

# LEGAL PHILOSOPHICAL CONSIDERATIONS OF PROSTITUTION: A ROADMAP TO UNDERSTANDING DIVERSE LEGAL APPROACHES TO PROSTITUTION IN EUROPE©

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## INTRODUCTION

The study of legal theory and philosophy entails conducting philosophical and scientific examinations of law and justice as a social phenomenon.<sup>1</sup> This may include engaging with theories and studies about law and justice with potential elements of speculations on the basis of ideas found in numerous disciplines, such as law, sociology, history, political science, philosophy, economics and natural sciences. The aim is to elucidate the character and nature of law, particularly in relation to society.<sup>2</sup> In practice, this takes shape in seeking to answer an indefinite range of questions about law and justice, which are not only interesting in themselves but also offer unique insights and an in-depth understanding of legal provisions and concepts in relation to their context.<sup>3</sup>

Due to the nature and extent of legal theory, it is impossible to consider every possible question which could be raised on a subject matter, especially in subject areas, which may be perceived as controversial, such as laws on prostitution. The vast amount of academic literature available on the subject covers a broad range of different concepts and ideas. This can make it difficult to piece together an initial overview of the core theoretical theories and basic notions before conducting a more in-depth analysis.

Due to the vast range of legal theories available on the subject matter, it will only be possible to discuss a carefully selected number. The intention of this paper is to

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<sup>1</sup> Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2013) 3.

<sup>2</sup> *ibid.*

<sup>3</sup> Richard A Posner, *The Problems Of Jurisprudence* (Harvard University Press 1990) 1; 220.

provide a point of reference when conducting legal theoretical research in the area of prostitution laws through a Eurocentric lens.

Within the study of legal theories, there are two predominant species of jurisprudence identified in academic literature, namely, analytical and normative jurisprudence.<sup>4</sup> Analytical jurisprudence is the umbrella term for theories seeking to answer questions relating to any major concepts of law as well as general questions of the meaning of law.<sup>5</sup> Normative jurisprudence covers legal theoretical ideas that focus on questions relating to the moral dimensions of law.<sup>6</sup>

Legal Theory classifications are merely labels of convenience. When researching specific theories, they provide valuable navigational aids. However, it is important not to view each theory as a true category. Even within the distinction between analytical and normative jurisprudence, one will find analytical elements in normative jurisprudence and normative elements in analytical jurisprudence.<sup>7</sup> Thus, even in this “Roadmap” certain theorists may appear in several classifications.

### LAYING OUT THE LEGAL ENVIRONMENT AND SOME KEY LEGAL THEORETICAL CONCERNS

According to the Council of Europe Resolution 1579 (2007), the approaches adopted in the 47 member states of the Council of Europe vary widely. It is noted that three predominant approaches can be defined: prohibitionist, regulationist and abolitionist.<sup>8</sup>

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<sup>4</sup> See for example: Dennis M Patterson, *A Companion To Philosophy Of Law And Legal Theory* (Wiley-Blackwell 2010) 9; 531; William Twining, *General Jurisprudence* (Cambridge University Press 2009) 226; Antony Duff and Stuart P Green, *Philosophical Foundations Of Criminal Law* (Oxford University Press 2011) Chapter 1; Scott Shapiro, *Legality* (Harvard University Press 2011) 2.

<sup>5</sup> HLA Hart, *The Concept Of Law* (Oxford University Press 2012) xlv.

<sup>6</sup> Howard Davies and David Holdcroft, *Jurisprudence* (Butterworths 1991) v; Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2013) 3.

<sup>7</sup> *ibid.*

<sup>8</sup> Council of Europe, Parliamentary Assembly, 'Resolution 1579 (2007) Prostitution – Which Stance To Take?', Assembly debate on 4 October 2007 (35th Sitting) s.4 et seq.

In the regulation of sexual services, prohibitionist approaches are generally categorised as targeting both the sale as well as the purchase of these services within criminalisation. It can also include the categorical prohibition of behaviour, which is closely related to the selling or purchasing of sexual services, such as street solicitation, or the running of an agency or a commercial sex business.<sup>9</sup>

Legal theoretical questions that can be found in the foreground of prohibitionist approaches may include what the purpose is of criminal laws, what the purpose of criminal sanctions is, whether prostitution could be considered a victimless crime, or whether there are elements of harm which need to be addressed by criminal law means.<sup>10</sup> A prohibitionist rationale may view society as a whole as the victim of prostitution and thus favour an approach that protects public order, society, and public morals through the criminalisation of prostitution.

Abolitionism describes approaches in which a set of policies do not unconditionally criminalise acts of prostitution *per se*, nor does it unconditionally criminalise activities that are closely related to prostitution, such as solicitation or brothel keeping. However, it may categorically criminalise one side of the prostitution interaction, often the procurement, in an attempt to eliminate the entire transaction.<sup>11</sup>

The legal theoretical concerns found in the forefront of abolitionist approaches pose questions regarding the social order within society and the concept of “victim.” In this sense, an abolitionist approach may be founded on the

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<sup>9</sup> Peter De Marneffe, *Liberalism And Prostitution* (Oxford University Press 2010) 16; Phil Hubbard, Roger Matthews and Jane Scoular, 'Regulating Sex Work In The EU: Prostitute Women And The New Spaces Of Exclusion' (2008) 15 *Gender, Place & Culture*.

<sup>10</sup> See for example: HC Deb 13 October 2015 vol 600 cc 58-65WH; Joel Feinberg, *Harmless Wrongdoing* (Oxford University Press 1988); M Kaspersson, 'Book Review: Criminal Woman, The Prostitute, And The Normal Woman' (2005) 15 *International Criminal Justice Review*; Dempsey, Michelle Madden. "Rethinking Wolfenden: Prostitute-use, criminal law, and remote Harm." *Criminal Law Review* (2005): 444-455.

<sup>11</sup> Peter De Marneffe, *Liberalism And Prostitution* (Oxford University Press 2010) 12, 29; Joyce Outshoorn, *The Politics Of Prostitution* (Cambridge University Press 2004) 8, see also: Geetanjali Gangoli and Nicole Westmarland, *International Approaches To Prostitution* (Policy Press 2006) 175; K Thorlby, 'May-Len Skilbrei And Charlotta Holmstrom, Prostitution Policy In The Nordic Region: Ambiguous Sympathies.' (2015) 18 *Sexualities*.

philosophical notion that the people selling the services in prostitution constitute the victims, and as such, need to be protected from criminalisation. However, on the other hand, it is still believed that the social order still requires prostitution to be tackled by criminal law means. Thus, the criminal laws seek to criminalise the procurement rather than the sale.<sup>12</sup>

Regulationism is a term used to describe a set of policies, which criminalises neither the sale or purchase of prostitution services nor any activities viewed as being closely related. However, this approach will impose certain restrictions on these activities, which differentiate prostitution from other transactions or businesses. Examples of this may include age restrictions or health regulations.<sup>13</sup> These imposed restrictions constitute the element, which differentiates regulationism from full decriminalisation. Full decriminalisation may be described as a set of policies that incorporate normalisation or *laissez-faire*.<sup>14</sup>

Legal theoretical approaches to regulationism often follow the ideas of libertarian paternalism. The underlying objective is to affect people's behaviour while at the same time, respecting their freedom of choice. This way, regulationists seek to direct people's choices towards welfare-promoting behaviours without disregarding their freedom of choice<sup>15</sup> The key legal theoretical questions seek to investigate what harm is caused by decriminalisation in contrast to criminalisation. The answers to these questions often reflect the idea that although prostitution may attract certain elements of harm, the harm caused by criminalisation will outweigh the harm caused by liberalisation, with paternalistic elements specifically targeting the areas of harm wherever they come about.<sup>16</sup>

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<sup>12</sup> Gayle Letherby, *Sex As Crime?* (Willan 2008) 385; Jane Scoular, *The Subject Of Prostitution* (Taylor and Francis 2009) 47.

<sup>13</sup> Peter De Marnette, *Liberalism And Prostitution* (Oxford University Press 2010) 29; Brigit C A Toebes, *The Right To Health. A Multi-Country Study Of Law, Policy And Practice*; Melissa Hope Ditmore, *Encyclopedia Of Prostitution And Sex Work* (Greenwood Press 2006) 372.

<sup>14</sup> *ibid.*

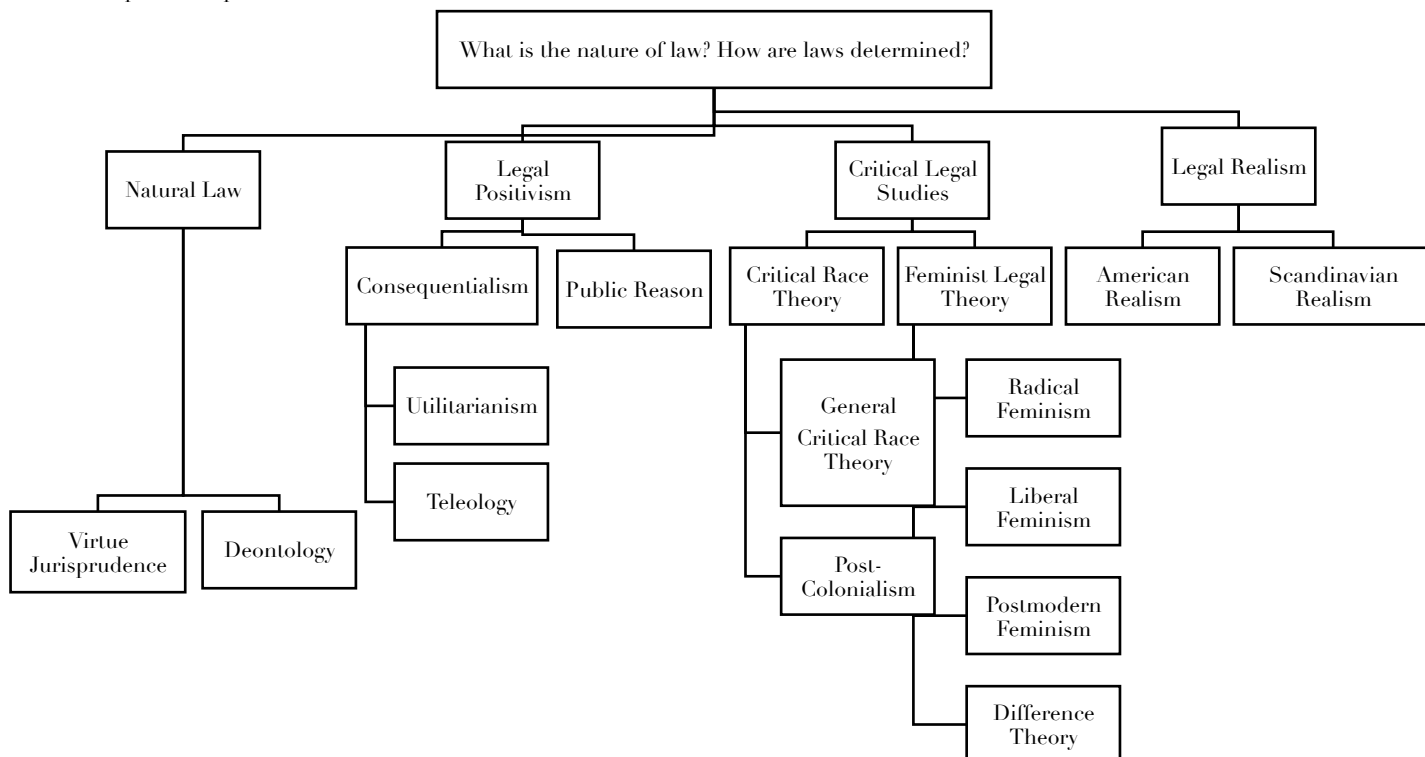
<sup>15</sup> Cass R Sunstein and Richard H Thaler, 'Libertarian Paternalism Is Not An Oxymoron' SSRN Electronic Journal, University of Chicago Public Law & Legal Theory Working Paper No. 43, 2003.

