

COMMENTARY

ON *Sex and Reason*

THE five following commentaries continue the debate concerning human sexuality and its regulation begun by Judge Richard Posner in his recent book, *Sex and Reason*. The first three commentaries, by Professors Katharine Bartlett, Ruthann Robson, and Martha Albertson Fineman, respond generally to Judge Posner's book and specifically to his application of economic principles to sexuality. A commentary by Judge Posner follows in which he responds to these three commentaries and to a previously published review of *Sex and Reason* written by Professor Gillian Hadfield. Professor Hadfield then presents the final commentary, in which she defends her analysis of Judge Posner's theory of sexuality against the criticisms Judge Posner presents in his commentary.

THE EDITORS

RUMPELSTILTSKIN

*Katharine T. Bartlett**

A beautiful maiden must prove to the king that she can spin straw into gold or her father, who had boasted to the king of her ability to do so, will die. Locked overnight in a room full of straw and with a spinning wheel, the maiden finds herself forced into a bargain with a mysterious stranger. In each of three successive evenings, the stranger transforms a roomful of straw into gold, in exchange first for a ring, then a locket, and finally the promise of her first-born child. The king is pleased with the gold, whereupon he fulfills his promise to marry the maiden. The new queen appears destined for a life of royal bliss, until her first child is born and the mysterious stranger returns to claim the child. The queen is understandably distraught, whereupon the stranger renegotiates the deal, telling the queen she may keep the child if she guesses the stranger's name in three days. Despite the help of her servant, who tirelessly searches the kingdom for all possible names, the queen is unable to guess the stranger's name. The night before the expected day of reckoning, however, the servant finds Rumpelstiltskin deep in the woods, chanting around the fire a song of anticipated triumph that gives away his name. The servant rushes back to report to the queen who, the next day, names Rumpelstiltskin and lives happily forever.

THE FATHER'S BOAST

IN Judge Richard Posner's *Sex and Reason*, Chicago School economics meets heterosexual mating, homosexuality, surrogacy, rape, pornography, nude dancing, and a variety of other matters relating one way or another to sex. Not surprisingly, in Posner's script, this match promises dividends and many happy returns. Posner claims that sexual

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behaviors, like marketplace transactions, are adaptive responses to the conditions and constraints within which individuals rationally pursue their own, self-interested preferences. Since individuals are the best judges of their own preferences and can be counted upon to pursue these rationally, society is best off when it imposes the fewest possible limits on sexual behaviors. Some limits may be required to prevent unacceptable costs to third parties ("externalities"). Limits on the sexual behaviors of all based on the morality of some, however, impede the pleasure-maximizing strategies of individuals whose behavior is not harmful to others. Thus, at the heart of Posner's theory is the proposal that sex regulation must pass the test of "moral indifference."

Although I agree with some of the proposals to deregulate sex that Posner offers, I find quite troubling the economic (or "functional") approach to sex regulation that he propounds. I have two major objections. First, Posner applies his approach by taking as givens most aspects of the social arrangements he purports to examine. By his theory he explains and thereby justifies, but rarely challenges, the priorities and conditions under which individuals form (or attempt to form) sexual relationships with one another. Posner's theory allows no critical purchase on these priorities and conditions, except to allow for the removal of barriers that may inhibit men and women from doing that which, by his analysis, they already are inclined to do.

My second objection, which is related to my first, is that Posner's theory of rational sex presupposes and thus perpetuates an impoverished, and impoverishing, view of the individual. In particular, Posner's analysis fails to recognize various aspects of individual and collective identity, upon which (for better and for worse) many visions of human nature and human flourishing depend. At the same time, his insistence upon "moral indifference" masks judgments about what counts as rational that incorporate some versions of the human good and reject others. Thus, Posner's analysis errs even on its own terms, failing to value dimensions of human experience that many individuals value highly and privileging, in the name of moral indifference, one particular set of moral principles over others.

Posner's economic theory of sex turns on an understanding of self-interested human motivation and behavior for which there appears ample evidence of the sort Posner amasses. But many human stories, like even simple fairy tales, have subtexts that may be too complicated for single-theory explanations, economic or otherwise: why did the maiden's father brag to the king about something that could be so eas-

ily proved wrong? Why would a king choose his bride based on abilities he would never have her exercise again? Why, when Rumpelstiltskin had established his entitlement to the queen's child, did he give her, with no additional consideration, a way out of her bargain? What made the queen's servant willing to work day and night, combing the entire kingdom for the proverbial needle in a haystack? Why, when the servant found Rumpelstiltskin, was the stranger gleefully chanting around the fire, inadvertently giving away his secret? Why did Rumpelstiltskin keep his last promise? Why have many of us grown up expecting that once safe with her child and her husband, the king, the queen would live happily ever after?

