemporary public discussions as a coherent and purposeful one, I will enlarge more fully on its implications for law.

*B. The Social Need for Fatherhood: The Testosterone Problem*

The Sexual Tory, true to her view of humans as animals, proclaims that male chemistry poses a primary social problem. She does not suppose that men enjoy sex more than women, but, that as a rule, they are more powerfully driven toward it.<sup>71</sup> Particularly in the period of young adulthood, when the sap is highest, she perceives males to have an unruly and intense preoccupation with sex which resembles that of other male mammals. While not prepared to endorse Aristotle's rating of the human male as the most salacious animal in nature save for stallions, she would rate him right up there with bulls, tomcats, billy goats, and other studs. She suspects that this chemistry is linked to other male traits having primeval biological functions, such as the propensity for physical violence<sup>72</sup> which may be useful when the family, or the society, is exposed to external threat.<sup>73</sup> She reckons that the flow of testosterone poses problems in ordering any stable society, but especially one that is a fit shelter for the gentle values of individualism and equal justice advanced by her senatorial colleagues.

The Sexual Tory perceives the family to be the means by which cultures everywhere have coped with this problem. At the same time that the family is the primary agent for transmitting to the next generation the values of the culture, such as a regard for indi-

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<sup>71</sup> The Tory is at risk of having a daughter like Jill Tweedie who "was brought up in the diffuse but all-embracing belief that inside every male was a seething volcano of sex, a churning stream of lava kept under control only by dint of iron discipline on the man's part and extreme caution on mine." L. BLOM-COOPER & G. DREWRY, *LAW AND MORALITY* 140 (1976).

<sup>72</sup> She agrees with Elizabeth Stanton that men are "destructive brutes," but not necessarily that women are "small-minded ninnies." E. GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* 205 (1984). There is not much doubt that Stanton was right about the men. See J. WILSON & R. HERRNSTEIN, *CRIME AND HUMAN NATURE* 104-25 (1985).

<sup>73</sup> This Tory is a pessimistic pacifist. Even if America is "kinder and gentler" and the Soviet Union pursues *glasnost* forever, she supposes that more young men will have to suffer the gruesome consequences of war. She tries to reckon this in her calculus of equal rights as she weighs the rights and interests in the family.

vidual rights and equal justice, it is also the primary means of taming antisocial impulses, particularly of males. It is not a unique discovery of our culture that testosterone and its consequences are most effectively controlled by channeling males into family relationships in which they share responsibility for developing in children those traits and values we most need and most esteem. Let us, she urges, accept the teaching of many (perhaps all) cultures and blunt the aggression of overheated young males by engaging them in the task of making their children more literate, more numerate, and more agile, and also more kind, more generous, more compassionate, more tolerant, more respectful of the rights of others, and even more willing to sacrifice their very lives if necessary for the protection of others.<sup>74</sup> This engagement or commitment of men to the welfare of children has been achieved by defining a role for the father that is respected and rewarded.

If effectively engaged in the rearing of children and the transmission of culture, fathers may also lend emotional and moral support to their wives, strengthening them in both capacity and resolve to do for the children what needs to be done. In return for that contribution to family, fathers may derive additional strength for themselves based on their own sense of self-worth. Since children generally inherit the self-assessments of those who nurture them, and derive pride in themselves from the respect that parents show to one another, their capacities to contribute as adults to the social order of which they are a part should be materially enhanced. Pride in parentage, she believes, is likely to become pride in community and nation.

In the Tory view, positive political and economic consequences derive from the habits of mind common to parents who are committed to the development of their children. Such persons, she believes, are far more likely to make the long-term investments needed to accumulate capital and to support political programs that favor investment rather than consumption of goods and services.<sup>75</sup> It is not parents who are the political constituency for massive deficit finance by the government.

The Sexual Tory reasons thus that the first duty of any parent

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<sup>74</sup> For a recent compilation of cultural comparisons, see *THE FATHER'S ROLE: CROSS-CULTURAL PERSPECTIVES* (Lamb ed. 1987).

<sup>75</sup> Cf. A. ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* (1988).

to his or her child is to love and support the other parent, even if the cost of doing so is an enormous sacrifice of sexual freedom and a risk that the distribution of benefits and costs may prove in the end to be uneven. In performing that duty to their children, parents also perform a public duty by enhancing the socialization of those children to the values of a society that sustains individual freedom and equality.

A culture that dismisses its males from the responsibilities of fatherhood would be not merely unique in human experience,<sup>76</sup> the Tory holds, but also dangerous and unhappy. Such a culture asks to have its streets populated with violent young men, its adolescents runaway and awash in chemicals,<sup>77</sup> its work force depreciated in value, and its children faced by a grim future of increase in these effects. Such a culture will get what it deserves.<sup>78</sup>

In developing her views about the importance of family, the Sexual Tory is a bit of an empiricist. She is familiar with the data generated by decades of school studies, which may confirm that one predictor of a child's school performance is the stability of the child's family.<sup>79</sup> She has also examined the crude science of criminology which tends to demonstrate that the absence of effective family nurture is a primary source of the violence which so mars our social life.<sup>80</sup>

<sup>76</sup> "[F]reedom of intercourse though not universally is yet generally prevalent in human societies. Freedom of conception outside marriage is, however, never allowed . . ." B. MALINOWSKI, *CULTURE*, *supra* note 62, at 63-64.

<sup>77</sup> See generally B. ROBINSON, *TEENAGE FATHERS* (1988) (discussing scope of adolescent pregnancy problem, particularly as it affects the teenaged father).

<sup>78</sup> This judgment is made not only by my Tory, but by Senator Moynihan as well:

From the wild Irish slums of the nineteenth century eastern seaboard, to the riot-torn suburbs of Los Angeles, there is one unmistakable lesson in American history: a community that allows a large number of young men to grow up in broken families, dominated by women, never acquiring any stable relationship to male authority, never acquiring any rational set of expectations about the future—that community asks for and gets chaos. Crime, violence, unrest, disorder—most particularly the furious, unrestrained lashing out at the whole social structure—that is not only to be expected; it is very near to inevitable. And it is richly deserved.

Moynihan, *A Family Policy for the Nation*, *AMERICA*, Sept. 18, 1965, at 280, 283.

<sup>79</sup> This aspect of the school data seems to have been understudied in the last decade. For a review of the literature, see P. ADAMS, *FATHERLESS CHILDREN* (1984).

<sup>80</sup> For a survey of the material linking family breakup to social violence, see J. WILSON & R. HERRNSTEIN, *supra* note 73, at 245-53; cf. E. CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* 181-221 (1985) (discussing relationship between families and crime). The most

She also draws support from the experience of different ethnic groups in America. She is inclined to believe, with Martin Luther King<sup>81</sup> and Patrick Moynihan,<sup>82</sup> that our failure to integrate blacks more fully into American life is in substantial part a result of our inability to develop and maintain black family traditions to replace those destroyed by slavery or by its aftermath. She attributes the great success of recent migrations to our country from such diverse places as Cuba and Vietnam to the stability of families within those migrating groups.<sup>83</sup> Finally, this Senator has travelled in the Far East where she observed great social dynamism, which she attributes in part to the great strength of family ties that confirm the roles and self-worth of Asian males.<sup>84</sup> While she would not and knows that we could not replicate Asian family life in America (except perhaps by massive immigration), she protests laws and policies that deny this wisdom of Asian culture.<sup>85</sup>

For these reasons the Sexual Tory, while cherishing individual rights and equality, would, if forced to choose among the three, prefer the values of family. She believes that sexual mores upholding the family meet even the John Rawls' test of justice,<sup>86</sup> for their benefits flow not only to those who share family relationships, but to any who share in the culture nourished by them. So she con-

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substantial anthropological study seems to be Bacon, Child & Berry, *A Cross-Cultural Study of Correlates of Crime*, 66 J. ABNORMAL & SOC. PSYCHOLOGY 291 (1963), which finds a causal link between violent crime and father-son intimacy. See also B. WHITING, J. WHITING & R. LONGBAUGH, *CHILDREN OF SIX CULTURES* (1975).

<sup>81</sup> "[F]or no other group in American life is the matter of family life more important than to the Negro. Our very survival is bound up in it . . ." Address by Martin Luther King, Jr., Abbott House (Oct. 1965), quoted in D.P. MOYNIHAN, *supra* note 42, at 37. See also Norton, *Restoring the Traditional Black Family*, N.Y. TIMES MAG., June 2, 1985, at 93. The Tory is especially taken that Martin Luther King shared her submission to the influence of Malinowski. See D.P. MOYNIHAN, *supra* note 42, at 169 (citing King's favorable reference to Malinowski in the Abbott House address, *supra*).

<sup>82</sup> D.P. MOYNIHAN, *supra* note 42.

<sup>83</sup> See, e.g., L. FUCHS, *HAWAII PONO: A SOCIAL HISTORY* (1961); R. GARDNER, B. ROBEY & P. SMITH, *ASIAN-AMERICANS: GROWTH, CHANGE & DIVERSITY* (1985).

<sup>84</sup> See, e.g., J. WILSON & R. HERRNSTEIN, *supra* note 72, at 452-57. Compare the earlier perceptions of R. BENEDICT, *CHRYSANTHEMUM*, *supra* note 63, at 290-91.

