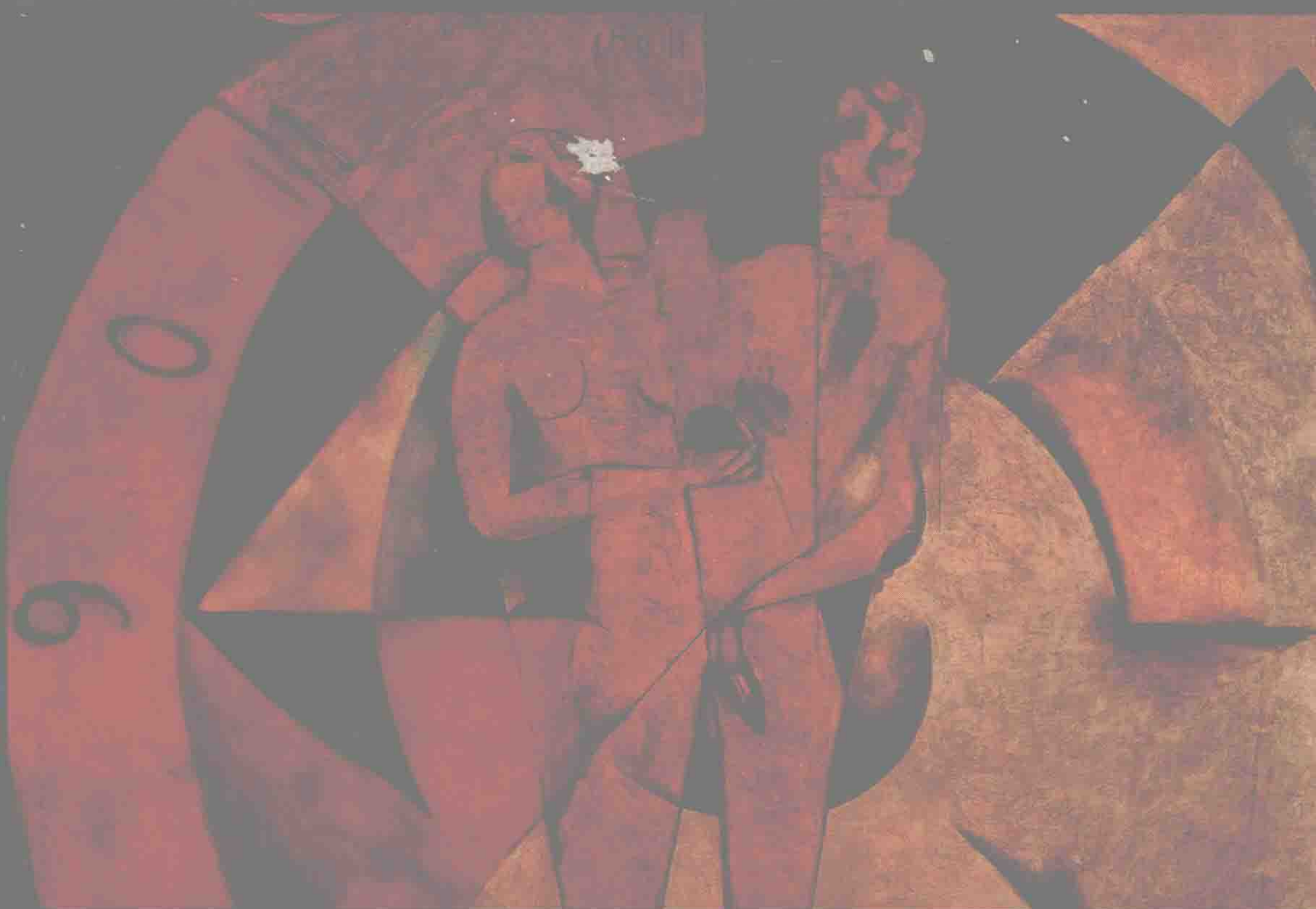


SEX AND REASON

RICHARD A. POSNER



R I C H A R D A. P O S N

Sex and Reason

H A R V A R D U N I V E R S I T Y P R E S S
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Pleasures are an impediment to rational deliberation, and the more so the more pleasurable they are, such as the pleasures of sex—it is impossible to think about anything while absorbed in them.