THREE ROOMS OF STRAW

Posner's theory of sex functions by (1) identifying the preferences men and women have with regard to sex; (2) analyzing the process of rational decisionmaking in which individuals will engage in order to obtain their preferences; and (3) coordinating human preferences and rationality with the social goals one might hope to achieve through sex regulation. In this section I will explain the role of each of these factors in Posner's model. In later sections I will challenge the description Posner gives of his own position as one of "moral indifference" and explore the limitations of Posner's analysis for understanding and promoting the possibilities for human flourishing.

(1) *Sexual Preferences*. Posner's assumptions about what motivates individuals with respect to sex are familiar and strongly gender-differentiated. A man wants sex, as much of it as possible, usually with a woman. A man also places a high value on knowing with certainty who are his biological issue, and thus he values a woman willing to restrict her mobility and independence so as to limit access by other men who might inseminate her. A woman, in contrast, wants her children to survive and since she apparently cannot accomplish this on her own, she seeks, above all else, a single strong and reliable (male) mate to help and protect her.

Posner's explanation for these preferences is sociobiological.¹ The survival of the species requires successful reproduction. Male sex organs enable men to reproduce with a single act, which can be repeated over and over throughout a man's life; frequent sex enhances the inci-

1. Sociobiology "seeks genetic explanations for social behavior and institutions." RICHARD A. POSNER, *SEX AND REASON* 20 (1992). Posner's sociobiological analysis is concentrated at *id.* at 88-98, 108-10.

dence of self-reproduction, and a strong sex drive increases the likelihood of frequent sex. Thus, natural selection processes have favored a strong male sex drive. At the same time, since men don't have to worry about the incapacity of pregnancy, natural selection processes also have stimulated their specialization in "full-time . . . physically demanding activities, such as hunting and defense."²

The biological role of women in reproduction has necessitated different genetic specializations. Since women can produce only one child every nine months, frequent sex and a strong sex drive are not important. At the same time, women's physical vulnerability during pregnancy and thereafter has made a woman's ability to attract a mate who could protect her very important. The ability to nurture and attend to the caretaking of her children while her mate was engaged in hunting and defense has also been very important. This is why, while men as a sex have developed a strong sex drive and defense capacities, women as a sex have acquired genetic predispositions toward sexual passivity, dependence, concern for sexual attractiveness, and nurturing.

Posner insists that his biological analysis, while consistent with a functional theory of sex, is not necessary to it,³ and that the line between the biological and the cultural in sex is "a detail from the standpoint of economic analysis."⁴ Nevertheless, he repeatedly returns to the biological in order to strengthen his arguments that the motivations he describes are less malleable than others (especially feminists) might think. Most important in this theory is the inevitability and unchangeability of the all-powerful male sex drive which somehow or other must be satisfied—by heterosexual sex (forced or otherwise), homosexual sex, or masturbation (with or without pornography). By homosexual sex, Posner refers mostly to male homosexuality, and his analysis of this subject shows both the importance of biological factors to his theory and also how easy it is to manipulate these factors to fit his view of the world. Because "true" homosexuality is biologically determined, Posner reasons that penalties for homosexual practices only add to homosexuality's burdens without any corresponding benefit to society, i.e., without any reduced incidence of homosexuality.⁵ On the

2. *Id.* at 90.

3. *Id.* at 88.

4. *Id.* at 110.

5. Some "opportunistic" homosexual behaviors, engaged in by heterosexuals who find the costs of heterosexual sex too high, might be affected by regulation, *id.* at 298, but even these behaviors are the result of the underlying biologically based male sexual urge.

other hand, Posner concludes that it is appropriate for society to withhold its endorsement of homosexual marriage and disfavor child custody by homosexuals, because the (biologically determined) male sexual strategy of frequent sex and the inability of homosexual couples to have their own (biological) children make male-male relationships less satisfying and less stable than male-female relationships⁶ and thus, impliedly, less secure for children.⁷

Posner's analysis of parenting roles also shows the important and slippery role genetic factors play in his analysis. It is female reproductive biology that sets in motion female concern about security for her children and thus the desire to attract and settle down with one reliable (male) mate. It is male reproductive biology that creates uncertainty, and thus the need for assurances about who the man's "real" children are, which in turn sets up the scenario in which it makes (biological) sense for the male to negotiate his mate's monogamy, immobility, and dependence.