<sup>85</sup> European nations are more attuned to the problem than we are. See generally M. GLENDON, *supra* note 64.

<sup>86</sup> J. RAWLS, *A THEORY OF JUSTICE* 11 (1971). Rawls' theory of justice is based on maintaining a social contract that free and rational persons, concerned only with furthering their own positions, would accept.

cludes, with *all past humanity*, if Malinowski is to be believed,<sup>87</sup> that every child should have a father.

### C. *Other Intrinsic Benefits of Sexual Mores*

Although finding these functional justifications for sexual mores associated with the preservation of the family to be ample, the Sexual Tory also perceives through her amateur anthropologist's eyes that standards of sexual conduct have additional intrinsic worth independent of these functions.

These added benefits are three. First, it is a human instinct, widely if not universally shared, to gain individual identity by reference to a group of which we are a part. To be an Ifugaoan or a Sunni or a Quaker is to exist by a code of conduct associated with that cultural identity. Sexual conduct, being as important as any conduct in which we engage, is generally at the heart of those codes that give us that culturally derived identity. In this way, individuals adhering to the sexual mores of their culture may receive benefits even if those mores do not serve the particular interests of those individuals.

Second, the Tory asserts, sexual mores of almost any kind provide us with a basis for forming expectations about the sexual behavior of our fellows, expectations that may be at least as important to many of us as those protected by the law of contracts or of property. Even for those not shy, a culture having no sexual code, if such can be imagined, would be frightening for most members of our species, who would be thereby deprived of much social contact.<sup>88</sup>

Third, sexual mores give to individuals norms of conduct that, as Lon Fuller has taught us,<sup>89</sup> are essential to the exercise of freedom. Their total absence would be a form of unfreedom because members of such a "liberated" culture would have no basis for choosing identities as individuals. They would lack, for example, a culture

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<sup>87</sup> See B. MALINOWSKI, *CULTURE*, *supra* note 62, at 63. "The most important moral and legal rule concerning the physiological side of kinship is that no child should be brought into the world without a man—and one man at that—assuming the role of sociological father, that is, guardian and protector, the male link between the child and the rest of the community." *Id.*

<sup>88</sup> See, *supra* note 22 and accompanying text.

<sup>89</sup> Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1311-13 (1955) (discussing necessity of social norms for making individual choice effective).



against which to rebel when rebellion is the choice to be exercised. The point may be made metaphorically by imagining a person having the choice at all times to be male or female, pregnant or sterile, parent or childless. Such a person would be imprisoned by the absence of any premise from which rational choice might proceed, being helpless even to reject itself in order to aspire to become different than it is.

Thus, for these additional reasons, the Tory is unashamed to advocate constraints that may sometimes conflict with individual interests or with the perceived requirements of equal justice.

#### *D. The Tory Program: Holding Marriages Together*

Acknowledging that the causes of the low estate of the American family are many,<sup>90</sup> the Sexual Tory challenges the law to do all that it can to correct the strong and deplorable trend. She is thus an advocate of the rights of children to enjoy stable family relations.<sup>91</sup> To the degree necessary to protect children, she rejects the premise of Kenneth Karst that "the freedom to go gives added meaning to the decision to stay."<sup>92</sup> Such a "freedom" she regards as harmfully destabilizing not only directly, but also indirectly, because it induces both partners to maintain emotional defenses against the day when the other spouse finds grass greener elsewhere. Children are entitled to parents who are committed, not free.

Rejecting also the defeatist premise that the law cannot influence sexual behavior or social forces,<sup>93</sup> she insists that we have not really tried to influence marital sexual conduct with the more sophisticated tools that we have developed in the arena of commercial regulation. She knows that the law has many instruments for the advancement of the family that have not yet been deployed.

The Sexual Tory's program differs greatly from those of her sen-

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<sup>90</sup> See generally K. KENNISTON, ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE 3-23 (1977).

<sup>91</sup> In this, she subscribes to the premise of the current Alan Arkin film, *Necessary Parties* (PBS television movie, Nov. 5 & 12, 1988), that children have a right to continuity and stability in family relations that is more important than the rights of adults.

<sup>92</sup> Karst, *supra* note 23, at 638.

<sup>93</sup> E.g., REP. OF THE COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT 48 (1963) (recommending that private consensual adult homosexual conduct not be a criminal offense).

atorial colleagues. It centers on the interests of children, not adults. It celebrates married sex as the preferred outlet for the sexual drive, especially for the parents of children. Her program is to offset the centrifugal social forces that are pulling families with children apart with an array of legal incentives for families to stay together.

She would use every available legal means (save perhaps the criminal law) to encourage, require and protect the commitments of parents to young children and to one another. To this end, she would deploy the laws of marriage and divorce, taxation, welfare, property—even creditors' rights—and, especially, torts.

The Tory would begin by repudiating the doctrine of "no fault" divorce for families with minor children.<sup>94</sup> A parent bearing responsibility for breaking his or her children's home would be liable to the children not only for support, but for punitive damages.<sup>95</sup> She would also put such strength in the parental support enforcement program that no parent could gain any possible financial benefit from the abandonment of his or her children and spouse.<sup>96</sup> The first half of any income earned by a noncustodial parent anywhere in America, and elsewhere that its law can be made by treaty to reach, would be used to support his or her minor children.<sup>97</sup> She would thereby re-establish the teaching of the law that nurture and preservation of the family bond is a duty owed by parents to their children and to the public.<sup>98</sup>

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<sup>94</sup> Mary Ann Glendon has pointed out that "no fault" divorce was not the product of a political judgment that no moral obligation to remain in an inconvenient marriage exists. Instead, "no fault" reflects only the realization that inquiry into issues of fault is ugly and, in our federal system, ugly issues are avoidable by movement to the least constraining jurisdiction. M. GLENDON, *supra* note 64, at 112-42.

<sup>95</sup> She would thus reverse the consequences of poverty visited on mothers and children by the "divorce revolution." See generally Weitzman, *supra* note 26.

<sup>96</sup> This would also be a material change in existing practice. See D. CHAMBERS, *supra* note 27, at 42-58 (examining financial position of a family after divorce).

<sup>97</sup> In this, she rejects the predictions offered by David Chambers in his article on compulsory child support, *supra* note 28. Cf. M. GLENDON, *supra* note 64, at 109-11 (criticizing Chambers's conclusions regarding the law and child support payments).

<sup>98</sup> The Tory thus has no doubts where Martha Minow is uncertain that "perhaps the reformers went too far in pursuing a version of freedom that underestimates the dependence of freedom itself on interpersonal connection." Minow, *Consider the Consequences*, 84 MICH. L. REV. 900, 918 (1985) (commenting on L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985)). Minow agrees with Weitzman's view that child support should be based on an approach that is likely to equalize the standards of living between custodial and non-custodial

The Tory would apply the concept of fault in making custody awards. To protect the more caring parent from a bad bargain resulting from the other parent's threat of a custody battle, she would eliminate judicial discretion and provide a legal right to full custody for any parent who has borne the primary burden for the care of a child whose custody is disputed unless grave misconduct can be proved by the divorcing partner.<sup>99</sup> A noncustodial parent responsible for breaking a marriage would be presumptively disqualified from custody and would forfeit even visitation rights unless granted as an act of grace by a court for the benefit of the child.<sup>100</sup> The Tory's law would hope for a stepparent to displace fully the forsaking parent, to enjoy with the nurturing parent, among other things, such financial support as the forsaking parent is capable of providing.

The Tory would also make full use of the Internal Revenue Code as an instrument of this family policy. Adverse tax consequences would result from any divorce affecting children.<sup>101</sup> This could be accomplished (1) by allowing double exemptions for children living with two parents or a widowed parent, (2) by conditioning and measuring the interest deduction for a home on the number of minor children living in it, and (3) by treating all support payments

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households. Minow, *supra*, at 917 (citing WEITZMAN, *supra*, at 379-83).

<sup>99</sup> M. GLENDON, *supra* note 64, at 99-102; R. NEELY, THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE 62 (1984) (discussing child custody aspects of divorce); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L.J. 950, 972-73 (1979) (noting "[t]he prevailing best interests standard exacerbates the disadvantages of a risk-averse parent because of its great uncertainty"). *But see* Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 561-63 (1984) (suggesting that rule giving custody to primary caretaker may not be rule most reasonable to adopt, since there is no firm evidence showing this is typically in child's best interest).

<sup>100</sup> In this, she shares the view of J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 33-39 (1979), that children need one parent or two living together who have unequivocal and undoubted parental authority and responsibility. *But see* Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (discussing how the law should regard parent-child relationships which children form outside the nuclear family); Bartlett & Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986).

<sup>101</sup> Contrast the "marriage penalty" eliminated in the 1981 revision of the Internal Revenue Code. D.P. MOYNIHAN, *supra* note 42, at 187-88. For a full discussion and argument that the tax law should be neutral with respect to marriage, see Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980).

by a noncustodial parent as income to the custodian and not deductible by the non-custodian.