ARISTOTLE, *Nicomachean Ethics*

Introduction

Anyone in our society who wants to write about sex without being accused of prurient interest had better explain what the source of his interest in the subject is. In my case it is the belated discovery that judges know next to nothing about the subject beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary—especially the federal judiciary, with its elaborate preappointment investigations by the FBI and other bodies. This screening, along with the gap, for which the screening is in part responsible, in judges' systematic knowledge of sex, is a residue of the nation's puritan—more broadly of its Christian—heritage. Another residue is the large body of laws regulating sex which judges are called on to interpret and apply, and sometimes asked to invalidate.

Two events, occurring at the time that I was casting about for a topic for the Rosenthal Lectures at Northwestern University, set me on the research path that has culminated in this book. The first was an attempt to plug one of many embarrassing gaps in my education by reading Plato's *Symposium*. I knew it was about love, but that was all I knew. I was surprised to discover that it was a defense, and as one can imagine a highly interesting and articulate one, of homosexual love.¹ It had never occurred to me that the greatest figure in the history of philosophy, or for that matter any other respectable figure in the history of thought, had attempted such a thing. It dawned on me that the discussion of the topic in the opinions in *Bowers v. Hardwick* (the decision in which the Supreme Court in 1986 upheld the constitutionality of state laws criminalizing homosexual sodomy)² was superficial, although that did not

1. That is not all it is. Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, ch. 6 (1986). But it is an important part. Homosexual love figures largely in the *Phaedrus* as well, but as something taken for granted, not examined.

2. 487 U.S. 186 (1986).

mean the decision was incorrect. The second event was the decision of my own court to hear en banc (that is, before the entire court rather than, as is customary, a three-judge panel drawn randomly from the court's membership) a case involving the constitutionality of a state statute that had been interpreted to forbid striptease dancers to strip to the buff.³ Unusually for our court, the case generated six opinions covering fifty-three dense pages in the *Federal Reporter*. (The decision by the Supreme Court, reversing our 7–4 decision by a 5–4 vote, generated four opinions—none of which commanded the support of a majority of the justices.) It will be apparent to anyone who takes the trouble to read these opinions that nudity and the erotic are emotional topics even to middle-aged and elderly judges and also that the dominant judicial, and I would say legal, attitude toward the study of sex is that “I know what I like” and therefore research is superfluous.

I disagree. Because of the reticence that, though diminishing, still characterizes public discussion of sex in our culture, Americans tend not to be well informed about the subject. Of course, everyone who is or has ever been sexually active, and many people who have not, know something about sex. But that something is not enough to provide a solid basis for judgments of social policy, and such judgments are inescapable in our law. The reticence I have mentioned is an obstacle to research as well. Yet despite it there is a vast multidisciplinary literature on sex, a literature to which medicine, biology, sociobiology, psychiatry, psychology, sociology, economics, jurisprudence, theology, philosophy, history, classics, anthropology, demography—even geography and literary criticism—have all contributed. Much of this literature is genuinely scientific, and much that is not is nevertheless highly informative. One of my goals is to summarize its principal findings, as far as they bear on law, in a form accessible to the legal profession. The timeliness of such an effort requires little comment in view of the stress that has been placed on the already badly strained American legal system by such phenomena (many of them interrelated) as the AIDS epidemic; the abortion controversy; the homosexual rights movement (which is pressing for the repeal of sodomy laws, for allowing homosexuals to marry and to adopt children, and for eliminating discrimination against homosexuals by the armed forces and other employers); the sexual revolution of which homosexual advocacy is one component and rampant illegitimacy another; the moral majority's counterrevolution; surrogate motherhood; the controversy over federal funding of erotic art; and the concerns forcefully expressed by feminists about marital and date rape, sexual harassment in the workplace, sexual abuse of children, and pornography.