<sup>16</sup> Joanna Phoenix, *Regulating Sex For Sale* (Policy Press 2009) 14.

### EXAMINATION FRAMEWORK

Due to the vast amount of legal theories, it has been important to develop an examination structure of the existing fundamental ideas of the various legal theories, in order to enable a targeted investigation of legal approaches to prostitution and the underlying philosophies. Thus, a so-called “roadmap” has been developed that will direct initial research into legal theoretical concepts and underlying ideas of prostitution laws in order to start one’s research on the right path. The aim is to provide a guided overview of some of the most relevant concepts of jurisprudence that will enhance efficiency, especially for researchers who are new to the area of legal theory in relation to prostitution laws. The starting point consists of the questions “What is the nature of law?” and “How are laws determined?” This will provide the relevant information to determine whether the research will be directed towards the legal umbrella-theories of Natural Law, Legal Positivism, Critical Legal Studies and Legal Realism. In the following “roadmap”, the paths down each of these overarching categories will be addressed in turn (*See: Figure 1*).

Figure 1: A Roadmap to European Jurisprudence



## EXPLORING THE LEGAL THEORETICAL VIEWS ON PROSTITUTION

In accordance with the examination framework depicted above, the first questions to ask in determining the legal theoretical classification of prostitution laws are how these fit into ideas of the way the nature of law is regarded and how laws are thought to be determined. These initial questions will point towards Natural Law, Legal Positivism, Critical Legal Studies or Legal Realism. The following will address each of these classifications individually in relation to their theoretical concepts of morality, sexuality, and law and the way these apply to prostitution and how the interpretations fit into the most prominent sub-classifications.

### **A. NATURAL LAW**

According to natural law theory, laws are derived from the nature of morality and are, thus, natural moral laws. Accordingly, many Natural law theorists support the

premise of *lex injusta est non lex* (Law which is not just is not law).<sup>17</sup> In other words, this means that laws, which contradict a moral sense of justice, are considered invalid.

Over the millennia, Natural law has developed from being based on the idea of the existence of divine laws, over canon laws, towards the idea of laws being inherently based on the fundamental moral foundations of human nature and in more recent times from human biology. Despite the developments in the ideas of where Natural laws are derived from, some essential aspects remain consistent, namely, that laws are already omnipresent and need to be uncovered by legal scholars.

The following will consider some of the main ideas in relation to sex, morality, and prostitution from the key Natural law thinkers in jurisprudential history.

In Plato's *Symposium*,<sup>18</sup> he focussed on the passion to possess the good and beautiful, which he referred to as *eros*.<sup>19</sup> Within his writings, one can recognise the same theoretical underpinnings which were later reflected in the Christian's antagonism to sexuality. One example can be found in Plato's distinction between vulgar and spiritual *eros*. The latter, according to Plato, is free from lust, wantonness, or lewdness,<sup>20</sup> and has virtue as a central concern between mentally beautiful lovers.<sup>21</sup> In *Phaedrus*, Socrates explains that genuine lovers will only engage in sexual intercourse when they are overcome with *akrasia* (weakness of the will) or when they have been disinhibited due to having had alcohol to drink.<sup>22</sup> Plato was concerned about the links between sexuality and power and autonomy.<sup>23</sup> A particular concern in this regard was the influence sexual pleasure had on a

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<sup>17</sup> Joel Feinberg, *Problems At The Roots Of Law* (Oxford University Press 2003) 6; J S Russell, 'Trial By Slogan: Natural Law And Lex Iniusta Non Est Lex' (2000) 19 *Law and Philosophy*.

<sup>18</sup> Plato and others, *The Symposium Of Plato* (University of Massachusetts Press 1970).

<sup>19</sup> Alan Soble, 'A History Of Erotic Philosophy' (2009) 46 *Journal of Sex Research*, 104-120, 106; Plato and others, *The Symposium Of Plato* (University of Massachusetts Press 1970).

<sup>20</sup> Plato and others, *The Symposium Of Plato* (University of Massachusetts Press 1970) 181c 181d, 185c, 209b 210c.

<sup>21</sup> Plato, *Republic* (G M Grube, Trans.) (Indianapolis: Hackett, 1992) 403a 403b.

<sup>22</sup> Plato, *Phaedrus* (A Nehamas & P Woodruff, Trans.) (Indianapolis: Hackett, 1995) 256b 256c.

<sup>23</sup> A W Price, *Love And Friendship In Plato And Aristotle* (Oxford University Press 1997); Alan Soble, *Sexual Investigations* (New York University Press 1996) 146 148.

human being's actions and on their lives in general. Accordingly, people became slaves to their passion and, in turn, subservient towards others. This could then threaten freedom and a happy life.<sup>24</sup> Plato lamented the dominant governing influence. He viewed sexual pleasure as having an absolute sovereignty over the actions a person takes in life.<sup>25</sup>

A few decades later, Aristotle<sup>26</sup> confirmed these thoughts in relation to *philia* (friendship-love).<sup>27</sup> Accordingly, genuine friendships sought the good in one another and improved the other's virtue. Sexual desire, in Aristotle's view, was based on an appetite, similar to the form of appetite one has for food and drink. This way of thinking was supported by Augustine and Kant in later centuries, who both agreed that sexual appetite was analogous to hunger and thirst and constituted a form of animal appetite.<sup>28</sup> However, Aristotle's ethics of moderation prescribed that the virtue of temperance required these appetites to be controlled.<sup>29</sup> This was based on the idea that the satisfying of these appetites was an attribute of animals rather than rational beings. These ideas have later been reflected in the virtue of chastity found in Christianity<sup>30</sup>

According to these Aristotelian natural law doctrines, it is logical to deduct from the virtue based ideas, that prostitution would be regarded as morally wrong. However, there are indications that Aristotle may not have thought prostitution to be as objectionable as one would first expect. Prostitution was a widespread phenomenon in Ancient Athens and included several forms, such as street prostitution, which similarly to today, constituted the lower end of the prostitution hierarchy, from young boys of poorer families through to courtesans who enjoyed a

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<sup>24</sup> Plato, *Symposium* (S Groden, Trans.) (Amherst: University of Massachusetts Press, 1970).

<sup>25</sup> Alan Soble, 'A History Of Erotic Philosophy' (2009) 46 *Journal of Sex Research* 46(2-3), 104-120, 107.

<sup>26</sup> Aristotle, *Nicomachean Ethics* (T Irwin, Trans.) (Indianapolis: Hackett, 1985).

<sup>27</sup> *ibid.*

<sup>28</sup> Alan Soble, 'A History Of Erotic Philosophy' (2009) 46 *Journal of Sex Research* 46(2-3), 104-120, 115.

<sup>29</sup> P T Geach, *The Virtues* (Cambridge University Press 1977) 131 et seq.; Raja Halwani, Sexual temperance and intemperance, in Raja Halwani, *Sex And Ethics* (Palgrave Macmillan 2007).

<sup>30</sup> Alan Soble, 'A History Of Erotic Philosophy' (2009) 46 *Journal of Sex Research* 46 (2-3), 104-120, 107.



higher status in the prostitution hierarchy.<sup>31</sup> Thus, according to Aristotle, this phenomenon was reconcilable with social morals due to the fact that he believed that poorer people were not as capable of developing to the same level of mental capacity as members of the Athenian upper class.<sup>32</sup> Furthermore, in line with Aristotle's moral conception of only indulging in the pleasures of the flesh in moderation,<sup>33</sup> it could be assumed that if, for instance, a person only purchased a prostitute's services on rare occasions, this may not fall within the realms of what Aristotle thought was a moral vice.<sup>34</sup>

Augustine<sup>35</sup> took Plato's and Aristotle's moral ideas further in relation to sexual intercourse in marriage and expressed accordingly that when carried out merely for the purpose of pleasure the wife would constitute the husband's harlot and the husband would classify as his wife's adulterous lover.<sup>36</sup> The foundation for this thinking needs to be sought in the Christian schools of thought of the 4<sup>th</sup> and 5<sup>th</sup> centuries.<sup>37</sup> Jerome, 4<sup>th</sup> century Christian philosopher, argued, for instance, that Adam and Eve were virgins while in Eden, yet with their first sin they were "cast out of Paradise" and "immediately married."<sup>38</sup> In this sense, sex was not considered to be part of God's initial plan for human beings, and thus the ideal would be for people to abstain.<sup>39</sup> Although Augustine was not as radical in his thoughts, he supported the idea that sex prior to the fall was not lustful. In his view, God's

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<sup>31</sup> E N Yankah, An (In)decent Proposition: Prostitution, Immorality and Decriminalisation (2010) University of Illinois - College of Law, Available at: <[http://works.bepress.com/ekow\\_yankah/2](http://works.bepress.com/ekow_yankah/2)> accessed: 26<sup>th</sup> July, 2015.

<sup>32</sup> Aristotle, *Politica*, *supra* note 70, Bk. I, Ch. IV-VIII, Bk. III, Ch. IV; Yankah, E., N., An (In)decent Proposition: Prostitution, Immorality and Decriminalisation (2010) University of Illinois, College of Law, Available at: <[http://works.bepress.com/ekow\\_yankah/2](http://works.bepress.com/ekow_yankah/2)> accessed: 26<sup>th</sup> July, 2015.