When it comes to explaining why biological parents are the optimal caretakers of children, Posner finds (in *both* parents this time) the genetic stimuli to identify their own welfare with that of their children and thus to pursue the children's welfare even when such pursuit is in tension with other, competing self-interests of the parents.⁸ But Posner favors a freer adoption market, and so must explain why adoptive parents are also worthy parents. He barely flinches. The genes can be fooled, he states (several times), so much so that it turns out that the biological programming to attach to children occurs even absent the genetic bond. "The human infant's need for protection has resulted in natural selection in favor of people who not only find infants cute, adorable, but also will bond with them."⁹ It would seem there is little that biology cannot explain.

Posner's assessment that the line between the biological and the cultural in sex is "a detail" is misleading, although in a perverse way, quite valid. It is misleading in the sense that the book would not be intelligible without the scientific-like certainty and fixity that biology appears to provide. It is crucial to Posner's theory that men and women

6. *Id.* at 305-06.

7. *See id.* at 417-20. Posner does not actually rely upon the instability of male-male relationships to justify society's disfavor for child custody by homosexuals. He states merely, "We do not have enough scientific evidence on the consequences of allowing homosexuals to raise children to be able to scoff confidently at the widespread intuition that it is a bad thing." *Id.* at 419.

8. *Id.* at 189.

9. *Id.* at 406.

can and should be viewed simply as who they are, with motivations and preferences that are fixed, subject not to social factors (such as advertising, personal relationships, public leadership, or law), but only to evolutionary forces that work so slowly as to be irrelevant for policy purposes. This view is not supported in Posner's theory except by his biological explanations. Posner's insistence that the biological foundation of his theory is not crucial to it is valid in an unintended sense, however, for in being able to construct *some* biological explanation for *any* sexual practice or strategy, Posner stretches beyond recognition, and thus renders meaningless, the distinction between biology and culture. By rendering this distinction meaningless, he establishes the inevitability of the sexual realities he describes and supports. In short, the line between biology and culture does not matter for Posner because his assumptions about what is natural and inevitable (the biological) closely match his assumptions about appropriate social arrangements (the cultural). To explain one is to defend the other.

(2) *Rationality*. Just as the motivations of the human subject are givens to be reckoned with but not changed, so also the processes by which individuals pursue the satisfaction of their preferences are, for Posner, foreseeable and stable. Individuals pursue rational strategies to maximize their own self-serving, profit-maximizing ends. Self-servingness and rationality are both critical. Individuals do not act on behalf of others unless they perceive that action to be, on balance, beneficial to them. And their self-interested pursuit is a rational one, meaning they engage only in behaviors for which the benefits actually outweigh the costs.

In determining the costs of certain preferences, Posner assumes that individuals are intuitively quite sophisticated about such matters as "search costs." If search costs are too high, an individual may "substitute" an inferior, but less costly, alternative. The principles of search costs and substitutability explain for Posner how different social circumstances and different rules about sex affect the sexual choices that individuals make. Thus, for example, a man may prefer a wife to satisfy his sexual needs (including raising his children), but if the search costs are too high—if, for example, he is too unattractive to find with only moderate effort the kind of mate he desires, or if he is physically confined in prison—he may substitute occasional, paid sex with prostitutes, sex with another man ("opportunistic" homosexuality), or masturbation (for which the search costs are zero, although there may be

other costs, such as costs of concealment or guilt).¹⁰

Search costs and substitutability principles also explain for Posner such matters as why homosexuals tend to move to urban environments. A low percentage of the population is homosexual, and if homosexuals spread themselves evenly throughout the population, it will be harder for homosexuals to find each other. When search costs for homosexuals are too high, they are likely to make inferior substitutions, like heterosexual marriage.¹¹ Under the same principles, couples that desire more information about each other before marrying will prefer cohabitation before marriage. If premarital cohabitation is discouraged or forbidden, the costs of marital search are higher, and as a result individuals are likely to enter into less satisfactory marriages.¹²

Posner's efforts to establish the rationality of sexual actors have an after-the-fact, or circular, quality. By initially posing human rationality, Posner proceeds to link the sexual behaviors in which individuals engage to the social and legal contexts in which they find themselves in a way that seems to prove what was initially hypothesized, i.e., their rationality. Before exploring this point further, it is important to clarify just where Posner seeks to take his theory.