Not neglecting the poor family, the Sexual Tory would substantially enlarge welfare benefits for married couples living together in relation to those available to the single parent.<sup>102</sup> To discourage single parenthood, she would at least partly replace the welfare benefits presently provided for single mothers with an elaborate system of child care, possibly modelled on the infant boarding schools of China, with the ablest of these single mothers being hired to work in such institutions and the others limited to weekly visitation rights.

Also not neglected in the Tory's program is the woman of means who would have a baby but not its father. To discourage the birth of children out of wedlock, she would require a court to conduct a hearing within the first month after the birth of such a child to inquire into the identity of the father and to consider whether it is in the child's interest to remain with the mother or with the father or with either set of grandparents.<sup>103</sup> The object would be to find the best home for such an unfortunate child, without regard for any rights that such a mother might imagine herself to have.

### *E. Adultery: A New Mission for the Law of Torts*

The Sexual Tory would also use law to diminish the attractiveness of extramarital sex partners. If the young father is randy, he should be urged to go home and share his sexual impulses with the mother.

To encourage this, she would replace the old and ineffective criminal law of adultery<sup>104</sup> with a new and effective law of torts.<sup>105</sup>

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<sup>102</sup> Cf. M. GLENDON, *supra* note 64, at 134-38 (discussing differences between American welfare system and Western European systems).

<sup>103</sup> Note that this approach gives no recognition to any asserted rights of an unwed father. See Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231 (1971); cf. *In re Richard M.*, 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975) (holding that where father legitimated a child, he had rights to custody equal to those of the father of any other legitimate child). *But see* Bartlett, *supra* note 100, at 921-24.

<sup>104</sup> For a compact and perceptive discussion of all the reasons justifying a cautious use of criminal law, see Kadish, *supra* note 20.

<sup>105</sup> Perhaps not so new. Compare the old writ of trespass on the case to punish seduction of a daughter. *E.g.*, *Chamberlain v. Hazlewood*, 151 Eng. Rep. 218 (Ex.D. 1839). See generally W. MALONE, *TORTS IN A NUTSHELL: INJURIES TO FAMILY, SOCIAL AND TRADE RELATIONS*

Her primary aim in doing so is to shift the law's concern from punishment of misconduct to protection of the rights of victims.<sup>106</sup> She would impose civil liability on the sexual partner of a person who is a parent of a minor child with another living parent, whenever the defendant knew or could by reasonable effort have determined that his or her sexual activity infringed on a co-parental relationship.<sup>107</sup> Both the children and the forsaken parent would be compensated for their anguish, and the children would be awarded punitive damages sufficient to deter repetition.

These interests would be advanced by the efforts of contingent-fee attorneys who might exercise their first amendment rights<sup>108</sup> to seek out any child-clients who might be the victims of such harms. She believes that such counsel can win the favor of American juries for children as adultery plaintiffs as they have for personal injury plaintiffs. What has been good for the victims of casual negligence must be regarded as even better, she urges, for young and helpless victims of intentional torts!

Proof of adultery as a tort would be less onerous than proof of adultery as a crime. Discovery would not be impeded by any privilege against self-incrimination.<sup>109</sup> The plaintiffs' attorneys might employ aggressive contingent-fee investigators to gather useful evidence. The Tory would, of course, continue to protect the privacy of adulterers, also by means of tort law, but she would reaffirm the present rule that evidence is not excluded merely because it was obtained by private persons in inappropriate ways.<sup>110</sup>

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78-79 (1979). The decline of such remedies is told in Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935). See also Chamallas, *supra* note 33, at 810-11.

<sup>106</sup> Cf. *Bowers v. Hardwick*, 478 U.S. 186, 209 n.4 (1986) (Blackmun, J., dissenting) (pointing out that analytical distinction could be found between private consensual sexual conduct and sexual crimes such as adultery and incest).

<sup>107</sup> The substitution of civil sanctions for those modelled on the criminal law was my theme in Carrington, *Civilizing University Discipline*, 69 MICH. L. REV. 393, 409-18 (1971). But cf. P. DEVLIN, *THE ENFORCEMENT OF MORALS* 26-42 (1965) (examining relationship between moral law and the law of torts).

<sup>108</sup> Cf. *In re Primus*, 436 U.S. 412 (1978) (solicitation of prospective litigants by non-profit organization is activity entitled to first amendment protection and may be regulated by government only very narrowly).

<sup>109</sup> C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2018 (1970).

<sup>110</sup> *Tirado v. Commissioner*, 689 F.2d 307 (2d Cir. 1982) (holding that evidence allegedly seized unlawfully by federal narcotics agents could be used in a subsequent federal civil tax proceeding); *NLRB v. South Bay Daily Breeze*, 415 F.2d 360 (9th Cir. 1969) (rule not allowing evidence obtained through an unreasonable search and seizure is not applicable in a

Moreover, these children's rights would be enforced without regard for the usual exemptions of assets from the bite of the writ of execution. Nor would the liability for adultery with a parent be insurable or dischargeable in bankruptcy. How sexually attractive, the Tory wonders, would be an available partner whose embrace was accompanied by a wage and bank account garnishment?

By such methods, she urges, tort law can be used as a means of modifying sexual behavior<sup>111</sup> in much the same way that it has been used to modify the behavior of manufacturers of dangerous substances and environmental polluters.

In thus restricting sexual access of parents outside marriage, the Sexual Tory feels obliged to concede a point to the unruly stallion; to keep father in the house, she favors the marital exception to the law of rape.<sup>112</sup> If father is violent, of course, she would remove him from the home and punish him, but not merely for being too randy on the wrong night. If mom is getting too much attention from dad, well that's better than too little. The senator just hopes that mother will be more gratified and strengthened than offended by the resulting attention. If it would help to balance the injustice of this arrangement, she would give equal rights to mothers to insist on sexual attention when they want it. Disfavoring criminal punishment of either father or mother for either too much or too little sexual conduct, she would, if legal intervention be deemed necessary, favor making persistent sexual refusal a ground for divorce and loss of custody.<sup>113</sup>

It is logically a part of the Sexual Tory's program to limit the

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civil proceeding); *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964) (evidence in a divorce action used to prove wife's adultery held admissible although obtained by means of an illegal forcible entry into wife's home); *cf. United States v. Janis*, 428 U.S. 433 (1976) (held that the exclusionary rule should not be extended to forbid the use, by one sovereign, of evidence illegally seized by the law enforcement agent of another sovereign).

<sup>111</sup> See Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975); *cf. Carrington*, *supra* note 107, at 413 ("[T]he civil-law model would give better service to the goals of punishment than punishment itself.").

<sup>112</sup> *People v. Browning*, 632 P.2d 1025, 1027 (Colo. 1981) (holding marital exception for criminal sexual assault is neither arbitrary nor irrational). *Contra People v. Liberta*, 64 N.Y.2d 152, 166-67, 474 N.E.2d 567, 574-75, 485 N.Y.S.2d 207, 214-15 (1984) (marital exemption would offend equal protection clause).

<sup>113</sup> *E.g., Barr v. Barr*, 58 Md. App. 569, 473 A.2d 1300 (1984) (husband's refusal to have sexual relations, and subsequent departure, grounds for divorce by wife); *Pfeil v. Pfeil*, 100 A.D.2d 725, 473 N.Y.S.2d 629 (1984) (wife's refusal to have sexual relations lead to divorce).

availability of attractions competing with married sex, especially for males. She would again deploy tort law to take the profits out of pornography and prostitution, but her preferred targets of enforcement would be the purveyors, not the father-consumers. Here she thinks the class action<sup>114</sup> may have some possibilities.

For similar reasons, she favors the prohibition of sexual activity at the workplace and the academy<sup>115</sup> to protect the interests of the children of all concerned and the public interest in their welfare.

The Sexual Tory knows, of course, that this program won't work for every family, and that some sad consequences and frustrations would result. She is optimistic, however, that parents who are largely dependent on one another for sexual gratification and who will feel the weight not only of renewed moral suasion, but also of tax, tort, and custody laws if they separate, will often find ways to solve their personal conflicts and thereby continue to perform their duties to their children and to the public, and, if sometimes grudgingly, to one another.

#### F. *The Tory Position on Abortion and Surrogate Motherhood*

The Sexual Tory opposes abortion on demand of the mother. While largely unmoved by the claims that a fetus has rights, she would nevertheless provide some constraints on acts that destroy the reproductive process, perhaps by exposing attending physicians to liability if they fail to secure the appropriate advice.

She perceives that abortion on demand teaches prospective mothers to think of the motherhood role selfishly. Mediocre parenting is, she thinks, likely to be the result. Parents, she believes, should not be encouraged to think of parenthood as a status to be pursued as an exercise of individual choice,<sup>116</sup> but rather as an opportunity for service not only to children, but also to the

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<sup>114</sup> FED. R. CIV. P. 23. See generally Dam, *Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

<sup>115</sup> She here approves Margaret Mead's dictum that there should be a taboo on sex at the work place. See Mead, *We Need Taboo on Sex at Work*, in SEXUALITY IN ORGANIZATIONS: ROMANTIC AND COERCIVE BEHAVIORS AT WORK 54 (D. Neugarten & J. Shafritz eds. 1980).