<sup>33</sup> Aristotle, *Nicomachean Ethics*, in Aristotle and others, *The Basic Works Of Aristotle* (Random House 1941) at Bk. III, Ch. X-XI.

<sup>34</sup> Martha C Nussbaum, 'Objectification, Philosophy And Public Affairs' 24:4 (1998) reprinted in Alan Soble, *The Philosophy Of Sex* (Rowman & Littlefield 2002) 394-396; B Russell, *Marriage And Morals* (1958) 121-122 and I Primoratz, 'What's Wrong with Prostitution?' 451-453 in Alan Soble, *The Philosophy Of Sex* (Rowman & Littlefield 2002) 462-466.

<sup>35</sup> Augustine, *On Marriage and Concupiscence*. In T Edinburgh & T Clark (eds), Augustine, Marcus Dods and Peter Holmes, *The Works Of Aurelius Augustine, Bishop Of Hippo* (T & T Clark 1874).

<sup>36</sup> *ibid*.

<sup>37</sup> See: Elizabeth A Clark, '« Adam's Only Companion » : Augustine And The Early Christian Debate On Marriage' (1986) 21 *Recherches Augustiniennes et Patristiques*, 21, 139-162; Gilles Quispel and Elaine Pagels, 'Adam, Eve And The Serpent' (1989) 43 *Vigiliae Christianae*; Uta Ranke-Heinemann, *Eunuchs for the Kingdom of Heaven: Women, sexuality and the Catholic church*. (New York: Penguin, 1990).

<sup>38</sup> St Jerome, printed in Augustine, Saint Bishop of Hippo.; John Chrysostom, Saint; Philip Schaff; Henry Wallace, *Nicene and post-Nicene fathers. Second series, Volume VI Jerome: Letters and Select Works* (New York, NY : Cosimo Classics, 2007) 359.

<sup>39</sup> Soble, A, A History of Erotic Philosophy (2004) Drexel University, *Journal of Sex Research* 46(2-3), 104-120, 108.

original purpose for sex was solely for procreation.<sup>40</sup> This is also the underlying principle applied in Augustine's disapprobation of contraception. Accordingly, he even went as far as to describe practices such as blocking conception or aborting fetuses as "criminal conduct" as people engaged in this kind of conduct were coming together by "abominable debauchery."<sup>41</sup>

It appears that in the almost 1000 years that followed, the attitudes towards sexuality became slightly less negative. Accordingly, in the mid-13<sup>th</sup> century, the theologian St. Thomas Aquinas developed his Natural Law theory of sexuality within his *Summa Theologiae*.<sup>42</sup> This work later became the authoritative foundation of the Catholic teachings. Here, he explained that coitus resulted from a God-given natural inclination and thus, the sexual organs would be fulfilling their natural purpose during sexual intercourse.<sup>43</sup> According to Aquinas, sexual pleasure had to be considered as a good thing, as it had been created by God. Yet, this type of pleasure had its rightful purpose and use, in the same way as everything else created by God. Hence, God planned for sexual pleasure in sexual acts as a contribution to "His" continuous work of creation. In this sense, God intended for human beings to have a natural inclination for sexual intercourse to ensure they continued to obey "His" command to be fruitful. Thus, sexual pleasure in itself was not considered a sin, as long as this was conducted in conjugal sexual acts which were intended to be procreative.<sup>44</sup> Aquinas derived his judgements about sexual activity from his Natural Law ethics.<sup>45</sup> In his line of arguments, he asserted that any unnatural vice<sup>46</sup> consisted "the gravest of sins" which he perceived to be worse than adultery or rape. The reason for this idea was that these unnatural vices were a

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<sup>40</sup> Augustine, Gerald G Walsh and Grace Monahan, *The City Of God* (1st edn, Catholic University of America Press 2008) Book 14, Chapter 24, 402.

<sup>41</sup> *ibid* 109; Augustine, *On Marriage and Concupiscence*. In T. Edinburgh & T. Clark (Eds.), *The works of Aurelius Augustine, Bishop of Hippo* (Vol. 12, pp. 93 - 202). (1874) 93 - 202.

<sup>42</sup> Thomas Aquinas, *Summa Theologiae* (Vols. 1 - 60). Cambridge, England: Blackfriars, 1964).

<sup>43</sup> Thomas Aquinas, *On the Truth of the Catholic Faith: Summa contra gentiles* (book III, pt. 2; V Bourke, trans.) (Garden City, NY: Image Books, 1956) (Original work published 1258 - 1264).

<sup>44</sup> *ibid*.

<sup>45</sup> Thomas Aquinas, *Summa Theologiae* (Vols. 1 - 60). Cambridge, England: Blackfriars, 1964) (Original work published 1265 - 1273), 11a-11ae, ques. 154, arts. 1 - 12); Soble, A, 'A History of Erotic Philosophy' (2004) *Drexel University, Journal of Sex Research* 46(2-3), 104-120, 110.

<sup>46</sup> NB Self-abuse, Bestiality, Sodomy or failure to use the proper organs in the natural style of intercourse.

direct “affront to God” and “His” intentions, whereas crimes such as rape or adultery merely violated “the developed plan of living according to reason” which was a “creation of man.”<sup>47</sup>

Approximately half a millennium later, in the 1700s, David Hume and Immanuel Kant contributed to the Natural law thoughts on sexual desire, love, and morality in a secular form. Hume claimed that love developed through a connection based on a person’s perception of beauty, bodily appetite and compassion which resulted in people becoming inseparable.<sup>48</sup> He explained that the latter two aspects of amorous passion were “too remote [by their natures] to unite easily.”<sup>49</sup> Kant expressed the idea that true human love was merely goodwill, affection, and the promotion of the “happiness of others and finding joy in their happiness.”<sup>50</sup> In his reference to the benevolence component of Hume’s concept of amorous passion, Kant asserts that this component is too different from sexual desire for these two to be able to be joined. The reason for this is that in Kant’s view, sexual desire is nothing more than an appetite towards a person, which in essence objectifies him or her.<sup>51</sup> In his opinion, sexual desire and benevolence would contradict one another, as the former would result in all motives of moral relationships ceasing to function and vice versa, benevolence would deter a person from carnal enjoyment.<sup>52</sup> This objectification of another person for sexual intercourse, according to Kant, could only be overcome in marriage.<sup>53</sup> Similarly to Aquinas, Kant thought that engaging in *crimina carnis contra naturam*, such as masturbation, constituted, in essence, the treatment of oneself as an object and, thus, degraded “human nature to a level below that of animal nature and [made] man unworthy of his humanity.”<sup>54</sup>

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<sup>47</sup> Alan Soble, 'A History Of Erotic Philosophy' (2009) 46 *Journal of Sex Research* 46(2-3), 104-120, 111.

<sup>48</sup> David Hume, *A Treatise of Human Nature* (Oxford, England: Oxford University Press, 2000) Book II, pt. ii, chap. 11.

<sup>49</sup> *ibid.*

<sup>50</sup> Immanuel Kant, Peter Heath and J B Schneewind, *Lectures On Ethics* (Cambridge University Press 1997) Ak 27:384.

<sup>51</sup> *ibid.*

<sup>52</sup> Immanuel Kant and Mary J Gregor, *The Metaphysics Of Morals* (Cambridge University Press 1996) Ak 6:426.

<sup>53</sup> Immanuel Kant, Peter Heath and J B Schneewind, *Lectures On Ethics* (Cambridge University Press 1997); B Herman, Could it be worth thinking about Kant on sex and marriage? (1993) In Karen Jones, Louise Antony and Charlotte Witt, 'A Mind Of One's Own: Feminist Essays On Reason And Objectivity.' (1995) 104 *The Philosophical Review*; Alan Soble, Sexual use and what to do about it: internalist and externalist sexual ethics. In Alan Soble and Nicholas Power, *The Philosophy Of Sex* (Lanham, MD: Rowman & Littlefield, Publishers, 2008) 259-288.

<sup>54</sup> *ibid.*

Kant's philosophical approach has been incorporated into several contemporary philosophies. In particular, the feminist theorists have resorted to Kant's critique of sexual objectification, especially in evaluating subject matters such as rape, prostitution, sexual harassment or pornography.<sup>55</sup> In contrast to the liberal ideas of consent, Kant believed that the objectification of another human being was too immoral as to allow for it to be justified with consent.<sup>56</sup>

One of the first philosophers to develop the Natural law ideas regarding sex towards the scientific realm was the German philosopher, Arthur Schopenhauer. Accordingly, he asserted that the beauty of an object of one's sexual desire was the way nature tricked men into believing that they sought to satisfy their erotic desires for their own individual good. However, he argued that sexual intercourse, in fact, only benefitted the survival of the species,<sup>57</sup> and yet caused men to irrationally give up their fortune and freedom in pursuit of their erotic goals.<sup>58</sup>

*(I) DETERMINING THE NECESSITY OF PROSTITUTION LAW UNDER NATURAL LAW IDEAS: VIRTUE JURISPRUDENCE OR DEONTOLOGY*

As discussed in the previous point, Natural law believes that ideals of justice and laws are pre-established by, for example, nature, or a higher power. Virtue jurisprudence is a sub-category of Natural Law that believes that the purpose of laws is to promote virtuous behaviour in a given society.<sup>59</sup> Thus, laws criminalising prostitution are necessary to promote the development of the virtuous characters of citizens. Established above, key supporters of these ideas can be found in Plato, Aristotle and St. Thomas Aquinas.

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<sup>55</sup> Estes, Y., Prostitution: A subjective position. In Alan Soble & N Nicholas Power (Eds.), *Philosophy of sex* (Lanham, MD: Rowman & Littlefield Publishers, 2008) 353-365; Martha Craven Nussbaum, *Sex & Social Justice* (Oxford University Press 1999).

<sup>56</sup> Alan Soble, 'A History Of Erotic Philosophy' (2009) 46 *Journal of Sex Research* 46(2-3), 104-120, 113.

<sup>57</sup> *ibid.*

<sup>58</sup> Arthur Schopenhauer, *The World As Will And Representation, Vol. 2* (Dover Publications 2012) 532, 550.

<sup>59</sup> Colin Patrick Farrelly and Lawrence Solum, *Virtue Jurisprudence* (Palgrave Macmillan 2008) 20; Denise Meyerson, *Understanding Jurisprudence* (Routledge-Cavendish 2007) 3.