(3) *The Sexual(ly) Free Market*. Posner might have stopped at setting forth economic principles that could be used by policymakers with different objectives to predict outcomes within, and thus to select between, alternative regulatory approaches. He goes further, however, committing himself to a set of free market ideals based on the conviction that in sex, as in commerce, the interests of society are met best if individuals are given the freest possible rein to act the way they act, pursuing their own self-interested preferences through their own self-referential means, constrained only to prevent unacceptable harm to others.

As to the details, Posner admits that his economic theory "does not draw a satisfactory line between self-regarding and other-regarding conduct,"¹³ and thus that one must look outside the theory itself to decide which behaviors are unacceptably harmful to others. He insists, however, that these lines can be drawn on morally indifferent grounds, without regard to such irrational factors as ideology, tradition, superstition, or morality. Moral indifference becomes, then, the centerpiece of

10. *Id.* at 119-22.

11. *Id.* at 126-29.

12. *Id.* at 120.

13. *Id.* at 438.

his theory of sex regulation.

Posner gives many examples of what he means by moral indifference and reason. He concludes, for example, that a statute forbidding use of contraceptives by teenagers is not sound because, although it deters premarital sex, this sex is objectionable only by some moral and religious lights; separated from these unnecessary and undesirable restraints, premarital sex is "a generally harmless source of pleasure."¹⁴

Posner also dismisses religion-based objections to abortion on rational grounds. The Roman Catholic Church has failed consistently, according to Posner, to afford fetal life the same moral value as a child's life. In so doing, it reneges on an assumption crucial to the anti-abortion position, "which is that a fetus is indistinguishable from a child."¹⁵ The fact that, as an empirical matter, women make decisions about abortion based on economic reasons, not moral ones, apparently verifies the irrationality and dispensability of the latter.¹⁶

Indeed, Posner claims to undermine religion altogether as a source of authority on questions relating to sex. He delivers not one stunning blow, but a series of piecemeal attacks. He argues, for example, that some moral theories, like Naziism, and religious theories, like Anita Bryant's theory that homosexuality is immoral, can be recast in terms of factual propositions that can be disproved.¹⁷ He argues that some religions, like Christianity, can be shown to be based on ideas of a distinctly human nature that do not compel the particular type of sexual morality for which they stand.¹⁸ He argues that religious belief is "plastic," emanating not from "authoritative texts" but from religious institutions responding to social concerns.¹⁹ And he argues that since there are many religions, people can and do choose the religion that meets their wants, rather than a need for the truth.²⁰ Together, from the accumulation of these rational arguments, it follows for Posner that religion does not provide "an adequate set of reasons for either retaining or overthrowing the traditional, and today embattled, morality."²¹

14. *Id.* at 330.

15. *Id.* at 280, 279-81.

16. *Id.* at 278-79, 281. Having dismissed these moral objections, Posner is left assessing the benefit of prohibiting abortions by multiplying "the value of each fetus saved times the number saved" and measuring that calculated benefit against the costs of enforcing the prohibition and the costs of illegal abortions. *Id.* at 286.

17. *Id.* at 222-24.

18. *Id.* at 227-28.

19. *Id.* at 237.

20. *Id.*

21. *Id.*

I question Posner's easy dismissal of morality as a basis for sexual regulation, and I question, in particular, Posner's claim that rules of sexual conduct can (and should) be determined on morally indifferent grounds. In the next section, I focus on what is hidden in the claim of moral indifference, and in the succeeding section I explore what is left out of the claim.

TURNING STRAW INTO GOLD

Posner claims that when reason is morally indifferent, it holds answers to otherwise irresolvable conflicts about the appropriate limits of sexual behavior. Yet it is clear all along the spectrum of possible applications that Posner's reason cannot operate in a morally indifferent way. At one end of the spectrum, William Eskridge already has demonstrated in his review of *Sex and Reason* that Posner's analysis of the "grimness" of life for homosexuals, offered to justify his resistance to same-sex marriage, reflects the moralisms and "1950s liberalism . . . of the Nelsons and the Cleavers as the happy nuclear family."²² I will concentrate on the other end of the moral spectrum, where the incapability of moral judgments in Posner's analysis is even more apparent.