My larger ambition is to present a theory of sexuality that both explains

3. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (en banc), reversed under the name *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

the principal regularities in the practice of sex and in its social, including legal, regulation and points the way toward reforms in that regulation—thus a theory at once positive (descriptive) and normative (ethical). Students of sexuality recognize and deplore the lack of a rigorous and comprehensive scientific theory of human sexual behavior,⁴ but, perhaps misled by Aristotle's dictum that furnishes the epigraph for this introduction, have not sought assistance in theories of rational choice. I try to cure that oversight. Functional, secular, instrumental, utilitarian, the theory that I present relies heavily on economic analysis, heretofore applied rarely to issues of sexuality though often to related issues of nonmarket behavior, including marriage, the family, and family law.⁵ I shall call it the economic theory of sexuality.

On the positive side, the theory asserts the paramountcy of rational choice in volitional human behavior, which sexual behavior is. But it does not deny that sexual desire, including gender preference, is rooted in our biological nature, and so it does not deny the intense emotionality of the sexual act or quarrel with Aristotle's dictum. On the normative side, the theory is a libertarian—not to be confused with either libertine or modern liberal—theory of sexual regulation. Libertarianism—or, as it is sometimes called, classical liberalism—the philosophy of John Stuart Mill's *On Liberty*, can be summed up in seven words: "Your rights end where his nose begins." Government interference with adult consensual activities is unjustified unless it can be shown to be necessary for the protection of the liberty or property of other persons.

The economic theory is merely the latest in an endless procession of theories of sexuality: Thomist, feminist, Marxist, sociobiological, Freudian, constructionist—the list goes on and on. But I shall argue that the economic theory incorporates, integrates, and transcends the perspectives, insights, and findings of the other theories of sexuality that can fairly be described as either scientific or social scientific. The uncompromising, the truly unassimilable rival of the economic theory—deserving of the most careful consideration not only because of its intrinsic merits but also because it reflects the beliefs of most of the people in our society—is not scientific or social scientific; it is a heterogeneous cluster of moral theories. These theories, the work of Catholic theologians such as Thomas Aquinas, Catholic philosophers such as Elizabeth Anscombe, lawyers such as James Fitzjames Stephen and Patrick Devlin, neoconservatives such as Irving Kristol, and philosophers of liberalism from Immanuel Kant to Joel Feinberg and Ronald Dworkin, are not convergent—

4. See, for example, Paul R. Abramson, "Sexual Science: Emerging Discipline or Oxymoron?" 27 *Journal of Sex Research* 147 (1990).

5. No longer are explicit markets the sole domain of economics. For discussion and references, see my book *The Problems of Jurisprudence* 367–370 (1990). On the economics of marriage and the family, see Gary S. Becker's magisterial economic study *A Treatise on the Family* (enlarged ed. 1991). For an introduction to the economic analysis of family law, see my *Economic Analysis of Law*, ch. 5 (3d ed. 1986). None of these works contains an index reference to sex.

far from it. But they are at one in regarding moral and religious beliefs that are irreducible to genuine social interests or practical incentives as the key to both understanding and judging sexual practices and norms. This makes them incompatible with the broadly scientific outlook that informs the approaches I seek to recast in the mold of economics—incompatible even though John Stuart Mill is a patron saint of both liberalism and utilitarianism.

An approximation to a scientific, nonmoral outlook on sexuality is highly influential today in northern Europe, especially Sweden, Denmark, and the Netherlands, as well as in Japan and other areas of East Asia. The outlook has a weaker grip in southern Europe, but it is resisted most strongly by a diverse group of nations that includes the United States, Ireland, South Africa, Cuba, Saudi Arabia, and Iran. The pattern of acceptance and rejection is itself a challenge to the positive side of my theory. One is not surprised that a government should repress freedom in both the economic (narrowly conceived) and sexual spheres, as in Cuba (a reflection of the orthodox communist position since Stalin's day), or permit it in both spheres, as in Japan. But why Swedes should have more freedom in matters of sex than Americans but less economic freedom is a considerable puzzle, although I shall attempt an explanation.