Legal Deontologists believe that actions are morally wrong, regardless of the consequences. According to Rawls, these moral intuitions, which vary between individuals, can be determined through a process he describes as 'reflective equilibrium.'<sup>60</sup> Accordingly, the collective of raw moral intuitions may be ordered in general principles, which could unify the collective of judgments in certain cases.<sup>61</sup>

Kant, following a deontological ideology, thought that the central idea of morality was found in duty. He based this ideology on the idea of a good will. Accordingly, "nothing can possibly be conceived in the world or out of it that can be called good without qualification except a good will."<sup>62</sup> Good will, in this sense, was seen to be a will, which has the objective of achieving *good* rather than merely being based on desire and inclination.<sup>63</sup>

As already discussed under the umbrella term of Natural Law, Kantian Deontology, as well as Aristotelian virtue-based theories, regarded prostitution as a moral harm. However, this in itself does not necessarily mean that the law should prohibit it.<sup>64</sup>

Instead of determining the self-inflicted harm as resulting from the indulgence in base pleasures, Kant argued that the harm was caused due to a breach of one's moral duties and the effects this had on one's dignity. However, despite Kant believing that prostitution constituted a grave violation of a person's moral duties, his theories in relation to autonomy are often used as a theoretical basis to claim that the law cannot force people to be morally upright.<sup>65</sup> In recent decades, there has been a significance placed on Kantian ideas in prostitution discussions, which make it advisable to conduct a more in depth contemporary analysis of his theories

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<sup>60</sup> Soren Holm and Monique F Jonas, *Engaging The World* (IOS Press 2004) 140 et seq.

<sup>61</sup> John Rawls, *A theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999).

<sup>62</sup> Immanuel Kant, *On The Metaphysics Of Morals And Ethics* (A & D Pub 2008) 10.

<sup>63</sup> *ibid.*

<sup>64</sup> Yankah, E., N., *An (In)decent Proposition: Prostitution, Immorality and Decriminalisation* (2010) University of Illinois, College of Law, 30, Available at: <[http://works.bepress.com/ekow\\_yankah/](http://works.bepress.com/ekow_yankah/)> accessed: 26<sup>th</sup> July, 2015.

<sup>65</sup> *ibid.*

in relation to prostitution at an early stage of jurisprudential research in prostitution laws.

## B. POSITIVISM

Maybe one of the most significant and most often mentioned forms of analytical jurisprudence is Legal Positivism,<sup>66</sup> which also constitutes the counterpart to Natural Law theories. The reason for this is that they constitute opposites in various areas of their concepts. Natural law, for instance, is considered a normative legal theory. In this sense, it is predominantly focussed on what law ought to be. Legal Positivism, on the other hand, looks at laws in order to determine what law is, what the laws are, and their effects. In essence, one could generalise positive legal theories as concerning facts whereas normative legal theories as being about values.<sup>67</sup>

In essence, positive legal theories can be categorised as dealing with three different aspects of legal analysis. These are doctrinal or descriptive theories, explanatory or causal theories, and effects and predictive theories.<sup>68</sup>

When considering the above characteristics, it may be difficult to pinpoint the exact point in time at which the positivist tradition began. In this sense, Hobbes's theory of law includes certain positive characteristics. Furthermore, theorists such as Jeremy Bentham or John Austin can clearly be placed within the realm of the positivist tradition.<sup>69</sup> In 'The Province of Jurisprudence Determined,'<sup>70</sup> Austin asserted that a given rule only constituted a law if it had been commanded by the sovereign towards his or her subjects, and when the commands were supported by

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<sup>66</sup> Neil MacCormick and Ota Weinberger, *An Institutional Theory Of Law* (Springer Netherlands 1986) 124.

<sup>67</sup> Joseph Raz, *The Authority Of Law* (Oxford University Press 2009) 135; Hans Kelsen, *Pure Theory Of Law* (University of California Press 1978) 219; Enrico Pattaro and others, *A Treatise Of Legal Philosophy And General Jurisprudence* (Springer Netherlands 2009) 221.

<sup>68</sup> Roy Bhaskar, *The Possibility Of Naturalism* (New York: Routledge, 2014) 160.

<sup>69</sup> Reidar Edvinsson, *The Quest For The Description Of The Law* (Springer-Verlag Berlin Heidelberg 2009) 5; Alexandra Rengel, *Privacy In The 21st Century* (Martinus Nijhoff Publishers 2013) 17; Michael D Bayles, *Hart's Legal Philosophy: an Examination* (Dordrecht : Springer Netherlands, 1992) 21.

<sup>70</sup> J Austin, *The Province Of Jurisprudence Determined* (John Murray 1861).

threats of punishment. Accordingly, the rule of reason is a social rule, which determines whether rules classify as rules or not.<sup>71</sup>

When looking at legal positivism, it is important to note that the scope of the theory can cover a wide range of theorists with a wide range of different approaches to the examination of laws. Often theorists who are classified as positivists may also be placed in other categories of jurisprudence. Bentham, for example, as mentioned above, is a clear representative of positive legal thoughts.<sup>72</sup> Nevertheless, in line with the examination framework depicted above, Bentham's concepts fall within the sub-category of utilitarianism.

The key point when looking at prostitution laws from a positivist perspective is the insignificance, if not neutrality, of moral concerns. Accordingly, normative considerations are not necessary to determine the validity of laws.<sup>73</sup> This is not to say that morals may not be mentioned at all, as they may come about in the investigation of jurisdictions, especially in the area of explanatory and causal theories. However, in these cases, the moral concerns will merely be regarded as facts without any normative value.

*(I) DETERMINING WHY PROSTITUTION LAWS SHOULD BE MADE:  
CONSEQUENTIALISM OR PUBLIC REASON*

Consequentialism holds that the consequences of someone's conduct or laws are the decisive foundation for judgments in relation to the right or wrongness of a specific conduct or provision. Hence, the consequentialist stance is that a morally right act will produce an outcome society would describe as good. In essence,

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<sup>71</sup> Jeffrey Brand-Ballard, *Philosophy Of Law* (London : Bloomsbury, 2013) 7.

<sup>72</sup> Xiaobo Zhai and Michael Quinn, *Bentham's Theory Of Law And Public Opinion* (Cambridge: Cambridge University Press, 2014) 144.

<sup>73</sup> Kenneth Einar Himma, *Law, morality, and legal positivism* (Wiesbaden : F. Steiner Verlag, 2004)

consequentialists believe that "the ends justify the means."<sup>74</sup> Accordingly, if a specific consequence is morally significant enough, it will justify any method.<sup>75</sup>

Consequentialism feeds into the realm of paternalists and other representatives of holistic understandings of societies who claim that human beings are intrinsically social beings. Thus, due to the fact that people form complex, inseparable relationships with other members within their societies, their individual actions will automatically have an effect on the other members of their society or even on the entire society as a whole.<sup>76</sup> In terms of consequentialist thoughts, ethical considerations play an important role. This is based on the assumptions that certain behaviours may have negative effects on society. Consequently, it may be necessary to restrict the liberties of individuals.<sup>77</sup> In regard to prostitution, some consequentialist ideas, whether relevant or not, are thought to include concerns such as prostitution contributing to the spread of sexually transmitted diseases. A hypothetical consequentialist consideration in this respect may involve legalising prostitution in order to remove these kinds of adverse effects by including provisions for regular health and safety check-ups.

One of the more significant sub-categories of Consequentialism is Utilitarianism. As mentioned previously, one of the theorists whose ideas have been historically attributed to utilitarianism is Jeremy Bentham. The *ratio legis* of Utilitarianism is the goal of producing "the Greatest Good, for the Greatest Number."<sup>78</sup> In this sense, legal rules should be adopted which will maximise utility.<sup>79</sup>

As aforementioned, Jeremy Bentham has been attributed to the Utilitarian School of Legal Thought. Especially his thoughts about marriage, sexual relations and morals touch on philosophical issues relating to prostitution and prostitution laws.

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<sup>74</sup> John Mizzoni, *Ethics* (Wiley-Blackwell 2010) 104.

<sup>75</sup> Ted Lockhart, *Moral Uncertainty And Its Consequences* (Oxford University Press 2000) x.

<sup>76</sup> Rohnn B Sanderson and Marc A Pugliese, *Beyond Naïveté* (University Press of America 2012) 160.

<sup>77</sup> *ibid.*

<sup>78</sup> John Troyer, *The Classical Utilitarians* (Indianapolis: Hackett Pub Co., 2003) 92.

<sup>79</sup> J. J Chambliss, *Philosophy Of Education* (Credo Reference Ltd 2008) 556.



Based on the fundamental idea that men and women are equal, Bentham designed a marriage law draft which was based on utilitarianism. In this sense, one of his conclusions was that questions concerning the relative value of spiritual or physical love were to be placed in the realm of personal choice rather than constituting decisions which a legislator could decide on for ‘the species in general’.<sup>80</sup> In later writings, he uses similar ideas in law and property. In his reasoning for a utilitarian approach to marriage, he expressed in order to allow for marriage to solely be governed by the individual’s desire to gain pleasure and avoid pain.<sup>81</sup> In contrast to Kant, for instance, Bentham described sexual intercourse as a pleasure. Thus, legislators needed to ensure that the quantity of this pleasure was as high as possible within society. This needed to be proportionate to the level of pleasure sexual intercourse entailed, which, according to Bentham, constituted the greatest of all pleasures.<sup>82</sup>

It is of significance in relation to prostitution, that Bentham acknowledged in these ideas, that this pleasure was not necessarily exclusive within legal marriage. In his considerations of non-conform sexual intercourse, by which he meant sexual intercourse outside of marriage for other reasons than procreation, he explained that the harm caused from the enforcing of a marriage contract was ‘palpable enough.’<sup>83</sup> In his utilitarian view, men may commonly realise after having enjoyed sex with one woman, that they could enjoy sex just as much with another woman. This idea was not solely attributed to male views and he saw this to be equally true for women. Accordingly, the sexual restraint which came with the enforcement of a marriage contract was an inconvenience for both sexes.<sup>84</sup> These thoughts have also been expressed by others in a way which could be reconcilable with the concepts of Natural Law. In this sense, Denis Diderot viewed a lifelong commitment to one

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<sup>80</sup> University College London, Bentham MS (UC) UC xxxii 103.