Posner's conclusion that teenage sex is a harmless source of pleasure is a useful starting point. This conclusion is possible only if one disregards completely the preference many individuals have for living in a society that treats sexual intercourse as a serious, mutual commitment between consenting adults. The harm of having this preference frustrated is acute especially perhaps for parents who, in their struggle to instill a preference for committed sex in their children, must counteract "loose" societal attitudes about sex and such affronts to their sensibilities as free access to contraceptives. However reasonable Posner's arguments about premarital sex may be to Posner, or to anyone else, they are not likely to be recognized as rational, or as morally indifferent, by those who believe that premarital sex is a surefire way to hellfire and damnation. Ignoring the preferences of such individuals, which economic theory purports to take at face value, Posner's "reason" is nothing other than a trumping of their morally based assessment of harm with his own.

Posner's dismissal of religion-based objections to abortion with ra-

22. William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 *YALE L.J.* 333, 365-66 (1992).

tional, morally indifferent reasons also cannot pass as morally indifferent. Even if inconsistency in moral claims made about fetal life can be shown, for example, this would hardly negate the strong preferences that many individuals express (whether or not rational by Posner's lights, or by mine) to live in a society that, like they themselves, puts a high (if not the highest) value on fetal life. In Posner's own terms, why else would they fight so hard to oppose abortion? Posner's refutation of their opposition, from *their* point of view, is as morally charged as that opposition.

Posner cannot get away from his own values, and his display of them reveals a great deal about what he takes for granted in existing social structures. Some values are explicit but undefended. He concludes, for example, that while homosexuality is irrepressible, it is undesirable. Thus, despite his libertarian impulses, he insists without explanation that a lesbian mother who would prefer her own daughters to be lesbians "cannot automatically be assumed to be a fit parent."²³

Other values are explicit and appear to be defended, but the defense is loaded with unexamined assumptions or unstated values that are not defended. For example, Posner explicitly opposes religious and legal barriers to contraception, and he defends his opposition by relying on the value of companionate marriage:

[B]y reducing the number of children, contraception might be thought to reduce the gains from marriage to the husband, and especially to the wife, whose economic dependence on her husband, and hence her desire to remain married, is apt to be greater the more children the couple has. . . . On the other hand, contraception encourages and strengthens marriage, especially companionate marriage, by reducing the cost of marital sex and by making the wife more companionable; no longer need she be continually pregnant and preoccupied with children to the exclusion of her husband.²⁴

It is hard to view Posner's preference for companionate marriage as a controversial choice on his part, although that hardly makes it a mor-

23. POSNER, *supra* note 1, at 419. Elsewhere Posner does offer an argument to support the proposition that male-male unions are less stable than male-female unions, *id.* at 305-06, but because the argument turns on the roving male sexual impulse, it would not (even if true, which depends on the value judgments with which one starts) support a value judgment based on the undesirability of lesbian unions.

24. *Id.* at 268-69.

ally indifferent one.²⁵ What is striking about this passage is the extent to which, even as it affirms companionate marriage, it remains locked in a view of marriage as an arrangement in which the man must be manipulated into making the marriage commitment, while the wife must be made desirable (or here, "companionable") enough to keep him.

What is striking also is that here, as throughout the book, while his version of companionate marriage is taken for granted as a desirable goal, other possible goals are treated either as not worth mentioning, or as significant only in an explanatory sense, rather than as goals worth pursuing for their own sake. For example, Posner mentions women's "changing occupational role[s]" in this passage, as elsewhere in his analysis,²⁶ only as a background circumstance—a reason for something else happening—rather than as an objective against which the wisdom of a particular regulation about sex might be measured. Other goals that he also fails by omission to value in deciding how to regulate sexual behavior include the self-respect of women and genuine tolerance between those with different moral views. I show below what some of these potential goals have in common.

STRIKING THE BARGAIN

What is perhaps most disturbing about each aspect of Posner's theory I have discussed thus far—his assumptions about male and female sexual preferences, his account of rationality, and the social values he explicitly or implicitly affirms—is the rudimentary concept of individual and social identity it reflects. Posner's individual is one who does not act on commitments when doing so may bring fewer benefits to the individual than the alternatives. Posner's individual does not have an identity, a history, or a set of traditions that would lead her to pursue goals or engage in behaviors so that she can be true to some view she has of herself or her community, for its own sake.²⁷ She does not have a coherent view of who she is, or who she would like to be, and thus has no vision of herself to be loyal to, even if she wanted to be