<sup>116</sup> Accord M. GLENDON, *supra* note 65, at 58-62. As Glendon observes, there are additional implications to the absolutist pro-life position as it informs other matters such as the withholding of treatment for newborns with physical or mental defects. See Burt, *Authorizing Death for Anomalous Newborns*, in GENETICS AND THE LAW 435, 436 (A. Milunsky & G. Annas eds. 1976).

commonweal, an opportunity that offers its own rewards and that should not be shirked without good reasons.<sup>117</sup>

The Sexual Tory would, in approving an abortion, give some recognition to the preference of a husband if conception occurred during marriage.<sup>118</sup> She acknowledges that the biological importance of the father is very slight.<sup>119</sup> Nonetheless, official declaration that the married father has no rights or even interests in a fetus that are worthy of legal consideration goes too far, in her view, toward declaring that the father has also no responsibility to the child and mother. One cannot, she believes, impose duties of loyalty and obligations of support on fathers who have no recognized interests in such decisions. If the choice to bear a child is wholly the mother's, then financial responsibility for that child is also wholly the mother's, a conclusion that the Tory roundly rejects.

Believing as she does in the public importance of parenthood, the Sexual Tory is sympathetic to those who would employ the science of surrogate motherhood. A family wanting children to nurture should be encouraged, first by facilitating adoption, but also by protecting the new methods by which one or even both parents can sow their own seed in the body of a willing woman.<sup>120</sup> On the other hand, the Sexual Tory would value the instincts of the surrogate mother who discovers her need to be the nurturing parent to

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<sup>117</sup> Cf. Louisell & Noonan, *Constitutional Balance*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 220-36 (J. Noonan ed. 1970) (analyzing the twin questions of whether it is constitutional for the state to regulate abortion and whether it is constitutional for the state not to regulate abortion).

<sup>118</sup> She does not necessarily advocate overruling *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976), where the Court denied the right of the father to veto an abortion. *Id.* at 69. But she would support the right of the father to a consultative role, and perhaps to a brief period for reconsideration of a decision to abort. Cf. *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981) (spousal notice and consultation requirements further integrity of marital relationship and family).

<sup>119</sup> Aiming thus to enhance the meager role of the father, she would not divide it, and would make no distinction between the rights and duties of the natural, foster, or stepfathers, but would assign the full role to the custodial father unless the interest of the child clearly indicated otherwise. *Contra* Bartlett & Stack, *supra* note 100.

<sup>120</sup> Compare S. AUSTL. HEALTH COMM'N, *REPORT OF THE WORKING PARTY ON IN VITRO FERTILIZATION AND ARTIFICIAL INSEMINATION BY DONOR* (1984); 2 LAW REFORM COMM'N OF CAN. MINISTRY OF THE ATT'Y GEN., *REPORT ON HUMAN ARTIFICIAL REPRODUCTION AND RELATED MATTERS* (1985); and N.Y. SENATE JUDICIARY COMM., *SURROGATE PARENTING IN NEW YORK: A PROPOSAL FOR LEGISLATIVE REFORM* (1987) with GR. BRIT. DEP'T OF HEALTH AND SOCIAL SEC., *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY (THE WARNOCK REPORT)* (1984).



outweigh the benefits of her contractual obligation. At least in a case in which the surrogate mother was inexperienced in motherhood at the time she made the surrogate contract, the Sexual Tory would not enforce the contract against her but would allow her to compete for custody on the same terms as any other unwed mother.

### *G. Parental Responsibility for Child Development*

It is not enough to achieve the Tory's objective that her program keep parents living together with their children. She also means for the law to teach both parents that they share responsibility for the development of their children, especially with respect to their cultural values and sexuality.

Parental responsibility is too little felt, the Tory thinks, because contemporary American parents have so very little control over their children. American parents are exceptionally weak in dealing with adolescent children. While in all cultures there is an age lower than the age of majority at which parental control becomes at best an illusion, the invention and wide distribution of automobiles has obviously lowered that age materially for Americans. Ineffective parental control at an earlier age is cause for concern in a society that wants its children to be inculturated to the more sophisticated values such as respect for the rights of others.

But even for very young children, the Tory urges, parents have little control. Television shapes the character of toddlers, infecting them with consumerism and the social values of the entertainment industry, particularly an appetite for romanticized sex. "Parental guidance advised" is in the Tory's view the most cynical expression in contemporary American usage.

Moreover, the Tory perceives that there is a kind of Gresham's Law in cultures; where adolescents share the same environment, all will tend to be attracted to the culture that offers the quickest and easiest gratifications.<sup>121</sup> On this account, the influence of the entertainment industry on the values and sexuality of children has

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<sup>121</sup> On this account, the Tory sees little wisdom in Justice Blackmun's dictum that "the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the house, hearts, and minds of citizens who choose to live differently." *Bowers v. Hardwick*, 478 U.S. 186, 213 (1986) (Blackmun, J., dissenting) (citation omitted).

been magnified.

Public education was established in the nineteenth century to enhance the American "melting pot," to create a counter-balance to the then powerful influence of family on child development. It is now a mere footnote to the powerful intrusion of the entertainment industry on the inculturation process. Only the strongest and most isolated of cultures is accorded a chance to resist.<sup>122</sup> Most parents have almost no authority to influence the development of their children, even with respect to cultural values and sexuality.

The Tory believes this is a serious problem. She believes that the right of parents to shape the values and sexuality of their children is an important right much undervalued by many Americans, especially the intellectual elite who scorn such confining values. She perceives that the right to perpetuate one's culture is an important incentive for many and perhaps most parents. Indeed, she suspects that the ambition to transmit one's values to future generations is one of the strongest and most widely shared human sentiments, ranking close to the sexual urge itself. She is confirmed in this view by the observation that most of the civil wars conducted around the globe since World War II find their origins in the desire of parents to perpetuate their cultures.<sup>123</sup> She notes as well that the rights of parents are recognized by the 1948 Universal Declaration of Human Rights,<sup>124</sup> if not by any American constitution.

The Tory would therefore confirm substantial parental power over their children's development, to the end that parents might at least nourish hope that their values will be transmitted to succeeding generations, that their grandchildren may be at least somewhat like themselves. To give parents some kind of chance, the Tory would favor adoption of a voucher plan that would enable parents without means to select the schools their children

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<sup>122</sup> The Amish have probably been the most aggressive group in the matter of self-perpetuation. See J. HOSTETLER & G. HUNTINGTON, *CHILDREN IN AMISH SOCIETY: SOCIALIZATION AND COMMUNITY EDUCATION* (1971). For our legal response, see *Wisconsin v. Yoder*, 406 U.S. 205 (1973) (first and fourteenth amendments held to prevent the state from compelling Amish children to attend formal high school to age sixteen).

<sup>123</sup> D. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 443-71 (1985) (examining the violence of ethnic conflicts).

<sup>124</sup> The Declaration states as follows: "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution." *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, art. 16(1) (1948).

attend.<sup>125</sup>

The Tory would, moreover, acknowledge the constitutional right of parents to withhold from public school a minor child whose teacher espoused any sexual life style that differs materially from the conventions espoused by the parents.<sup>126</sup> She would therefore affirm the power and responsibility of a school district to dismiss a teacher for overtly maintaining an irregular sex life.<sup>127</sup>

In addition, the Tory would recognize as a tort any intentional act infringing on parental control over the sexuality of their children. She would, for example, recognize the conduct formerly described as statutory rape as a tort actionable by parents, and tortious without regard to the sex or previous level of sexual activity of the child.<sup>128</sup> She would punish severely by means of the criminal law a public school teacher having any sexual contact of any kind with a student, and expose the public or private school to liability, including punitive damages, for any negligent failure to prevent such contact. Indeed, she is not sure that Abelard's castration was not fully merited by his treacherous conduct.

Absent some law reform of this kind, the Tory Senator would be uneasy about the proposed repeal of the sodomy law in her state. She does not believe with Emperor Justinian that homosexuality causes earthquakes, nor, for that matter, that any other gloomy consequences flow directly from intimacies between partners of the same sex.<sup>129</sup> She therefore has no interest in actually punishing homosexual conduct involving consenting adults if it occurs in private places, since this private conduct does not threaten the moral

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<sup>125</sup> See generally J. COONS AND S. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978).

<sup>126</sup> Cf. *Wisconsin v. Yoder*, 404 U.S. 205 (1973) (compulsory education law held unconstitutional as applied to Amish children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state statute requiring attendance at public schools held unconstitutional as violating fourteenth amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law forbidding teaching any language other than English to any child below ninth grade is unconstitutional as invasion of liberty guaranteed by fourteenth amendment).

<sup>127</sup> *Accord Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984) (upholding school board's decision to not renew teacher's contract based in part on communications made by the teacher in reference to her sexual preference).

<sup>128</sup> Cf. MODEL PENAL CODE §213.6(1) (concerning the defense of mistake as to age for the crime of statutory rape).