<sup>81</sup> Mary Sokol, ‘Jeremy Bentham On Love And Marriage: A Utilitarian Proposal For Short-Term Marriage’ (2009) 30 *The Journal of Legal History*, 1-21, 3; J. R Dinwiddy, *Bentham* (Oxford University Press 1989) 22. See Jeremy Bentham, *Principles of Morals and Legislation* (Theclassics Us, 2013) 42 59, 103 104, 115 116.

<sup>82</sup> Mary Sokol, ‘Jeremy Bentham On Love And Marriage: A Utilitarian Proposal For Short-Term Marriage’ (2009) 30 *The Journal of Legal History*; University College London, Bentham MS (UC) UC xxxii 103.

<sup>83</sup> University College London, Bentham MS (UC) UC lxxi 91.

<sup>84</sup> *ibid.*

woman incompatible with the natural inconstancy of men<sup>85</sup> and Rousseau, although believing that marriage was advantageous for the human species as a whole, did not believe that the permanent union between women and men was dictated by nature.<sup>86</sup>

In regards to prostitution, Bentham recognised similar distinctions between forms of prostitution as in a hierarchy as already mentioned in regards to Aristotle.<sup>87</sup> Accordingly, he distinguished between “public women”, which referred to women working in street prostitution, and which constituted the lower ranks within the hierarchy, “kept women”, which described prostitutes who worked in brothels and “courtesans”, who were considered to be at the top of the hierarchy.<sup>88</sup> On the one hand, Bentham was not against prostitution, and he did not condemn women, especially poor women, who worked as prostitutes.<sup>89</sup> In this sense, he was aware of their economic situation and, thus, proposed solutions which were in line with many feminist concepts found today, and which were far beyond the common thinking of Bentham’s time. In this sense, Bentham regarded prostitution to be an economic problem. He explained that poor women prostituted themselves due to the fact that they were not able to find alternative employment to support themselves. He stressed the disadvantageous position women were in when seeking work in comparison to male labourers. In his opinion, this situation was intensified by men carrying out jobs which could be described as more suitable for women, such as sewing or tailoring, selling toys or running fashion shops.<sup>90</sup> Bentham’s proposed solution can be viewed as an early form of positive discrimination. In this

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<sup>85</sup> See: Blandine L. McLaughlin, ‘Diderot and Women’, in Samia I Spencer, *French Women And The Age Of Enlightenment* (Indiana University Press 1984) 297.

<sup>86</sup> Jean-Jacques Rousseau and Maurice Cranston, *A Discourse On Inequality* (Penguin Books 1984) 111.

<sup>87</sup> See section on Natural Law.

<sup>88</sup> Bridget Hill, *Women Alone* (Yale University Press 2001) 110; R. Probert, ‘Chinese Whispers and Welsh Weddings’ (2005) 20 *Continuity and Change* 211, 228, 220; Sokol, M, Jeremy Bentham on Love and Marriage: A Utilitarian Proposal for Short-Term Marriage (2009) *The Journal of Legal History*, Vol. 30, No. 1, April 2009, 1-21, 9.

<sup>89</sup> Mary Sokol, ‘Jeremy Bentham On Love And Marriage: A Utilitarian Proposal For Short-Term Marriage’ (2009) 30 *The Journal of Legal History*, Vol. 30, No. 1, April 2009, 1-21.

<sup>90</sup> *ibid.* 12; Jeremy Bentham, *The Theory of Legislation*, C.K. Ogden, ed., trans. from the French of Étienne Dumont by Richard Hildreth, (New York, 1931) 385.

sense, he proposed to implement legislation which would exclude men from working in these kinds of sectors in order to reserve them for women.<sup>91</sup>

In his utilitarian examinations of prostitution, Bentham saw the harm caused in the areas of the potential transmission of venereal diseases<sup>92</sup> and issues regarding the paternity of illegitimate children. The latter point, in particular, was of a concern for Bentham due to high rates of infanticide<sup>93</sup> or the harsh exclusive provisions that the common law placed on illegitimate children.<sup>94</sup>

In order to reduce these harms, Bentham proposed changes to the law in order to allow for illegitimate children to gain legitimacy after the parents got married, and to decriminalise infanticide for the protection of mothers.<sup>95</sup> His reasoning for this was the fact that infanticide constituted an ‘inevitable impulse of self-preservation at the expense of one being which does not feel the cost’.<sup>96</sup> Bentham argued that as the offences of prostitution or infanticide could not be prevented, at least the harm caused needed to be reduced.<sup>97</sup> In terms of imposing sanctions on prostitution, Bentham further, was of the opinion that the harms caused by prostitution were sufficient moral sanction, which revoked any further need for political sanctions.<sup>98</sup>

One final point to be mentioned, which may be of significance in the examination of the regulation of prostitution was Bentham’s ideas of welfare provisions as a potential solution to reduce harm. In this sense, he proposed for particular hospitals to act as a form of asylum for women, not only prostitutes but also abused

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<sup>91</sup> Jeremy Bentham; G W H Fletcher, *Analysis of Jeremy Bentham's Theory of Legislation* (Trübner & Co.: London, 1864) 72; Charles F Bahmueller, *The National Charity Company* (University of California Press 1981) 16; Mary Sokol, 'Jeremy Bentham On Love And Marriage: A Utilitarian Proposal For Short-Term Marriage' (2009) 30 *The Journal of Legal History*, Vol. 30, No. 1, April 2009, 1-21, 12.

<sup>92</sup> University College London, Bentham MS (UC) UC lxxxxvi 197.

<sup>93</sup> University College London, Bentham MS (UC) UC lxxxxvi 207.

<sup>94</sup> John Hamilton Baker, *An Introduction To English Legal History* (Butterworths 2002) 489-490.

<sup>95</sup> University College London, Bentham MS (UC) UC lxxxxvi 207; Mark Jackson, *New-Born Child Murder* (Manchester University Press 1996) 6-7; University College London, Bentham MS (UC) UC lxxxxvi 214; See Bridget Hill, *Women Alone* (Yale University Press 2001) 113-115; Mark Jackson, *New-Born Child Murder* (Manchester University Press 1996) 3; Mary Sokol, 'Jeremy Bentham On Love And Marriage: A Utilitarian Proposal For Short-Term Marriage' (2009) 30 *The Journal of Legal History*, Vol. 30, No. 1, April 2009, 1-21, 10.

<sup>96</sup> University College London, Bentham MS (UC) UC lxxxxvi 207.

<sup>97</sup> University College London, Bentham MS (UC) UC lxxxxvi 210.

<sup>98</sup> University College London, Bentham MS (UC) UC cli 163. UC lxxxxvi 197.

married women. He proposed these places to constitute a safe place of concealment in which women could find protection.<sup>99</sup>

Teleology as a legal theory is very closely related to utilitarianism. The crucial distinction is that, in relation to the purpose of prostitution laws, they should be developed to achieve a specific goal, regardless of whether this achieves the greatest good for the largest amount of people. John Stuart Mill's ideas can be classified as teleologist in nature. Similarly to Bentham, Mill also spoke up in favour of a utilitarian approach to prostitution, however, with scepticism towards intangible metaphysical moral duties.<sup>100</sup>

Mill believed that it should be for the individual to decide how he or she wished to pursue achieving pleasure and the absence of pain.<sup>101</sup> In his idea of please, he believed that people would usually prefer pleasures associated with their higher capabilities over purely lower pleasures.<sup>102</sup> Here, a parallel can be drawn to Aristotle's idea of the highest eros being the pleasures of the mind.<sup>103</sup>

Mill classified prostitution as falling within the category of base pleasures. Furthermore, he associates prostitution with a number of harms, which affect the lives of both the prostitute and the client in a negative fashion. However, this does not necessarily include the fact that the work of prostitution is unpleasant for prostitutes, as work is seen to be unpleasant for most employees. Again, the utilitarian perspective emerges here, in the argument that one undertakes unpleasant work for remuneration, which allows for later enjoyment and pleasures. However, according to Mill, the act of prostitution may impede a person's ability to enjoy pleasures due to negative effects on a person's health or psychological

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<sup>99</sup> University College London, Bentham MS (UC) UC cliv 153, see also: Janet Semple, *Bentham's Prison* (Clarendon Press 1993) 290–295; Robert Dingley, *Proposals For Establishing A Public Place Of Reception For Penitent Prostitutes, &C* (W Faden 1758); Roy Porter, *Enlightenment* (Allen Lane/Penguin Press 2000) 373; University College London, Bentham MS (UC) UC cli 161.

<sup>100</sup> John Stuart Mill, Jeremy Bentham and Alan Ryan, *Utilitarianism And Other Essays* (Penguin Books 1987) 272–276, 301–303.

<sup>101</sup> *ibid.* 278.

<sup>102</sup> *ibid.*

<sup>103</sup> See section 4.1. on Natural Law.

fitness.<sup>104</sup> In particular, this kind of emotional distress may affect a prostitute's ability to form relationships with other human beings, either romantically or in friendship.

A significant element of Mill's ideas is the emotional damage he associated with prostitution, which could negatively affect one's ability to form deep friendships or supportive, intimate romantic relationships.<sup>105</sup>

These harms are not only attributed to affect prostitutes. Clients are also seen to be negatively affected in the sense. As prostitution does not involve the same pleasures as sex in a caring and intimate relationship, the easy access to short-term pleasures of prostitution may prevent clients from obtaining the greater long-term pleasures derived from meaningful relationships.<sup>106</sup>

A further niche of positive jurisprudence to be mentioned at this point is the relationship between public reason and the law. Some argue that the notion of Public Reason first came about through Rawls' work.<sup>107</sup> However, there are indications of it having been mentioned by earlier scholars. In this sense, Hobbes, for instance, wrote:

In which question we are not every one, to make our own private Reason, or Conscience, but the Publique Reason, that is, the reason of God's Supreme Lieutenant, Judge; and indeed we have made him Judge already, if wee have given him a Sovereign power, to doe all that is necessary for our peace and defence.<sup>108</sup>

Here, it seems clear that Public Reason is used to describe the judgements of a sovereign.

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<sup>104</sup> John Stuart Mill, Jeremy Bentham and Alan Ryan, *Utilitarianism And Other Essays* (Penguin Books 1987) 281–285; Peter De Marneffe, *Liberalism And Prostitution* (Oxford University Press 2010) 13-15, 22-26. W Chapkis, *Live Sex Acts* (Routledge 1997) 1, 78.

<sup>105</sup> *ibid*; Yankah, E., N., An (In)decent Proposition: Prostitution, Immorality and Decriminalisation (2010) University of Illinois, College of Law, 20, Available at: <[http://works.bepress.com/ekow\\_yankah/](http://works.bepress.com/ekow_yankah/)> accessed 26 July 2015.