25. It represents a stand, for example, against arranged marriages and in favor of divorce.

26. See, e.g., POSNER, *supra* note 1, at 86, 171, 173-78, 195-96, 252, 436.

27. Posner's consideration of identity as a factor affecting an individual's rational choices arises only in connection with the individual's unchangeable, biological drives. Thus, for example, he writes that homosexuals might forego the opportunity to seek a scientific "cure" for homosexuality, despite its social costs, because "being homosexual is part of their identity." *Id.* at 308. He does not recognize the potential ways in which one's *social* identity might influence one's "rational" choice.

loyal to herself, which she apparently does not. While her only commitment is to herself, she has no sense of herself, except perhaps as an agent of personal desire and consumption.

Writing off, as irrational, sexual preferences and strategies linked to one's sense of identity means writing off a spectrum of motivations and choices that I would argue are basic to many individuals' notions of human flourishing. Posner's brand of rationalism, for example, makes true altruism impossible. Behind every apparently altruistic behavior must be self-interest. Thus, I suppose Posner would say, an individual who keeps vigil over a dying spouse must do so to gain the admiration of friends or family. A mother who forgoes certain opportunities for sexual adventure to be with her child does so in order that her vicarious existence through that child will be made richer by the child's increased well-being. An individual who chooses to be sexually faithful to a spouse does so only because forbearance from other sexual liaisons enhances the possibility of reciprocal loyalty. (Why do individuals prize loyalty to begin with? Not, it appears, to affirm a particular view of oneself, but rather, primarily, because it makes the male more secure that the children he is supporting are his own, and because it makes the female more secure that her mate will stay on to protect her.)

Can this be all there is? I, for one, doubt it. To rationalize all behavior as self-interested in this way is to miss the opportunity for more nourishing explanations of human behavior that draw on socially acquired identities and commitments. An individual's choice to be sexually faithful, to favor the welfare of one's child over oneself, or to sacrifice one's own career for a partner's may result in some foreseeable gain to that individual, but it is unlikely that the behavior can be fully accounted for without factoring in motivations relating to one's sense of oneself, one's traditions, and one's community that are not accounted for in Posner's model of rationality.

If Posner cannot account for irrational altruism, neither can he account for its near opposite—irrational hate or prejudice. Most interesting in this regard is his effort to explain away misogyny as an explanation for human sexual behaviors, favoring instead explanations that view such behaviors as rational, strategic adaptation to particular conditions:

[M]any legally sanctioned or even compelled practices that are superficially misogynistic may actually be in the best interests of women. The most dramatic example is female infanticide in societies in which women's opportunities are severely

limited (not necessarily as a result of discrimination). In such societies, infanticide may increase the number and wealth of females who survive to adulthood.²⁸

This passage strains Posner's own view of self-interest in many ways.²⁹ What is noteworthy for my purposes is Posner's failure to attach any significance to the likely diminished quality of life associated with being a female in a society that chooses to kill some individuals *on the basis of their femaleness*—in other words, to the diminished value of one's own identity. Posner appears not even to wonder whether "value" may be lost when an aspect of oneself considered basic, immutable, and defining is also considered inferior, undesirable, and even a reason for one's termination.

Posner makes the same mistake, in reverse, when he goes on to analyze the costs of misogyny to men:

The second problem with the suggestion [that sex laws must be a successful effort by men to redistribute wealth from women to themselves] is that neither all men nor all women are identically situated with respect to the benefits and costs of discrimination against the other sex. Fathers of daughters do not benefit from discrimination against women, and we have seen that the Greek and Roman law of dowry sought to protect the interests of such men. Male employees may gain from excluding women from certain employments, but male employers may lose from such exclusion. Some women benefit from sexual freedom, others lose. And women linked financially or through altruism to men (husbands, sons, fathers, brothers) may be harmed by measures that redistribute wealth from men to (other) women. Since men and women have overlapping interests, it is simplistic to attribute a particular law to the interests of men or the interests of women.³⁰

Note that while in the previous passage women were treated as a class—the interests of all women were represented earlier by the sur-

28. *Id.* at 216.

29. In tying the self-interests of women generally to the self-interests of a subset of women, Posner assumes that women are willing to sacrifice themselves so that other women will have better lives. On Posner's own terms, what's in it for them? Would men act the same way? As to the benefits gained by the surviving women, is it reasonable to expect that a society that kills off its girls is likely to make sure that some greater portion of the freed resources will be shifted over to women?