<sup>129</sup> She cannot imagine what Chief Justice Burger had in mind in saying that sodomy is "an offense of deeper malignity than rape." *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (concurring) (quoting 4 W. BLACKSTONE, *COMMENTARIES ON THE COMMON LAW* \*215).

superiority which she wishes to confer on married sex or threaten the authority of parents to influence the sexual development of their children.<sup>130</sup>

Yet she recognizes the virtual universality of parental ambitions for the sexuality of their children and affirms that their hopes and expectations in that regard are entitled to some legal recognition and protection. She strongly suspects that "homophobia,"<sup>131</sup> like most cultural phenomena, has a functional origin in the instincts of parents to transmit their culture to future generations. The Senator thus regards existing sodomy laws as a kind of contract between the state and young parents, perhaps especially between the state and fathers. By its sodomy law, the state is saying to the prospective spouse-parent: "If you will control your desires and restrict yourself to this condition of monogamy for the benefit of your children and the future generations, we will do what we can to assure your participation in those future generations by discouraging your children from relations and lifestyles which would deprive you of the prospect of grandchildren who know and respect your values."

#### VII. TORIES V. LIBERTARIANS AND SOCIALISTS

This Tory program is, of course, denounced by Sexual Libertarians as repressive of individual rights and, in the most literal sense, paternalistic. Sexual Socialists denounce the program as anti-egalitarian in its special treatment of parenthood and sexist in its frank acknowledgment that men and women are different and may generally perform somewhat different roles in their relationship. Both Libertarian and Socialist deride the Tory concern for the alleged testosterone problem, which they dismiss as sexist propaganda.<sup>132</sup> Thus, the Tory disagrees with both the Libertarian and the Socialist on a number of issues including the laws promoting the stability of marriage, abortion on request, spousal rape and sodomy.

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<sup>130</sup> In this respect, her position is that of *THE WOLFENDEN REPORT*, *supra* note 93, at 11.

<sup>131</sup> See, e.g., Von Beitel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 *HUM. RTS.* 23 (1977).

<sup>132</sup> Compare Jill Tweedy's account: "The boys I grew up with absorbed this social propaganda eagerly and, as a result, were often brainwashed into total sexual irresponsibility, drunken engine drivers in charge of runaway trains with everyone colluding to blame the drink." L. BLOM-COOPER & G. DREWRY, *supra* note 71, at 141.

Nevertheless, both Libertarian and Socialist have points of agreement with the Tory. The Tory shares with both a secular approach to the subject. The Libertarian position on surrogate motherhood is close to that of the Tory, although derived from different values. The Socialist can expect support from the Tory in making fathers pay and in the suppression of prostitution and pornography, although again the positions are derived from different values.

Moreover, the Tory is not unwilling to make concessions. She concedes the point to the Sexual Socialist that marriage in America has too often resulted in an imbalance of power between the parties. To correct for that, she would make it a feature of co-parenthood that all earned taxable income of either parent be paid in equal shares to each for so long as the two have minor children.<sup>133</sup> This would assure the parent bearing primary custodial duty of an equal share in the economic power of the family unit.

She is also willing to make concessions to the Libertarian. Her program is not so prudish as to require that all other forms of sexual activity be punished. The Sexual Tory has no interest, for example, in premarital sexual activity or even in the sexual activity of childless married couples, except insofar as the effectiveness of the law in promoting family stability for children may be linked to the regulation of other relationships. A culture will, she suspects, encounter obstacles in trying to induce sexual self-restraint by parents while allowing complete sexual license for non-parents. Moreover, the Sexual Tory is prepared to conduct her program almost wholly without resort to the criminal law, and this she perceives to be an important concession to the Libertarians.

A legislative body composed of these three Senators alone could perhaps therefore agree on a program, if not one that is coherent. Such a body might favor both no-fault divorce and making fathers pay; it might provide abortion at will and enforce contracts for surrogate motherhood; it might punish prostitution but not sodomy; and it might punish a father for imposing on his spouse, but perhaps not for imposing on his secretary.

### VIII. THE SEXUAL POPULIST

As it happens, my three senators are not free to negotiate a legis-

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<sup>133</sup> *But cf.* J. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* (1981); Weitzman, *supra* note 26.

lative program without considering the contentions of a fourth senator who represents a religious constituency.

This fourth senator's constituency is not represented in my own thinking and so I describe her views succinctly. My own Episcopalian faith, born as it was to sanction the sexual transgressions of Henry VIII,<sup>134</sup> is heavily liturgical and makes very few demands on the life styles of its adherents. But few religious sects can be so described, and the fourth senator represents the serious adherents of those religious traditions that do maintain some strict teachings with respect to sexual conduct. Her constituents are likely to be fundamentalist Protestants, but they might be devoutly Catholic, Orthodox, Talmudic, or even Islamic or Buddhist. From whatever religious text they derive their standards of conduct, they are voters who want the law to forbid sin. Accordingly, they share strongly held views about abortion, divorce, and many of the other topics on which I have touched.

The secular senators are tempted to dismiss this fourth as the advocate of irrationality, thus simply to outvote her as and when they can. They could point to the many cruelties and foolish notions maintained by religious zealotry to the great harm of people and proclaim a new era in which religious teaching is to play no role in public affairs. However, this impulse to dismiss religion as a source of policy is resisted by wise senators even though they deny the religious premises of their religious Populist colleague. This is so for three reasons.

First, religious instruction regarding sexual conduct has been maintained everywhere and seemingly since the beginning of time. If one is to blame religion for historic blunders, it must then be credited with much that is positive about the times in which we live. We are all in some sense the product of such religious teaching. Individual rights, equality, and family are all ideas or institutions nourished by religious traditions. At a personal level, many secular constituents have very close relationships with supporters of the Populist cause; they are parents, siblings, children, and neighbors of the secular constituencies. They are therefore bound to respect believers even if they do not share their beliefs.

Second, this obligation to respect religious belief has constitu-

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<sup>134</sup> For the story of the English schism with the Pope, see G. ELTON, *REFORM AND REFORMATION IN ENGLAND 1509-58* (1977).

tional aspects. While the first amendment is not applicable, its premises are not irrelevant. In providing first above all else for the protection of religious practitioners from one another, our Bill of Rights not only acknowledged the importance of religion in regard to public issues, it also imposed on the government a duty not to use public institutions for secular ends if the result is to demean religion by establishing a secular humanism as the official faith.<sup>135</sup> There is, as Kent Greenawalt has put it, "no basis to assign a priority to non-rational, non-religious judgments over religious convictions,"<sup>136</sup> and, in this sphere, there is little that can assuredly be said to be "rational." My secular senators are thus constrained by a shared sense of official duty to accord respect to the Populist and her adherents.

Third, in facing religious populism, secular senators must weigh practical political considerations. Each of the secular senators does from time to time rely upon the political support of the Populist in securing enactment of other laws not pertaining to matters of sexuality. Moreover, there is the consideration of *realpolitik*: religious adherents if ignored can become as unruly as other groups.<sup>137</sup> My senators, as I imagine them, are not persons to bend easily to a public opinion poll. They would accept the obligations imposed upon them by Edmund Burke,<sup>138</sup> and more recently by Ronald Dworkin,<sup>139</sup> to think for themselves. They would not yield to Lord Devlin, who argued that the people have the right to punish conduct that they collectively regard as abhorrent, whatever their reasons might be.<sup>140</sup> On the other hand, they perceive accommodation to be an important aspect of their mission, and they reckon that even the most secular of their constituents would prefer laws that

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<sup>135</sup> Cf. *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (affirming that neither the state nor federal governments can aid religions based on a belief in existence of God against religions founded on different beliefs). *But cf. Edwards v. Aguillard*, 482 U.S. 578 (1987) (state statute which advances particular religious belief is unconstitutional as violation of first amendment). See also Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 Duke L.J. 977 (1987).

<sup>136</sup> Greenawalt, *Religious Convictions and Law Making*, 84 MICH. L. REV. 352, 379 (1985).

<sup>137</sup> Cf. Grey, *Eros, Civilization and the Burger Court*, 43-3 LAW & CONTEMP. PROBS. 83 (1980) (examining the Burger Court's decisions concerning sex, marriage, and the family).

<sup>138</sup> SELECTED WRITINGS OF EDMUND BURKE, *supra* note 40.

<sup>139</sup> Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 1001 (1966). Professor Dworkin would have the legislature "test the credentials" of popular moralities.

<sup>140</sup> See generally P. DEVLIN, *supra* note 107.

do not give greater offense to religious sensibilities than necessary to protect genuinely important secular interests. They are therefore prepared to weigh and balance, to limit and qualify.

For all these reasons, the wise secular senators treat religious populism as a political force deserving respect. They negotiate with and accommodate its representative as well as among themselves. This influence reduces the prospects for a coherent legislative program.

#### IX. THE SEXUAL REPUBLICAN

There is yet another member of this senate who will shape the law bearing on sexuality. Because this senator is a bit of a peacock, long on style but easily frightened, I imagine him to be male and pretty and (Oh, I am sorry!) a Republican. He represents another large constituency, one that is largely indifferent to any of the issues of sexuality considered in this article. Indeed, his constituents would, if they could, use the fast-forward button to get through the fifteen second political commercials that sometimes interrupt their television viewing. They vote for promises of peace and prosperity and low taxes today. As long as they get theirs, they would let others and the future take care of themselves as best they can.

As representative of this constituency, the fifth senator is prone to flee controversy, especially about matters that some people regard as very important. If asked for his position on abortion, sodomy, or pornography, his favorite answer is "I am all right on that." Color this senator callow.

This senator plays a major role in lawmaking on any topic, including sexuality. In considering how our sexual conduct is to be governed, if it is to be governed, realism requires that we keep this player in mind.