Neither my theory nor its rivals are about sex *tout court*. They are about the social, including the legal, implications of sex—hence my frequent use of the term sexuality, implying concern with attitudes and customs as well as with practices. It is well known that laws punishing socially disfavored sexual behavior, with the partial exception of those regulating coercive sex, such as rape and the seduction of young children, are rarely enforced with even minimum effectiveness. Mostly they are dead letters, yet efforts to repeal them are resisted vigorously. We shall therefore have to consider the social function of the unenforced or radically underenforced law, as well as the relation—a staple in the discussion of sex laws, many of which are concerned with consensual and hence seemingly harmless although morally offensive conduct—between law and morals.

So: fact (background, history), theory, and regulation (legal and other) are the successive focuses of this book. But a more specific enumeration of its aims may be helpful.

First, to bring to the attention of the legal profession the rich multidisciplinary literature on sexuality—and to shame my colleagues in the profession for ignoring it.

Second, to demonstrate the feasibility and fruitfulness of an economic approach to the subject—more broadly of a functional approach in which insights are borrowed from a variety of fields but in which economics, the science of rational human behavior, provides the organizing perspective. The effort may seem quixotic, for it is a commonplace that sexual passion belongs to the domain of the irrational; but it is a false commonplace. One does not

will sexual appetite—but one does not will hunger either. The former fact no more excludes the possibility of an economics of sexuality than the latter excludes the possibility of an economics of agriculture.

My third aim is to expound a specific economic theory of sexuality, and as part of that project to derive hypotheses from the theory and confront them with data both quantitative and qualitative. All theories are tentative, a theory as novel as the economic theory of sexuality especially so. Nevertheless, I believe that much of the variance among different eras, cultures, social classes, races, and the sexes themselves in behavior, attitudes, customs, and laws concerning such aspects of sexuality as premarital sex, homosexuality, polygamy, prostitution, rape, contraception, abortion, infanticide, pornography, public nudity, and child sexual abuse can be explained, and changes in them predicted, by reference to the handful of variables that the theory identifies as likely to be significant. The principal variables are the occupational profile of women and—a related but not identical factor—women's economic independence, plus urbanization, income, the sex ratio, and scientific and technological advances relating to the control of fertility and to the care of mothers and infants. There are causal relations among these variables as well, which I shall discuss from time to time.

The reader may be primed by mention of economic theory to expect a book bristling with mathematical formulas and forbidding jargon. That is not the character of this book. I do not question the value of formal theory,⁶ but the theory expounded in this book is informal and nontechnical. Yet it has considerable explanatory and suggestive power. It can illuminate questions about human sexuality such as why the morality of modern Sweden is different from that of medieval Europe and why both are different from that of ancient Greece; why Roman women were sexually freer than Greek women and Victorian women were less free sexually than women in eighteenth-century England; how income and wealth affect sexual morality differently; why cities are traditionally believed to be centers of vice; why an increase in the effectiveness of contraceptive methods results in a higher frequency of coitus; why black men in the United States are less likely than white men either to undergo voluntary sterilization or to use condoms; why the nature of the sexual services offered by prostitutes has changed since the Middle Ages; why marital rape is increasingly a crime; and why in some societies a homosexual tends to be thought of primarily as a person who has a strong preference for same-sex relations whereas in others he is thought of as a "normal" person who commits unnatural acts because of lust or other wickedness.

Explanatory power is only one test of a theory's fruitfulness. Another is its

6. Powerfully defended—with significant reservations—by a leading mathematical economist, Gerard Debreu, in his article "The Mathematization of Economic Theory," 81 *American Economic Review* 1 (1991).

power to generate counterintuitive (hence novel, nontrivial, nonobvious) hypotheses that can be tested empirically and that do not flunk the test. A number of such hypotheses are proposed in this book (the qualification “other things remaining unchanged” should be understood with respect to each of them), including these:

- The AIDS epidemic, by making homosexual activity unavoidably more costly—whether through the greater cost of AIDS or the lesser cost of switching to safe sex—has reduced the amount of that activity, not just the amount of unsafe sex. It has also reduced the number of illegitimate births and increased the number of legitimate ones.
- Effeminate heterosexual men, handsome heterosexual men, and “macho” heterosexual men have, on average, more homosexual experience than noneffeminate, nonhandsome, and nonmacho heterosexual men.
- If a city, having attracted a large number of homosexuals, stops growing, the percentage of homosexuals will continue to increase.
- Homosexuality, but not (female) prostitution, is more likely to be approved or tolerated in a polygamous society than in a monogamous one.
- A larger fraction of female than of male homosexual activity is opportunistic or situational rather than driven by a strong preference for same-sex over opposite-sex relations.
- An opportunistic male homosexual will prefer boys to men, a “real” homosexual men to boys.
- The percentage of Roman Catholic priests who are homosexual has risen since the Middle Ages.
- Black men are less likely to rape or to abuse children sexually than white men are.
- The external costs of venereal diseases are lower than those of other infectious diseases.
- In Sweden the increase in women’s market earnings has generated an even larger increase in women’s full income—the sum of their own market earnings and of contributions in cash and services from men.
- The incidence of adultery relative to fornication has declined over time.
- Polygamy, *de jure* or *de facto*, will be found in a society of noncompanionate marriage; monogamy, in a society of companionate marriage; and monogamy with an admixture of *de facto* polygamy, in modern Western nations, where marriage is companionate but many women have children outside of marriage because they are no longer dependent on men.

- Clitoridectomy (removal of the clitoris) and infibulation (sewing up the entrance to the vagina) are more common in a polygamous than in a monogamous society.
- Both a sexually repressive society and a permissive one will have a lower incidence of rape than a society in which repressive and permissive attitudes toward sex are mingled.
- Recent technological advances in reproduction, such as artificial insemination and in vitro fertilization, have increased the full income of women relative to men.

My fourth aim is to use social scientific knowledge of sexuality, including the knowledge generated by economic analysis, as a foundation for proposing reforms in law and public policy. Although I make some concrete suggestions for reform, the emphasis throughout the book is on positive (descriptive) rather than normative (prescriptive) analysis. Sound reform depends on knowledge to a degree that lawyers do not always appreciate. We shall see that the Supreme Court's decisions on sexual privacy are not only poorly reasoned but poorly informed.

My remaining aims are to demonstrate the inadequacy of conventional legal and moral reasoning in dealing with complex, emotion-laden social phenomena such as sexuality; to illuminate general issues concerning the nature, causes, consequences, and justification of laws and of morals; and to contribute to the blurring of the lines that separate academic disciplines.

A WORD MORE on organization. Part I presents essential background of a historical, anthropological, and sociological character. Its three chapters take up the history of scholarship on sexuality, the variance (historical and cross-cultural) in human sexual customs and regulations, and the laws regulating sex. To help find the pattern in those laws, I develop in Chapter 3 an index of relative sex-law severity by comparing a nation's or a state's punishments for the principal sex offenses to its punishments for other offenses.

Part II describes and tests the economic theory of sexuality and compares it with the principal moral theories of the subject. I begin, however, with the biology of sex (Chapter 4). I do this to mark off the biological or determined from the rational or chosen (in a sense to be explained), the latter being the domain of economic theory, and also to note the parallels between the biological and economic approaches to the subject. I see biology as explaining the drives and preferences that establish the perceived benefits of different sexual practices to different people. Although nothing essential to the economic analysis depends on whether these drives and preferences are indeed determined by our genes or whether instead, as some social constructionists believe, they are cultural artifacts, my own view is that an integrated biolog-

ical-economic theory of sex (call it the bioeconomic theory, with the economic component the one emphasized in this book) is the most promising theory of the subject that we are likely to have for some time. Chapters 5 and 6 develop the positive side of the economic theory, emphasizing the role of what I call the effective sex ratio, urbanization, and women's occupational profile in explaining the extent of sexual liberality in a society. Chapter 7 presents the normative side of the economic theory and also considers the political economy of sex regulation, that is, the political forces that sometimes guide the regulation of sexuality into the optimal path laid out in that chapter and sometimes deflect it from that path. Chapters 5 through 7 are the theoretical core of the book.