30. POSNER, *supra* note 1, at 216.

vival of some—in this passage the interests of some men are seen as potentially adverse to those of others. Despite the use of unexamined gender stereotypes in his analysis, Posner is consistent in failing to take any greater account of men's collective identity interests than he does of women's. Just as women do not experience anything that counts as harm as a result of "superficially misogynistic" practices, so men apparently experience no benefits from them. The likelihood of greater confidence, success, pleasure, or self-esteem is not acknowledged. The significance of how one is perceived, or perceives others, is not addressed. Under Posner's theory, behaviors based on such perceptions would seem either to be irrational or explainable on other grounds.

Posner's failure to value the harms of disaffirmation, or the benefits of affirmation, runs through his discussion of a number of different issues. In defending commercial surrogacy, for example, he claims to dispose of the commodification argument against it by stating that what is sold in surrogacy arrangements is not the child itself but the "mother's right to keep the baby."³¹ This technical argument misses altogether the basic point of the commodification critique, which is that some types of transactions (whatever their exact legal definition) may shape the individuals affected, influencing how they see themselves and others. In the case of surrogacy, that influence may be either negative (constructing the baby as a commercial object rather than as an individual beyond value, not-for-sale) or positive (constructing the individual as so valuable as to justify the extraordinary lengths to which others may go in order to have the privilege of raising her). Posner misses both possibilities because he does not recognize either how practices affect identity or how identity matters to individuals.

CHANTING AROUND (AND AROUND) THE FIRE

Posner's theory is a circular one. Using a methodology so indeterminate that it can explain whatever it chooses to find, Posner is able to make any existing structure or practice he wishes appear rational, even biologically compelled. Many of the sexual institutions and norms which prevail in today's society make a lot more sense once it is established that men can't help their shifting sexual desires and their need for immediate sexual gratification, that women are genetically programmed to long for a male protector and to be primary caretakers of their children, and that male-male unions are inherently unstable

31. *Id.* at 413.

because of the absence of the biological prerequisites for stability.

Posner's criteria for rationality assume what is most at issue when it comes to the regulation of sexual behavior: what values society will respect and in what ways. Those aspects of human existence that cloud his analysis—matters of identity, commitment, morality, and tradition, for example—are rendered functionally irrelevant, irrational, and thus outside the cost-benefit analyses he conducts. Indeed, reason is defined *against* such other factors, making them inadequate (irrational) explanations for human behavior and eliminating any policy analysis based on affirming and disaffirming the values they may imply.

The theory is circular especially in the way it links self-interestedness and behavior. Once it is assumed that preferences are determined by individual self-interest and that human behaviors are the rational consequences of human preferences, there is no observation—no counterexample—that can defeat the theory. Since individuals would not engage in certain behaviors unless they believed that there was something to be gained, any apparent exception is proof only that one has not searched deeply enough for the self-interested benefits an individual might be attempting to acquire. Likewise, behavior that seems irrational is simply behavior that has not yet been adequately evaluated or explained.

This circle spells trouble even for Posner himself. If the world works the way Posner says it does, why does it need anyone to remind it to think more rationally? Conversely, if human sexual behaviors already *are* rational, what is to be gained from an appeal to rationality? Posner appears to recognize the inconsistency between his indictment of those current attitudes about sex that he deems irrational and his description of the rationality of behavioral adaptations over time: "If our sexual attitudes are a tissue of ignorance, superstition, prejudice, tradition, and ideology, how likely is it that those attitudes, and the behavior they generate, can be explained as products of rational maximization?"³² But having recognized the contradiction, he simply solders the unconnected strands with a simple, question-begging declaration: under certain conditions, religious and other ideological thought, and even "sheer ignorance," can be a rational adaptation to particular social circumstances.³³

The self-verifying circularity of the theory cannot be remedied by

32. *Id.* at 437.

33. *Id.*

simple adjustments to the application of a basically sound theory. Either all preferences and behaviors are rational, in which case the theory has no policy bite, or the standards of some must be imposed on others, in which case the process of identifying preferences and evaluating strategies necessarily entails judging—second-guessing—those preferences and strategies. It is not, then, as Posner claims, that a functional analysis leads to a basic public posture of noninterference while a non-functional policy does not. Rather, the outcome of a functional analysis will depend on *what functions*, i.e., on what preferences count, what motivations operate, and what values one assumes.