The American legislative process is a method of accommodating such diverse interests and even uninterests. It is in order to compel accommodation that our legislatures were created bicameral. Thus, democratic legislation aims at compromise not principle; it creates a ramshackle shelter for competing ideas and values, not a palatial system of rights having architectural integrity. Of course, therefore, sexual conduct laws made by this senate of five will be a crazy quilt that is unlikely to seem decorative to any of its members. On this account, it is not fair to complain that our legislation is not a coherent or rational expression of any comprehensive view of sex-



ual rights or sexual standards of conduct.

Perhaps more serious is the concern that the democratic process tends to deadlock, especially in confronting incendiary issues such as those that are the topic of this paper. Deadlock may in fact be the condition of most legislative bodies in North America sitting in 1988 to consider the range of issues from abortion to surrogate motherhood. Even this, however, is not an unintended consequence of our constitutional scheme, which was designed to prevent legislative excess. Our process is designed to deadlock whenever the people do not know what they want done.

#### X. RESOLUTION OF SEXUAL ISSUES IN CONSTITUTIONAL ADJUDICATION

Because the legislative process is given to deadlock and to unprincipled accommodation of competing values, and because of the highly visible role that our courts have come to play in our governance, it is not surprising that resort is made to the third branch and to constitutions, state and federal, to resolve these troubling dilemmas.

It is, of course, primarily the Libertarians who seek to pursue their program through adjudication. As proponents of unfettered sexuality, they hope to advance the whole of their program by constitutionalizing the law of sexual mores. They celebrated a triumph in *Roe v. Wade*,<sup>141</sup> and they can nourish hopes that fornication,<sup>142</sup> sodomy laws,<sup>143</sup> and perhaps even someday, prostitution laws,<sup>144</sup> will be swept away by constitutional edict based on the still emerging individual right of privacy.

The program of the Sexual Socialist can share in some of the possible fruits of constitutional adjudication, but she cannot ac-

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<sup>141</sup> 410 U.S. 113 (1973). *But see Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989). *Webster* suggests that the court may be increasingly hostile to the sort of societal goals advocated by the Sexual Liberation.

<sup>142</sup> See Note, *Fornication, Cohabitation and the Constitution*, 77 MICH. L. REV. 252 (1978) (concluding that state laws prohibiting fornication and cohabitation are unconstitutional because laws are unnecessary to achieve the compelling state interest at which these laws are directed).

<sup>143</sup> *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (stating that Georgia's law against sodomy should have been held unconstitutional).

<sup>144</sup> Cf. Jennings, *The Victim as Criminal: A Consideration of California's Prostitution Law*, 64 CALIF. L. REV. 1235 (1976) (examining the causes of prostitution and the rationales for retaining its criminal status). See generally A. ALLEN, *supra* note 25, at 169-79 (1988).

comply with her program of regulation without substantial participation of the avowedly political arms of the state governments, with perhaps some help from the Congress of the United States. The Tory may likewise effect some of her program through judge-made law, albeit tort law and not constitutional law; but she, too, needs legislative means to effect the kinds of changes in tax and welfare law that she espouses. The Populist seems in her turn to be wholly dependent on legislation to effect her program of punishing sin.

Constitutionalization of sexual rights in the manner advocated by the Libertarian poses substantial problems. Some are conventional problems of separation of powers that arise in any contest of power between court and legislature. Others are problems of federalism that arise in any contest between state and federal authority.<sup>145</sup> I will not attempt a comprehensive constitutional analysis of all these problems arising in the full range of cases that are within the subject of this paper. I limit myself to six observations that are generally applicable to the constitutionalization of sexual mores.

First, judges, like professors, have little professional competence that applies to the expression or evaluation of sexual mores. Judges cannot escape the deeply inculturated reactions to sexual matters that form their senses of who they are. Learned legal briefs, perhaps laced with social and economic scientific data,<sup>146</sup> might help but, in the end, decisions among these competing values must be largely intuitive, based on little more than prejudice. No one can reasonably regard our judges as being qualified to serve as our moral teachers in these matters.<sup>147</sup>

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<sup>145</sup> See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 15-1 to -21 (2d ed. 1988) (concerning rights of privacy and personhood).

<sup>146</sup> On the inadequacy of the information with which to make family policy, see generally R. MNOOKIN, *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM AND PUBLIC POLICY* (1985); D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

<sup>147</sup> For advocacy of the role of judge as moral teacher, see Fiss, *Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1 (1979). In commenting on the suggestion that our judges might assume the role of moral teachers such as Gandhi, Christ and Socrates, Carl Schneider observed that:

The cautious judge may wish to remind himself what happened to Gandhi, Christ, and Socrates. He may wish to ask himself what qualities of character, training, or experience equip him to use this kind of moral force. He may wish to ask himself what consequences this kind of moral ambition has for most people.

Schneider, *Lawyers and Children: Wisdom and Legitimacy in Family Policy*, 84 *MICH. L. REV.* 919, 940 (1986).

Randomly selected juries would be viewed by many of those governed as having a higher claim to expertise in such matters because of their broader range of sexual experience. Judges do, of course, decide matters of which they have equally little learning, but sex does rank high on the list of matters of which their general ignorance is conspicuous. A jury also would have the advantage that its decision is episodic, good for one case only; there is no chance that a single jury could impose its sexual morality on the rest of us. There is hence less need to question the authority of the jury than there is that of our judges.

The questionable authority of judges is the second special problem in making a constitutional law of sexual rights. The absence of any commission to our judges to control our sexuality is especially obvious, because the textual basis in our constitutions, state or federal, for the exercise of judicial power over sex and family is especially spare.<sup>148</sup> Citizens and other officers of the government cannot be easily dismissed when they question the right of judges to define our sexual mores.

Legitimacy for sexual rights must be derived from the slender strand of decisions involving the right of privacy first acknowledged in *Griswold v. Connecticut*.<sup>149</sup> In its application to protect activities of adults conducted in genuine privacy,<sup>150</sup> recognition of a right to privacy seems generally firm,<sup>151</sup> for it derives strength from the fourth amendment proscriptions against unreasonable

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<sup>148</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986); cf. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting) (noting that decisions turning on purported Constitutional principles that cannot fairly be read into that document frustrate the authority of the people to govern themselves). Constitutional authority for the exercise of judicial power over matters of sex and family is found in other constitutional schemes. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 (stating that everyone has a right to respect for his privacy, family life, home, and correspondence and that this right shall not be interfered with by a public authority except in accordance with law and as is necessary in a democratic society).

<sup>149</sup> 381 U.S. 479 (1965). Cf. *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (stating that no right is more sacred than the right of every individual to be free to possess and control his own person).

<sup>150</sup> Cf. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (reversing conviction of defendant who had distributed samples of contraceptive foam at the close of his lecture to students).

<sup>151</sup> See generally L. TRIBE, *supra* note 145. As Professor Tribe observes in § 15-21, there is dictum in *Hardwick*, 478 U.S. at 191, that could call into question several earlier decisions which provide the framework for the constitutional right of privacy.

search and seizure.<sup>152</sup> As a broader proposition aspiring to protect individuals from any of the legal constraints on sexual conduct advocated by Socialists, Tories, and Populists, the right of privacy rests on a soft foundation. Descending as it does from an 1890 law review article bearing on the law of torts,<sup>153</sup> and a dictum of Justice Brandeis,<sup>154</sup> it can find textual roots only in generous applications of the first amendment<sup>155</sup> or, imaginably, of the eighth<sup>156</sup> or ninth amendments.<sup>157</sup> While few knowledgeable persons expect the Court to be slavishly bound to the text of a two-hundred-year-old instrument,<sup>158</sup> the Court's more creative work should be conducted when it can be self-confident about the positive quality of its contribution to the law and the polity. It is one thing to stretch a point when there is a strong moral consensus undergirding the Court's actions, and quite another when that consensus is lack-

<sup>152</sup> Cf. *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (the fourth amendment belongs as much to the citizen on the street as to the closeted homeowner); *Hardwick*, 478 U.S. at 213 n.7 (1986) (Blackmun, J., dissenting) (noting that the kinds of searches that might be necessary to obtain evidence of sexual activity banned by statute seemed repugnant to the fourth amendment).

<sup>153</sup> The concept of a right of privacy is sometimes attributed to the pioneering article of Brandeis and Warren, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890), although that article advocated a personal right to be protected by tort law, not new constitutional dogma.

<sup>154</sup> The fourth amendment, he said, implied "the right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (involving the secret tapping of phone lines by the government and holding that obtaining and using such evidence at trial did not violate the fourth amendment prohibition against unreasonable search and seizure).

<sup>155</sup> Cf. *Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (holding that California's Unruh Act which entitles all persons regardless of sex to full and equal accommodation, advantages, facilities, privileges, and services in all business establishments in California does not violate the first amendment by requiring California Rotary Clubs to admit women); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that the first amendment prohibits making private possession of obscene material a crime).

<sup>156</sup> *Hardwick*, 478 U.S. at 197 (Powell, J., concurring) (agreeing with the majority that there is no fundamental right to engage in sodomy but stating that the respondent might have been able to assert such a right under the eighth amendment prohibition of cruel and unusual punishment).