<sup>106</sup> *ibid*. 21.

<sup>107</sup> James M. Buchanan, 'Rawls On Justice As Fairness' (1972) 13 *Public Choice*, 123-128; John Horton, 'Rawls, Public Reason And The Limits Of Liberal Justification' (2003) 2 *Contemp Polit Theory*, 5-23; Bruce W. Brower, 'The Limits Of Public Reason' (1994) 91 *The Journal of Philosophy*.

<sup>108</sup> Thomas Hobbes and others, *Hobbes: "Leviathan"* (Cambridge University Press 1996).

Furthermore, Rousseau explained in his *Discourse on Political Economy*,<sup>109</sup> that a father should not only trust his own personal reason in being a good father. Instead;

[T]he only rule he should follow is the public reason, which is the law. Hence nature has made quantities of good fathers, but it is doubtful whether, since the world began, human wisdom has produced ten men capable of governing their fellows.<sup>110</sup>

In contrast to Hobbes, Rousseau sees public reason as a form of general will, which seeks to achieve the common good.

Kant also touched on the idea of Public Reason. Accordingly, he stated that;

The public use of man's reason must always be free, and it alone can bring about enlightenment among men; the private use of reason may quite often be very narrowly restricted, however, without undue hinderance to the progress of enlightenment. But by the public use of one's own reason I mean that use anyone may make of it as a man of learning addressing the entire reading public. What I term the private use of reason is that which a person may make of it in a particular civil post or office with which he is entrusted.<sup>111</sup>

Accordingly, for Kant, public reason appears to be the reason people gain from one another in the process of becoming enlightened. This appears to be in direct contradiction to Hobbes's use of the term.

As mentioned above, Rawls is often considered the founder of the modern concept of Public Reason. This is based on his work *Justice as Fairness: A restatement*<sup>112</sup>, in which he stated that;

[G]reat values fall under the idea of free public reason, and are expressed in the guidelines for public inquiry and in the steps taken to secure that such inquiry is free and public, as well as informed and reasonable. These values include not only the appropriate use of the fundamental concepts of judgment, inference, and evidence, but also the virtues of reasonableness and fair-mindedness as shown in the

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<sup>109</sup> Jean-Jacques Rousseau and Jean-Jacques Rousseau, *Discourse On Political Economy* (Oxford University Press 1999).

<sup>110</sup> Jean-Jacques Rousseau, *Discourse on political economy; and, the social contract* (Oxford: Oxford University Press, 1999) 5.

<sup>111</sup> Immanuel Kant, Hans Reiss and H.B Nisbet, *Political Writings* (Cambridge University Press 1991) 55.

<sup>112</sup> John Rawls and Erin Kelly, *Justice As Fairness* (Harvard University Press 2001).

adherence to the criteria and procedures of common sense knowledge, and to the methods and conclusion of science when not controversial, as well as respect for the precepts governing reasonable political discussion.<sup>113</sup>

This definition indicates that Public Reason is defined as the reason of political societies. This constitutes a way for a society to formulate its plans in addressing and prioritising its objectives and putting these into action. Furthermore, according to Rawls, Public Reason finds its limitations within the realms of reasoning which could still appeal to the wider general public, such as “presently accepted general beliefs and forms of reasoning found in common sense, and the methods of science when these are not controversial.”<sup>114</sup>

### C. CRITICAL LEGAL STUDIES

When initially conducting research into jurisprudence of prostitution laws, it becomes clear that theoretical approaches falling under the umbrella term of Critical Legal Studies form by far the most extensive category. Nevertheless, this “Roadmap” to understanding prostitution laws in Europe, will only be able to provide a superficial and selective glimpse of the available theoretical ideas.

Critical legal studies first emerged in the 1970s as a revolutionary legal theory, which sought to reshape society in accordance with human personality, without the influences of class domination and political agendas.<sup>115</sup> In this sense, supporters of these ideas, such as Kennedy and Klare, defined Critical Legal Studies as being “concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society.”<sup>116</sup>

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<sup>113</sup> *ibid* 190.

<sup>114</sup> John Rawls, *Political liberalism* (New York : Columbia University Press, 2005) 224.

<sup>115</sup> Jonathan Turley, ‘Hitchhiker’s Guide to CLS, Unger, and Deep Thought’. *Northwestern University Law Review* 81 (1987): 595.

<sup>116</sup> Duncan Kennedy and Karl E. Klare, ‘A Bibliography of Critical Legal Studies,’ (1984) *Yale Law Journal*, Vol. 94, 461.

*(I) DETERMINING THE CRITICAL VOICES: CRITICAL RACE THEORY AND FEMINIST LEGAL THEORY*

Over the past decades, the significance of the Critical Legal Studies movement has disappeared and been replaced by more specialised movements, that share the initial common foundation inspired by Critical Legal Studies, such as feminist legal theory and critical race theory.<sup>117</sup>

Critical Race Theory views prostitution as a social phenomenon, which reflects the social injustices within society. Within these views, this is most significantly seen in the overrepresentation of people with certain ethnic backgrounds.<sup>118</sup> The aim of Critical Race Theories is to direct the law towards a focus on the experiences of minority groups in prostitution in order to tackle racial injustice.<sup>119</sup>

The general ideas of Critical Race Theory perceive the laws as still predominantly made by middle to upper class white males. This means that the experiences of people from other backgrounds are inadequately regulated for. The consequence is that these people have fewer options and are, thus, more likely to end up in prostitution. This calls for more inclusive laws throughout the legal system in order to fight the negative effects of prostitution.<sup>120</sup>

A sub-category of Critical Race Theory is Post-Colonialism. According to these ideas, Europeans have robbed their former colonies of their culture and wealth. The effects of this background are still visible in society today and many ethnic minorities are still suffering from poverty due to this. The underlying idea

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<sup>117</sup> John Henry Schlegel, 'Critical Legal Studies', In Sally E Hadden and Alfred L Brophy, *A Companion To American Legal History* (John Wiley & Sons 2013).

<sup>118</sup> Richard Delgado and Jean Stefancic, *Critical Race Theory* (Temple University Press 2000) 295; U.S. Dept. of Health & Human Services, *Health Status Of Minorities And Low-Income Groups* (US Dept of Health & Human Services, Public Health Service, Health Resources and Service Administration, Bureau of Health Professions, Division of Disadvantaged Assistance 1991) 193; Elijah Anderson, *Code of the street : decency, violence, and the moral life of the inner city* (New York : W.W Norton, 2000) 32.

<sup>119</sup> Stephen A Saltzburg, *Criminal Law* (Lexis Pub 2000) 87; Diana Elizabeth Kendall, *Sociology in our times* (Boston, MA : Cengage Learning, 2016) 280.

<sup>120</sup> C. Hakim, *Feminist Myths and Magic Medicine: The Flawed Thinking Behind Calls for Further Equality Legislation* (London: Centre for Policy Studies, 2011).



according to this legal theoretical approach is that the poverty suffered by ethnic minorities, in turn, leads to an overrepresentation of ethnic minorities in prostitution. Hence, positive action would be required to achieve a fairer labour market and, in turn, reduce the issue of prostitution.<sup>121</sup>

Prostitution is a subject matter, which has been considered in extensive detail in Feminist Legal Theories and there are clear indications of the great significance of the issues of prostitution within Feminist Legal Theories, but also vice versa.<sup>122</sup>

The following will attempt to consider some of the more relevant aspects of the prostitution discussions in relation to Feminist Jurisprudence.

Feminist Jurisprudence is mainly focussed on the way in which the law was instrumental in women's historical subordination and the way this is still reflected in laws and society today. Its key objective in this process is to encourage changes in relation to women's status by means of adaptation and modification of the law and its approach to gender, in order to achieve a system which can be regarded as equally just for members of all genders.<sup>123</sup> There are four main schools of thought within Feminist Jurisprudence, which are generally described to be four models of feminism, each incorporating different concepts. These models are the Liberal Equality Model, the Difference Theory, the Sexual dominance model and the Post modern and anti-essentialist model.<sup>124</sup>

Probably the two largest schools are the Liberal Equality Model, which is also often referred to as Liberal Feminism, and the Sexual dominance model, which

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<sup>121</sup>Sumi Madhok; Anne Phillips; Kalpana Wilson, *Gender, agency and coercion* (Basingstoke : Palgrave Macmillan, 2012) 128.

<sup>122</sup> Fineman, M., Jackson, J. E., & Romero, A. P., *Feminist and queer legal theory: intimate encounters, uncomfortable conversations* (Farnham, UK : Ashgate, 2009).

<sup>123</sup> *ibid.*

<sup>124</sup> Nancy Levit & Robert R.M. Verchick, *Feminist legal theory: a primer* (New York: New York University Press, 2006).

incorporates the ideas of Radical Feminism.<sup>125</sup> However, the other two schools should not be considered as being insignificant.

The Liberal Equality Model seeks genuine equality for women in contrast to merely nominal equality. This objective is sought by means of application of liberal values, predominantly female experiences.<sup>126</sup> The sexual Difference Model, in contrast, seeks to highlight the natural gender differences and seeks these differences to be acknowledged within the law. They believe that this is the only way distinctive female issues can be adequately remedied.<sup>127</sup> This approach is based on the idea that there are natural or cultural characteristics which distinguish women from men, which need to be taken into account in the laws.<sup>128</sup>

The Dominance Model strongly rejects the ideas of liberal feminism. It views the legal system as a system which has historically been developed by men, in order to manifest perpetual male dominance.<sup>129</sup>

The Postmodern and Anti-essentialist Model focusses on the general post-modern idea, that every individual perspective is socially situated. Accordingly, this school of thought rejects the idea of a universal woman's voice and explores the ways other characteristics which contribute to social subordination, such as race, sexual orientation or class, correlate and interplay with women's experiences and the future destinies of women.<sup>130</sup>

The Difference Theory is based on the idea that formal equality will not always lead to substantive equality. In this sense, the liberal feminist ideas are criticised

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<sup>125</sup> *ibid.*

<sup>126</sup> Jerry D. Leonard, *Legal Studies as Cultural Studies: a reader in (post) Modern Critical Theory* (New York, State University of New York Press, 1995) 92.

<sup>127</sup> *ibid.* 93 et seq.

<sup>128</sup> S. Kumra, R. Simpson, & R. J. Burke, *The Oxford handbook of gender in organizations* (Oxford ; New York, NY : Oxford University Press, 2014) 114.

<sup>129</sup> Nancy Levit & Robert R.M. Verchick, *Feminist legal theory: a primer* (New York: New York University Press, 2006) 22.