A number of applications of the economic theory are set out in Part II, and several are then examined in depth in Part III; these more detailed examinations (which emphasize regulatory issues) reveal new strengths, but also limitations, of the economic approach. Economic analysis cannot, for example, solve the moral issue of abortion; but it can help to clarify it. The order of chapters in Part III may seem random, but it is not. To lay the groundwork for a discussion of the judicial response to the sexual revolution (the subject of Chapter 12), I must explore (in Chapters 9 through 11) the regulatory questions raised by contraception, abortion, and homosexuality, for these are the principal subjects of the Supreme Court's sexual privacy cases. The last two chapters take up discrete but important areas of sexual regulation. Chapter 14 is about coercive sex, mainly rape and the sexual abuse of children. Chapter 15, a mirror image of Chapters 9 and 10, discusses not, as those chapters do, efforts through contraception and abortion to divorce sex from reproduction, but efforts through adoption and artificial insemination to divorce reproduction from sex. Such efforts drag in their wake significant ethical as well as economic issues.

The danger in using either the brief chapter descriptions just tendered or the table of contents with its chapter titles and subtitles as a guide to the book is that a number of topics are not confined to the particular chapter or subchapter the title of which mentions them. Homosexuality, for example, is discussed—from a historical, biological, economic, legal, and family-law angle (homosexual adoption)—in a number of chapters besides Chapter 11 ("Homosexuality"). Polygamy enters in Chapter 5 as well as in Chapter 9, abortion in Chapters 5 and 12 as well as 10, rape in Chapters 4, 5, 7, 13, and 14. Moral theories of sex figure prominently in Chapters 10 and 13 as well as in Chapter 8. Prostitution appears in a number of chapters. Theoretical issues crop up in Part III as well as Part II, regulatory issues in Part II as well as Part III. More than in many books, the index is an essential reference tool.

A word about the boundaries of my subject and specifically its relation to the study of the family on the one hand and of population on the other. As demonstrated by Gary Becker's book on the family (cited in note 5), it is

possible to analyze the family without explicit consideration of sex. Of course, sex is in the background, because a basic function of the family is procreation, and, at least until recently, procreation required sexual intercourse.⁷ Discussions of marriage cannot avoid topics such as impotence and adultery. Similarly, discussions of fertility by demographers cannot avoid topics such as contraception that are central to the study of human sexuality. And, on the other side, it is impossible to consider sex as a *social* phenomenon, as I do in this book, without bringing in the family and fertility, since so much regulation of sex is concerned with preserving and strengthening the family, or at least particular kinds of family, and some of that regulation has been explicitly concerned with the consequences for population. Nevertheless, the family, fertility, and sexuality are distinct even though overlapping subjects. It makes a difference whether one is interested in the family as such, the growth (or decline) of population as such, or sexual relationships as such. To the student of the family, homosexuality is of peripheral interest; Becker's book contains but two brief mentions of the topic. To the demographers, the regulation of homosexuality is evidently of no interest, for the only mentions I have seen of the topic in discussions of population—apart from a very fleeting mention by Malthus (see Chapter 1)—are by Aristotle and Heinrich Himmler. But to the student of sexual relationships, homosexuality is of central importance; indeed, it is the subject of the vastest literature in the domain of sexology, as scholarly (and sometimes not so scholarly) writing about sex is called. Similarly, prostitution is of some interest from the standpoint of family and demographic studies, but not much; yet as a significant and much-regulated form of sexual relationship it is of major interest to the student of sexuality. An even clearer example is pornography: a topic of considerable interest to the student of sex but of virtually no interest to the student of the family and, I am sure, of absolutely no interest to the student of demography.

But there is much overlap among the three areas of inquiry. Polygamy illustrates this point. The polygamous organization of families is a focus of Becker's book. But the rejection of polygamy by Christian societies (with a few exceptions, of which the best known is Mormon society in the nineteenth century) is a notable example of the Christian effort to confine sexual activity to monogamous marriages, so it receives attention in this book as well. I am hugely indebted to Becker and other economists whose studies of the family and fertility have provided me with essential tools for the economic study of sexuality, but I emphasize that these are separate inquiries. Moreover, my analysis is not exclusively economic. It draws heavily on other disciplines.

Because sex is not a fully respectable subject for public discussion in the United States (at the same time it permeates the popular media, and for that

7. Although successful artificial insemination of humans goes back to the eighteenth century, the procedure was rare until this century—in fact is still quite rare. See Chapter 15.