<sup>157</sup> See Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305 (1985) (arguing for constitutional right to self-governance located in the ninth amendment, to afford protection to liberties not specifically listed in the Constitution).

<sup>158</sup> E.g., "[T]he liberty [protected by] the fourteenth amendment embraces more than the rights found in the Bill of Rights." *Roe v. Wade*, 410 U.S. 113, 172-73 (1973) (Rehnquist, J., dissenting). See also Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91 (1987).

ing<sup>159</sup> as it surely is with respect to matters of sex.

Thus, the application of the right of privacy in *Roe v. Wade*<sup>160</sup> was found by many sound observers to lack legitimacy.<sup>161</sup> Some proponents of the result in that case have striven to make more convincing arguments than the Court was able to muster.<sup>162</sup> However, even while libertarian theorists imagine its further extensions to protect newly minted sexual rights,<sup>163</sup> there remains a rankling sense that the Court overstepped its role.<sup>164</sup>

The weakness of the authority of the Supreme Court to settle these issues imposes on each decision a cost paid in the coin of precious institutional political capital. In evoking political backlash from Tories, Socialists, or Populists whose programs are obstructed by judicial proclamations of individual rights that trump policies made by the legislative process, the Court invites cynicism about its own motives and intense political interest in judicial appointments which weaken public acceptance of its moral leadership with respect to those matters for which it has clear responsibility.<sup>165</sup>

Third, even if there were an appropriate judicial role with respect to sexual policy that might be implied from our constitutional scheme, it is especially difficult to assign that role to *federal* judges. Article I of the Constitution confers no responsibility for family or sex on the Congress of the United States. While the Congress has, in such fields as welfare and taxation, taken sex and

<sup>159</sup> Thus it is that the Court has often invoked Tory values of concern for the institutions of the family while expressing the right of privacy. *Hardwick*, 478 U.S. at 192.

<sup>160</sup> 410 U.S. 113 (1973).

<sup>161</sup> *E.g.*, A. BICKEL, *THE MORALITY OF CONSENT* 28 (1975) (questioning whether the abortion question should have been left to the political process); A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 53-55 (1976) (noting that the Court substituted its judgment in place of the result of the political process); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43-73 (1980) (examining fundamental values judges use in decision making); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 396 (1981) (discussing Supreme Court's efforts to nullify political process on basis of general principles not derived from Constitution's text or structure).

<sup>162</sup> *E.g.*, Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 97-103 (1982); Nichol, *supra* note 157.

<sup>163</sup> *But see* A. ALLEN, *supra* note 25 (acknowledging development of American tort, statutory, and constitutional privacy law).

<sup>164</sup> *E.g.*, *Doe v. Bolton*, 410 U.S. 179, 221-23 (White J., dissenting) (finding no support in the Constitution for overriding state abortion statutes); C. SCHNEIDER & M. VINOVSIS, *THE LAW AND POLITICS OF ABORTION* (1980).

<sup>165</sup> The problem of legitimacy may be viewed somewhat differently in those states in which judges stand for election, and are thus accountable for their hubris.

family into account, it is clear that if any responsibility is left to the states by the federal constitution, this is it. Thus, considerations of federalism combine with considerations of separation of powers to magnify doubts about the legitimacy of rights established by generous implication from the Constitution of the United States.

State legislatures especially need authority to deal with sex and family to maintain their credibility as players in our constitutional scheme. Because our sexual mores are central to our social life and have such pervasive influence on the quality of our communities and our individual lives, state legislatures cannot be generally disempowered to regulate them without significantly weakening their ability to control other forms of conduct having less consequence to the social order and carrying less moral opprobrium than our sexual conduct. Indeed, it may not overbear the point to say that the power to legislate with respect to sexual mores is the paradigm of powers "reserved to the States respectively, or to the people."<sup>166</sup> It is thus the ultimate right guaranteed by the Bill of Rights, a right conferred on state legislatures.

Fourth, with respect to matters of sex, there is a prudential concern, reinforcing a constitutional scheme placing primary responsibility on state legislatures, that lies in the wisdom of allowing diverse local cultures to flourish. If there is any sphere of public discourse in which the Brandeis dictum celebrating the states as social laboratories<sup>167</sup> has current worth, it is surely the sphere of sex regulation. Ignorant as we collectively are in the face of the modern technology of sex, it is quite possible that we can learn from experience in the social laboratories of the states. There may yet emerge other and better accommodations among the competing moralities.

This consideration is especially important at a time of rapid

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<sup>166</sup> U.S. CONST. amend. X.

<sup>167</sup> In the words of Justice Brandeis:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as laboratory; and try novel social and economic experiments without risk to the rest of the country.

*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

technological change that challenges all our assumptions about the consequences of sexuality. This is no time to foreclose speculation and adaptation. In the matriarchy to which I am subject, the responsibility for nurturing children in these troubling sexual issues is assigned to the grandfather. This assignment is made for the apparent reason that his views on such matters are likely to be given the least weight by the coming generation. For them, these problems will abide, but in forms yet unannounced, calling perhaps for responses not yet imagined by any of us. Constitutionalization of sexual rights precludes diversity and thus experimentation in these matters.

Fifth, there is the additional prudential concern, also reinforcing the constitutional prerogative of state legislatures, that any organ of government making broad decisions with respect to sexual matters needs to take into account considerations of *realpolitik*. For that reason, it should be able to negotiate its resolutions and to make accommodations as circumstances appear to require. This is not the kind of lawmaking that results from constitutional adjudication;<sup>168</sup> it is, as this article illustrates, precisely the kind of lawmaking that can be expected to result from legislation.

Thus, a few years ago, Thomas Grey made an argument<sup>169</sup> for constitutionalizing the protection of homosexuals against the threats of sodomy law on the basis of a suggested need to prevent violence and control the gay community. His utterance was made, however, before the Right-to-Life movement hit the streets in force.<sup>170</sup> Extended to the present situation, his argument would lead to reconsideration of *Roe v. Wade* in order to still the crowd in the street. Perhaps later its reinstatement would be called for when the Right-to-Life mob retired in satisfaction and was replaced by an equally angry feminist mob demanding a judicially

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<sup>168</sup> Illustrative of the "non-negotiable" position that tends to characterize constitutional rights is the statement of Justice Blackmun: "[T]he mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live differently." *Bowers v. Hardwick*, 478 U.S. 186, 213 (1986) (Blackmun, J., dissenting) (citation omitted).

<sup>169</sup> Grey, *supra* note 137, at 97.

<sup>170</sup> See generally R. LIEBAN, R. WUTHNOW, & J. GRUTH, *THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMATION* (1983). The Court impliedly acknowledged this phenomenon in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 769-70 (1986).

decreed right to abortion on demand.

As noted, it is problematic for a legislature to deal with incendiary social problems: even a legislative body has an obligation to "test the credentials"<sup>171</sup> of a popular morality to assure that it is not a tool of genuine injustice and oppression. But even Professor Dworkin has not urged that Lord Devlin's populist voter (the man on the Clapham bus)<sup>172</sup> should have his sentiments on matters of sexual morality altogether disregarded and his social order restructured to suit the tastes of a "moral elite."<sup>173</sup>

Difficult as this concern for *realpolitik* may be for a legislative body, it is more difficult for an institution that purports to enforce rights by a principled process. Principles can be negotiated, but can also be lost in the process. As Owen Fiss has taught us, there are troubling consequences to a system of bargaining over fundamental rights.<sup>174</sup> If, then, it is perilous to allow bargaining over fundamental constitutional rights, caution must be exercised in intruding constitutionalism and declarations of fundamental rights into an arena of conflict in which bargaining is an advantageous instrument of governance.<sup>175</sup>

Also important, as Mary Ann Glendon has observed,<sup>176</sup> is that legislative solutions lack finality. They invite continued discourse between political disputants. If the accommodation made by the senators is displeasing to their constituents, those constituents may work a little harder at the next election and hope that the next legislative session will be more sensitive to their concerns. Judicial declarations of constitutional right are, to be sure, likewise not fixed in stone, but they provide no outlet for the energies of citizens who want them to be changed. Those who lose in court are

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<sup>171</sup> Dworkin, *supra* note 139, at 1001.

<sup>172</sup> P. DEVLIN, *supra* note 107, at 15.

<sup>173</sup> Dworkin, *supra* note 139, at 1002.

<sup>174</sup> Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (questioning whether the alternative dispute resolution and settlement which is encouraged by the powers given to federal judges under FED. R. CIV. P. 16 will lead to just results in certain fundamental rights cases).

<sup>175</sup> To invert Fiss, courts are unsuited to this task because they are "ideologically committed [and] institutionally suited to search for the [true] meaning of constitutional values, . . . [and do not] see their primary function in terms of registering the actual occurrent preferences of the people—what they want and what they believe should be done." Fiss, *supra* note 148, at 10.