<sup>130</sup> Tracy A. Thomas, Tracey Jean Boisseau, *Feminist Legal History: Essays on women and Law*, (New York: New York University Press, 2011) 22 et seq.

for being male-biased.<sup>131</sup> As men and women are different in many biological aspects, both potentially have different needs that need to be considered in law. However, as the legal system has developed over thousands of years based on male experiences, the female needs have not been equally considered in the evolution of legal systems.<sup>132</sup>

Due to the wide range of feminist analyses of prostitution, the following will review a few selected legal theoretical concepts in relation to prostitution in order to serve as a representative indication of the attitudes within the scholarly realm.

According to the ideas of Radical Feminism, prostitution is always morally undesirable, as it constitutes one of the most graphic accounts of men's domination over women in society.<sup>133</sup> Prostitutes are seen as symbols of the value that women have in society. In this sense, prostitutes are representative not only of women's sexual subordination, but also of women's social and economic subordination in society.<sup>134</sup>

Radical feminists highlight the harm caused by prostitution to female experiences in order to illustrate the present inequalities within a gendered analysis of sexuality and the state.<sup>135</sup> The most significant criticism in accordance with the writings of Kathleen Barry,<sup>136</sup> Andrea Dworkin,<sup>137</sup> Catherine MacKinnon,<sup>138</sup> Kate Millet,<sup>139</sup> and

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<sup>131</sup> Nancy Levit & Robert R.M. Verchick, *Feminist legal theory: a primer* (New York: New York University Press, 2006) 15.

<sup>132</sup> Gad Barzilai, *Communities and law : politics and cultures of legal identities* (Ann Arbor : University of Michigan Press, 2003) 169; Tjitske Akkerman, Jean Monnet, Siep Stuurman, *Perspectives on Feminist Political Thought in European History: From the Middle Ages to the Present* (New York: Routledge, 2013) 90.

<sup>133</sup> Camille Pateman, *Defending Prostitution: Charges Against Ericsson* (1983) *Ethics* 93: 561-65; Jane Scoular, *The Subject of Prostitution* (2011) *Feminist Theory* 2004; 5: 343.

<sup>134</sup> E. Giobbe, *Confronting the Liberal Lies about Prostitution*, in D. Leidholdt, & J. Raymond (eds) *The Sexual Liberals and the Attack on Feminism*, (New York: Elsevier Science, 1990) 77.

<sup>135</sup> Jane Scoular, *The Subject of Prostitution* (2011) *Feminist Theory* 2004; 5: 343, 344.

<sup>136</sup> See: K. Barry, *Female Sexual Slavery*. (Englewood Cliffs, NJ: Prentice-Hall, 1979); K. Barry, *The Prostitution of Sexuality*. (New York: New York University Press, 1995); Jane Scoular, *The Subject of Prostitution* (2011) *Feminist Theory* 2004; 5: 343, 345.

<sup>137</sup> Andrea Dworkin, *Intercourse*. (New York: Free Press, 1987); Dworkin, A., *Pornography: Men Possessing Women*. (New York: Plume, 1989).

<sup>138</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method and the State* (1982) *Signs* 7(3): 515-44; Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*. (Cambridge, MA: Harvard University Press, 1987); Catharine A. MacKinnon, *Toward a Feminist Theory of the State*. (Cambridge, MA: Harvard University Press, 1989); Catharine A. MacKinnon, *Confronting the Liberal Lies about Prostitution*, (1990) in D. Leidholdt & J. Raymond (eds), *The Sexual Liberals and the Attack*

Carole Pateman<sup>140</sup> is the understanding of prostitution as constituting a form of violence against women. This violence is not solely interpreted in the actual conducting of prostitution, but is seen more fundamentally as the representation of ‘the absolute embodiment of patriarchal male privilege.’<sup>141</sup> Sheila Jeffries provides a good insight into the reasoning behind these thoughts by explaining that prostitution constitutes “the ultimate in the reduction of women to sexual objects which can be bought and sold, to a sexual slavery that lies at the root of marriage and prostitution and forms the foundation of women’s oppression.”<sup>142</sup> Radical feminists believe that prostitution contributes to women’s oppression. Thus, they seek to have all prostitution classified as a human rights violation.

A good representation of the Liberal Feminist Views can be found in Pheterson’s ‘A Vindication of the Rights of Whores.’<sup>143</sup> Accordingly, prostitutes are placed in the realm of a civil rights movement in which they are demanding for the right ‘to charge for what other women give for free.’<sup>144</sup> The ideas offer significant counter-hegemonic insights by challenging the identification of sexual acts with acts of desire and opposing the distinction between erotic and affective activity, on the one hand, and economic life on the other.<sup>145</sup>

Paglia’s account of “drag queen feminism” highlights some of the liberal ideas of prostitution and sexuality.<sup>146</sup> Accordingly, Paglia explains that women are the dominatrix of the universe. In this sense, she explains that prostitutes constitute the ruler of the sexual empire, which men can only have access to by paying.<sup>147</sup> This

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on *Feminism*. (New York: Elsevier Science, 1990); Catharine A. MacKinnon, Prostitution and Civil Rights (1993) *Michigan Journal of Gender and Law* 1: 13–31.

<sup>139</sup> K. Millet, *The Prostitution Papers*. (St. Albans: Paladin, 1975).

<sup>140</sup> Carole Pateman, ‘Defending Prostitution: Charges Against Ericsson’ (1983) *Ethics* 93: 561–65; Carole Pateman, *The Sexual Contract*. (Cambridge: Polity Press, 1988).

<sup>141</sup> K. Kesler, Is a Feminist Stance in Support of Prostitution Possible? An Exploration of Current Trends (2002) *Sexualities* 2: 219–35, 219.

<sup>142</sup> Sheila Jeffries, *The Idea of Prostitution*. (Melbourne: Spinifex Press, 1997) 2.

<sup>143</sup> Gail Pheterson, *A Vindication of the Rights of Whores*. (Seattle, WA: Seal Press, 1989).

<sup>144</sup> Frédérique Delacoste & Priscilla Alexander, *Sex Work: Writings by Women in the Sex Industry*. (London: Virago, 1989) 273.

<sup>145</sup> Noah D. Zatz, ‘Sex Work/Sex Act: Law, Labor, And Desire In Constructions Of Prostitution’ (1997) 22 *Signs: Journal of Women in Culture and Society*. 22(2): 277–308, 277.

<sup>146</sup> Camille Paglia, *Vamps & Tramps: New Essays* (Vintage, New York, 1994).

<sup>147</sup> Camille Paglia, *Vamps & Tramps: New Essays* (Vintage, New York, 1994) 42 et seq.

demonstrates the way in which the liberal ideology is willing to view the freedom of women to separate themselves from their subordinate position by utilising their bodies and their sexuality to gain power. Accordingly, feminist perspectives such as the sexual dominance model are criticised as “reducing prostitutes to pitiable charity cases in need of their help.”<sup>148</sup> Hence, in doing so, they are “guilty of arrogance, conceit, and prudery.”<sup>149</sup> In contrast to the radical ideas of prostitution, the Liberal Feminists believe that prostitution can be a desirably chosen activity.<sup>150</sup>

Postmodern Feminists do not tend to consider prostitution as a dissident sexual practice or a fundamentally oppressive one. Accordingly, “the referent, the flesh-and-blood female body engaged in some form of sexual interaction in exchange for some kind of payment, has no inherent meaning and is signified differently in different discourses.”<sup>151</sup>

Postmodern Feminism is often recommended to be viewed in light of their empirical research due to the wide range of separate accounts of prostitution postmodern feminism tries to include in their perspectives. A good example is Julia O’Connell Davidson’s research,<sup>152</sup> which empirically looks into a multitude of types of prostitution in relation to the degrees of control prostitutes have over their lives.

A key point in postmodern discussions of prostitution is concerned with its links to migration. In this regard, Agustín, for instance, criticises the Coalition Against Trafficking in Women of having attempted to merge the concepts of human trafficking and prostitution “in an effort to save as many victims as possible.”<sup>153</sup> However, this practice totalises all experiences of migrants and women within prostitution, who find themselves in a variety of different circumstances and with a

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<sup>148</sup> *ibid.* 57.

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.*

<sup>151</sup> Shannon Bell, *Reading, Writing and Re-Writing the Prostitute Body*. (Bloomington: Indiana University Press, 1994) 1.

<sup>152</sup> Julia O’Connell Davidson, *Prostitution, Power, And Freedom* (University of Michigan Press 1998).

<sup>153</sup> Laura Agustín, ‘Sex Workers and Violence Against Women: Utopic Visions or Battle of the Sexes?’ (2001) *Development* 44(3): 107–10, 107, available at: <http://www.walnet.org/csis/papers/dsid-0109.html>

variety of different levels of personal will, which impedes the effective process of proposing practical solutions.<sup>154</sup>

The Difference Theory can be used to argue many different and opposing arguments to prostitution. The crucial element is the consensus of an inadequate consideration of sexual differences in the law. In this sense, some use the ideas of this theory to argue that women are economically forced into prostitution due to inadequate labour laws that are still ineffective in achieving gender equality in the labour market. Others take a completely different stance, and explain that due to the different gender roles in sexual intercourse, women are inadequately perceived as automatically constituting the victim within the transaction. Accordingly, due to the nature of female genitals, it is perceived that women are the “inactive” party in sexual activity, to whom something is done, whereas men are considered the “active” party, who are doing something to someone.<sup>155</sup> Thus, the sexual differences result in laws that depict men as perpetrators and women as victims.<sup>156</sup>

A contemporary theoretical approach which deserves a particular emphasis in the examination of Feminist Legal Theories and prostitution is found in the works of Martha Nussbaum. In particular, in her piece ‘Sex and Social Justice’<sup>157</sup>, she seeks to explain how sex and sexuality are immaterial distinctions in relation to morality.

Nussbaum’s work is of key significance in modern developments of Feminist Legal Theory. Although she is often classified as a Liberal Feminist, it may be justifiable to say that she is a Liberal, who also happens to be a Feminist. The reason for this is the way she has developed her own distinct version of Liberal Feminism. In a way, Nussbaum attempts to move Liberal Feminism towards a new era, in which women can be equal and enjoy equal rights on the basis of Legal Liberalism, not

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<sup>154</sup> *ibid.*

<sup>155</sup> Sheila Jeffreys, *Anticlimax: a feminist perspective on the sexual revolution* (Women's Press, 1990) 138; Alan Soble & N Nicholas Power (Eds.), *Philosophy of sex* (Lanham, MD: Rowman & Littlefield Publishers, 2008) 121, 379.