<sup>176</sup> B. MOYERS, A WORLD OF IDEAS 470-84 (1989) (account of interview between Moyers and Glendon that appeared in PBS television broadcast of *A World of Ideas*).



told, essentially once and for all, that their ideas and values are not to be expressed in the law of the state or nation. This can be, and perhaps has been, deeply alienating. As Glendon informs us, parliamentary resolution of these issues in Europe has served to keep divergent sexual moralities in more tolerant relationships to one another.<sup>177</sup>

Sixth, it is also relevant, if never controlling, that acutely unwelcome sexual regulation can often be evaded in the manner of those who vote with their feet. We have in fact had much experience in recent decades with transiency of individuals avoiding the lash of laws seeking to regulate sexual conduct. Nevada is out in front on easy divorce and prostitution,<sup>178</sup> but many states provide sanctuaries for sexual conduct that other states proscribe. On account of our mobility, *Roe v. Wade* may be almost unnecessary to make abortion available to all American women on demand.<sup>179</sup> Only the regulation (or absence of regulation) of unwelcome sex at the workplace seems to be resistant to the evasions of transiency. The power of any state over the sexual behavior of its citizens is thus in fact limited by the ability of citizens to avoid the enforcement of such laws.<sup>180</sup> In such contexts, the state is weak and the need for judicial control of legislative excess is lessened.

For all these reasons, and despite the limits of the wisdom available to state legislatures, it is they who must generally assume primary responsibility for the management of sexual matters. Given these features of the law of sexual mores, our courts should not aspire to a high profile in such matters.<sup>181</sup> It seems unlikely that they will. Sexual revolution led by judges is not in prospect.

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<sup>177</sup> M. GLENDON, *supra* note 64, at 18 (suggesting that while French abortion legislation might be condemned for allowing abortion, the result has been a political compromise that has stopped the high level of turmoil that existed before the legislation was passed).

<sup>178</sup> Note, *Right of Privacy Challenges to Prostitution Statutes*, 58 WASH. U.L.Q. 439, 472-80 (1980) (surveying the statutory positions of the fifty states on the matter of prostitution).

<sup>179</sup> The Court almost acknowledged as much. *Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973) (noting that at the time of the decision about one-third of the states had adopted liberal abortion statutes).

<sup>180</sup> Glendon explains that the divorce law reform that swept the United States reflected in part the inability of more conservative states to resist the competitive pressure created by "liberal" states sanctioning the "quickie" divorce. M. GLENDON, *supra* note 64, at 105.

<sup>181</sup> Note that some of the considerations identified here are less applicable where the state court judges are elected and subject themselves to accountability at the ballot box.

## XI. PROCEDURE AND SEXUAL LAWMAKING

Nevertheless, courts do have an appropriate role to play in sexual matters. It is a modest role, one that engages courts not in resolving ponderous moral questions, but rather narrower issues involving the proper functioning of our institutions. These are issues at which American courts are genuinely expert, and their use of that expertise to prod and cajole the other branches of government is well-established and well-accepted.

I have in mind two kinds of issues of process that seem especially appropriate for constitutional adjudication. There may be more.

One role is to constrain executive branch enforcement of laws bearing on sexual conduct. An important judicial function is to assure that the procedure employed to deal with sexual offenses, whether civil or criminal, is appropriate to the substantive matters at hand. Particularly with regard to criminal prosecutions for sexual offenses whose only identifiable victim is the public, it is an important function of courts to insist that all the procedural corners be cut square. In the criminal context as well as the civil, procedure is servant to substance. In a time of foment regarding our sexual mores, a prosecutor should proceed well within the limits and not at the margins of discretion conferred by a statute, and an appropriate function of the court is to see that this restraint is observed.

Thus, for example, in a sodomy prosecution, a court is right to insist that evidence be gathered by methods that are scrupulously respectful of the police etiquette prescribed by the Constitution. In doing so, a court can draw on the holding of *Griswold v. Connecticut*,<sup>182</sup> a decision animated by similar concerns for process: the Connecticut birth control statute failed in part because there was no constitutionally valid method to gather evidence of its violation.<sup>183</sup>

In insisting on procedural nicety, courts may incidentally establish a de facto constitutional law protecting homosexual behavior

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<sup>182</sup> 381 U.S. 479 (1965).

<sup>183</sup> *Id.* at 485-86. "Would we allow the police to search the sacred confines of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notion of privacy surrounding the marriage relationship." *Id.*

between consenting adults in private.<sup>184</sup> Nothing in *Bowers v. Hardwick*<sup>185</sup> prevents, or even discourages such a development of law constraining investigations of sodomy that reach into the bedrooms of citizens. A court regulating invasive police work is securely on its own turf and only incidentally involved in the making of sexual policy that it is unfit to make.

Such inarticulate constitutionalization of "gay rights" is just the kind of political accommodation at which our judiciary is most adept. Such procedural restraints should be congenial to any sound judge, whether Libertarian, Socialist, Tory or Populist, for they do not require even the judge to advance or to approve of the mores of the accused. All can appreciate that the law must be especially scrupulous in dealing with matters of such delicacy.

A second function of the judiciary is to assure that state legislatures perform their functions in accommodating or synthesizing diverse sexual politics. Legislative deadlock can properly occasion a measured judicial response designed to set the legislative wheels back on track. *Roe v. Wade* offers an illustration of this judicial function, although it was not performed in that case. The Texas statute challenged in *Roe v. Wade* was quite old<sup>186</sup> and rested on the false premise that abortion was highly dangerous to the pregnant patient.<sup>187</sup> The courts could in that case have read the statute to apply only to dangerous abortions, thus remanding to the Texas legislature the question of its application to relatively safe abortions. The result in the case would have been the same, but the opinion of the Court would simply have proclaimed that if the Texas legislature meant to prevent safe abortions, and thereby raise a significant constitutional issue, it would have to say so more directly. Such a decision would have been amply legitimate, and resolution of the politically sensitive moral issue would have remained the responsibility of persons elected by the people of Texas to decide what kind of society will be maintained in Texas and

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<sup>184</sup> This was the recommendation of the WOLFENDEN REPORT, *supra* note 93, at 187-89, and became the law of Great Britain in 1967. Sexual Offenses Act, 1967, ch. 60.

<sup>185</sup> 478 U.S. 186 (1986).

<sup>186</sup> TEXAS PENAL CODE OF 1857, c. 7, Arts. 531-36.

<sup>187</sup> 410 U.S. at 151 n.48 (Court noted the few state courts interpreting abortion laws during late 19th and early 20th centuries focused on pregnant woman's health rather than on preserving embryo and fetus). See also *Doe v. Bolton*, 410 U.S. 179, 180 (1973) (noting that prior to 1968 Act, abortion in Georgia was not criminal if to preserve life of the mother).

what sorts of persons Texans will be.

Such a "remand to the legislature" is not novel in our experience,<sup>188</sup> especially where constitutional issues can be avoided.<sup>189</sup> As Mary Ann Glendon reports, this is what was done by the West German Constitutional Court in its 1975 decision affirming the *rights of the fetus* to be protected from ill-considered abortion.<sup>190</sup> Indeed it may be that *Roe v. Wade* may yet be read in this way, for the Court was careful to leave some room for legislative choice.<sup>191</sup>

Such accommodation, perhaps cowardly, would not satisfy everyone, especially Sexual Libertarians, because it will leave them to struggle and negotiate for their moral program in the chambers of the legislature. But there, in the legislature, the Tories and Socialists and Populists will have their day on the issues of sexual morality, and in a democracy they are entitled to that day.<sup>192</sup>

## XII. CONCLUSION

Having espoused so many views, these musings of an old nudity lawyer should conclude as a traditional Fourth of July speech. Such a speech would come trippingly off the tongue of my fifth senator who waives the flag at every troubling issue and thereby avoids discussing their solutions.

Imagine his remarks delivered on a hot summer evening, in the park, from a bandstand suitably draped in bunting. The home team won. The hot dogs were roasted. The iced watermelons were sliced. The Roman candles were fired. The brass band has provided the appropriate John Philip Sousa fanfare. Now it is time for

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<sup>188</sup> Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 35, 38-39 (1957) (advocating as legitimate function of the courts the power to "remand" cases to legislatures in certain instances).

<sup>189</sup> United States *ex rel.* Attorney Gen. v. Delaware and Hudson Co., 213 U.S. 366, 408 (1909) (Court's duty to avoid deciding constitutional questions if such questions can be avoided).

<sup>190</sup> M. GLENDON, *supra* note 64, at 33-34.

<sup>191</sup> 410 U.S. 153-54 (affirming state's right to pass some laws affecting a woman's abortion choice and recognizing that state can sometimes appropriately regulate in areas protected by right to privacy).

<sup>192</sup> Accord M. GLENDON, *supra* note 64, at 54-62. This conclusion bears a resemblance to that tendered in Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227 (1973) (discussing constitutional law as basis for equal educational opportunity in America).

everyone, even the dogs and children, to stretch out on the grass to hear the candidates for county commissioner and sheriff and state senator do their thing.

With all such hopefuls, our fifth senator might be heard to say: "I stand with you today for the individual rights we all cherish as Americans. Indeed, I stand also with you for the rights of every individual and group of individuals to equal rights under the law. And I stand as well for the American family and for all those rights necessary and proper for the protection of the family. And finally, I stand foursquare for the democratic right of the people through their elected representatives to decide how our cherished individual rights, and our prized right to equality, and our rights essential to protect our families shall be reconciled and enforced."

After such a red, white and blue peroration, I for one would go debate these issues with the children present. I encourage readers to do the same.