<sup>156</sup> Linda LeMoncheck, *Loose Women, Lecherous Men : a Feminist Philosophy of Sex*. (New York: Oxford University Press, 2006) 173; Vern L Bullough; Bonnie Bullough, *Human sexuality : an encyclopedia* (New York : Garland Pub., 1994) 211.

<sup>157</sup> Martha C. Nussbaum, *Sex & Social Justice*. (New York: Oxford University Press, 1999) 29-47.

only as women, but as individual persons. This is reflected in her idea of personhood in relation to rights which she describes in the following manner:

[T]he core of rational and moral personhood is something all human beings share, shaped though it may be in different ways by their differing social circumstances. And it does give this core a special salience in political thought, defining the public realm in terms of it, purposefully refusing the same salience ... to gender and rank and class and religion.<sup>158</sup>

Especially in relation to prostitution, Nussbaum has reviewed the concept of objectification as found in Kant's ideas as well as in the Feminist arguments put forward by Catherine MacKinnon and Andrea Dworkin.<sup>159</sup> In her chapter "Seven Ways to Treat a Person as a Thing", she lists seven notions as being inherently involved in the objectification of a person. These include instrumentality, denial of autonomy, inertness, fungibility, violability, ownership, and the denial of subjectivity.<sup>160</sup> A key point in Nussbaum's opinions is the fact that, contrary to the empowerment and sex-positive considerations of the Liberal Feminist Model discussed above, Nussbaum believes that pornography, for instance, is still a form of objectification in accordance with her analysis. In this sense, she demonstrates similarities in her reasoning with the ideas of radical feminism. Nevertheless, she remains a strong advocate of the legalization of prostitution. In 2008, Nussbaum became known for her statement in relation to prostitution and abortion that "the idea that we ought to penalise women with few choices by removing one of the ones they do have is grotesque."<sup>161</sup>

One of Nussbaum's key arguments in relation to prostitution is the fact that the act of selling sexual services cannot be argued in terms of its moral dubiousness. Accordingly, when women choose to enter into prostitution on the basis of a lack of economic options, the wrongfulness is not in the act of prostitution itself, but

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<sup>158</sup> Martha C. Nussbaum, & E. Freud, E., *Sex and Social Justice* (New York: Oxford University Press, 1999) 70.

<sup>159</sup> *ibid.* 2018

<sup>160</sup> *ibid.*

<sup>161</sup> Martha C. Nussbaum, 'Trading on America's Puritanical Streak, Prostitution Laws Mean-spirited, Penalize Women' (2008) the Atlanta Journal-Constitution on March 14th, 2008. Available online at <[http://www.ajc.com/search/content/opinion/2008/03/13/spitzered\\_o314.html](http://www.ajc.com/search/content/opinion/2008/03/13/spitzered_o314.html)>

instead in the economic circumstances of women which lead to the lack of alternative choices.<sup>162</sup>

A particularly interesting account of the evaluation of the selling of one's body in the form of prostitution is Nussbaum's analysis of prostitution in comparison with other physical labour. In this sense, by examining the similarities between prostitution and six hypothetical accounts of other forms of labour, consisting of "1. A factory worker in the Perdue chicken factory, who plucks feathers from nearly frozen chickens", "2. A domestic servant in a prosperous upper-middle-class house", "3. A nightclub singer in middle-range clubs, who sings (often) songs requested by the patrons", "4. A professor of philosophy, who gets paid for lecturing and writing", "5. A skilled masseuse, employed by a health club (with no sexual services on the side)" and "6. A person whom [she calls] the "colonoscopy artist"; she gets paid for having her colon examined with the latest instruments, in order to test out their range and capability".<sup>163</sup>

In her examination, she concludes that all employed people accept money in return for some form of use of their bodies. Although she explains that certain stigmatisation may be valid in relation to some professions based on well-reasoned arguments. However, she explains that prostitution appears to be stigmatised in relation to other professions on the basis of class-prejudice and stereotyping, especially in relation to the criminalisation of prostitution and historic perceptions of immorality.<sup>164</sup>

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<sup>162</sup> Martha C. Nussbaum, 'Whether from reason or prejudice': Taking money for bodily services (1998) *Journal of Legal Studies*, 27, 2; Voice, P., Martha's Pillow: Nussbaum on Justice and Sex (2002) *Social Justice Research*, Vol. 15, No. 2, June 2002.

<sup>163</sup> Martha C. Nussbaum, "Whether from reason or prejudice": Taking money for bodily services (1998) *Journal of Legal Studies*, 27, 2.

<sup>164</sup> *ibid.*



In the process of the development and justification of her ideas, Nussbaum draws on the concepts of many of the mentioned philosophers in this paper, such as Mill, Kant, Rawls, Plato and Aristotle.<sup>165</sup>

#### D. REALISM

The core element of Legal realism is its challenge of the classical legal claims of legal institutions providing autonomous systems, self-regulating legal discounts which are untouched by politics. Similarly to Legal Positivism, Legal Realism examines the law purely as the commands of a sovereign, which in today's political environment is most commonly the state. However, contrary to positivists such as Austin, realists see this as a process which is achieved through the courts as mediums.<sup>166</sup> As the legislation deals with matters in relation to general classes of persons, things or actions, statutory wording needs to be kept general in order to achieve a broad application. This often means, however, that the texts lack precision.<sup>167</sup> This generality, thus, can open itself up to potential borderline cases emerging.<sup>168</sup> Accordingly, one of the main tasks of realists is to seek to uncover the uncertainties of laws. They argue that for any particular person in any particular factual situation, the law and the way it will affect the particular person in question is a matter for the courts to determine. Thus, the law for that particular subject will only come to exist after a court has ruled on the particular facts of the particular case.<sup>169</sup> Based on this idea, laws and statements of law are merely predictions of future court decisions.<sup>170</sup>

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<sup>165</sup> Martha C. Nussbaum, *Sex & Social Justice*. (New York: Oxford University Press) 1999.

<sup>166</sup> P.J. Fitzgerald, *Salmond on Jurisprudence*, Sweet & Maxwell, London, Twelfth edn., 1966, 35.

<sup>167</sup> *ibid.* 39.

<sup>168</sup> *ibid.*

<sup>169</sup> Jerome Frank, *Law and the Modern Mind*, London Stevens & Sons Ltd., 1949, p.46.

<sup>170</sup> *ibid.*

(I) *DETERMINING WHERE THE POWER TO INFLUENCE IS LOCATED:  
AMERICAN OR SCANDINAVIAN REALISTS*

Based on this, the American Realists are considerably sceptical about legal rules. In cases where a court needs to decide between certain alternatives, the outcome will heavily rely on certain characteristics of the members of the bench such as their social background, personality, gender etc.<sup>171</sup> Oliver Wendell Holmes Jr., one of the most significant representatives of this school of thought,<sup>172</sup> wrote in his book ‘The Common Law’ that,

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.<sup>173</sup>

Dean Roscoe Pound, explains accordingly, that judges should use wide discretion, recognise unique circumstances, employ flexible standards and be encouraged to achieve “free judicial finding[s] of the grounds of decision”; and that “certainty attained by mechanical application of fixed rules to human conduct has always been illusory”.<sup>174</sup> This statement indicates how Pound views the law as a form of social engineering, instead of legal imperatives which are obeyed by subjects due to fear of coercive sanctions.<sup>175</sup>

While the American realists predominantly looked into the way in which law is made and the way it ought to be made, the Scandinavian realists focussed on the way in which the law affects people’s behaviour and is able to change it. In this sense, the approach of this theory is to explain the force of the law in a scientific

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<sup>171</sup>P.J. Fitzgerald, *Salmond on Jurisprudence* (Sweet & Maxwell, London, Twelfth edn., 1966) 40.

<sup>172</sup> Steven J. Burton, *The path of the law and its influence: the legacy of Oliver Wendell Holmes, Jr.* (Cambridge : Cambridge University Press, 2007) 133.

<sup>173</sup> Oliver Wendell Holmes, *The Common Law*, (Macmillan And Co., 1911) 1.

<sup>174</sup> Jerome Frank, ‘*Law and the Modern Mind*’ (London: Stevens & Sons Ltd., 1949) 207.

<sup>175</sup> Krishna Iyer, V. R., *Justice at Crossroads*, (Deep & Deep Publications, New Delhi, 1992) 34.

manner, which is separate from the traditional metaphysical elements.<sup>176</sup> These scientific investigations have revealed that the force of law is a result of its psychological effect, which in turn is created by the ritualistic modes in which law is made. This includes both the process of legislation being approved by Parliament as well as judges making decisions. The four most well-known Scandinavian realist scholars are Axel Hägerström, Karl Olivecrona, Vilhelm Lundstedt, and Alf Ross.<sup>177</sup>

When seeking applications of the ideas of these theorists in current literature, it becomes apparent that there is little or no work which looks into the correlation between the ideas of Scandinavian realism and approaches to prostitution. The reason for this may be that the focus of realism is in the functioning of law itself and not the substantive elements of the law, which would be regarded as mere realist facts.

## CONCLUSION

The aim of this “roadmap” was to provide a guided overview of some of the most relevant concepts of jurisprudence in order to enhance efficiency when beginning to conduct legal theoretical research in the area of prostitution laws. Being able to initially determine whether the approaches being examined point towards the ideas of Natural Law, Legal Positivism, Critical Legal Studies or Legal Realism narrows down the research focus and prevents aimless and irrelevant research, which is not only time-consuming, but can also result in the loss of initial focus. Hereafter, a guided “tour” down the various paths of these four legal umbrella-theories has developed an understanding of the relevant concepts of various sub-theories, as they have developed from one another over the historic evolution of legal theory. It can be seen that legal theory has developed from a predominant Natural Law environment, to an increasingly positivist outlook on laws, that in recent decades

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<sup>176</sup> Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2013) 119.

<sup>177</sup> *ibid.*

has become increasingly critical. This, however, does not mean that the previous ideas have become obsolete; they have continued to be present in the underlying ideas of many contemporary approaches. In this sense, some essential ideas of Aristotle are clearly reflected in the theoretical ideas of Immanuel Kant, whose ideas have influenced the thoughts of feminist legal theorists, such as Catherine MacKinnon or Martha Nussbaum.

Although the “roadmap” has been based on a selected number of theories and theorists, it provides a foundation, from which one can proceed into a more in-depth analysis of the jurisprudence of prostitution laws and an understanding of their interplay in practice.