For those who think that the state has gotten too involved in the regulation of sex, Posner's economic analysis may be quite seductive. It appeals to those principles we have been taught to admire most; it appears to be scientific rather than emotional, rigorous rather than sentimentally soft. The application of Posner's theory yields some interesting insights—it is useful for the Catholic Church to consider, I suppose, whether the condemnation of homosexuality may actually mean that a larger portion of the priesthood will be homosexual,³⁴ or for "pro-life" advocates to know that greater acceptance of adoption increases nonmarital sexual intercourse, by lowering its cost.³⁵ But the theory moves from these "insights" to policy conclusions by way of self-reinforcing assumptions that represent Posner's positions in moral and cultural debates that he restructures, misleadingly, as nonmoral and scientific.

Posner's theory is circular in one final and crucially important way. It affirms what it chooses to count as valuable and thereby perpetuates those values. A theory that describes human motivation as self-interested, and unchangeable in that self-interestedness, discourages thinking in non-self-interested ways. If, as Posner appears to believe, no other way of thinking is possible, then no harm is done. But what if other possibilities do exist? What if the preferences of individuals can be altered (the premise, indeed, of the multi-billion-dollar advertising industry)? What if individuals can be motivated to put the interests of others (of at least *some* others) ahead of their own? If these possibilities exist—and *surely they must*—Posner's theory is harmful and dangerous, participating in the creation and re-creation of the very world it purports to so scientifically describe.

34. *Id.* at 155.

35. *Id.* at 408.

LIVING (HAPPILY?) EVER AFTER

The problem with those men who avoid their share of the housework and seek (metaphorically or otherwise) to chain their women to the bedstead is not that these behaviors are irrational. It is that, rational or not (or in spite of their rationality), the social conditions that perpetuate women's subservience to men are unfair and should be changed. Likewise, the problem with those who bash homosexuals is not that their behavior is irrational; it is, in fact, quite understandable, especially when issues of identity, tradition, and morality are taken into account. Nevertheless, society may quite justifiably conclude that, however rational it may be, bashing homosexuals—or keeping them out of the classroom or the military—is wrong.

To an important extent, the approval of or even tolerance for homosexuality cannot be achieved by denying that homosexuality causes no harm to others. Discussion of the "facts" of homosexuality and its "harmlessness" to others may be persuasive to some fence-sitters, but to make the full case, society will need to take a moral position favoring, for example, individual choice in matters of sexual expression, or tolerance of the private sexual behaviors of others that one may abhor. Likewise, the stability of abortion rights, if that is to be the public's policy, depends not on ignoring the harm such rights cause to those whose quality of life is thereby diminished, but on clarifying and defending society's commitment to certain values—a commitment to women's control over their reproductive decisions, for example, or to improving the quality of life for children who are born.

Recent experience teaches us that sharply focusing issues as moral is divisive and can aggravate conflict, even violence.³⁶ The problem is that those who lose moral battles are rarely fooled into thinking that they have not been injured. Indeed, in some very literal sense, the offense of having one's harms not even counted as harms adds insult to injury.

I have no grand theory about the regulation of sex that offers a clean alternative to the pretense of value-free debate or to the divisiveness of open moral combat. I doubt, in fact, that any such theory exists. The main points of this essay are (1) that any theory, grand or otherwise, must work with a more rich and complex view of human nature that takes into account the human need to belong, to be different, to

36. See Timothy Egan, *Violent Backdrop for Anti-Gay Measure*, N.Y. TIMES, Nov. 1, 1992, at A40 (describing violence generated by anti-gay initiative in Oregon).

contribute, to remain faithful to some sense of oneself, to change, to pursue noble goals, and (2) that Posner's theory, in rationalizing selfishness as the individual's prime operational force, is not likely to lead to society's greater benefit because it dampens rather than encourages the individual to aspire to a "better" view of him/herself.

What would happen if in theorizing about sex we began with a premise, apparently irrational under Posner's scheme, that society benefits most when individuals fight rather than give in to whatever tendencies they might have to think of themselves first? Instead of legitimating self-interest as the highest form of rationality, what would happen if the unselfish, community-minded aspects of the human spirit are elevated? ("Ask not what your country can do for you," etc.)

I wonder, too, what would happen if a theory of sex was evaluated against a yardstick that measured not only how it advanced the freedom to pursue individual preferences, but also the likelihood that it will encourage individuals to speak more freely with, and at the same time listen with greater empathy to, those whose values they do not share. In addition to (or even instead of) reasons for vigorously pursuing one's own individual interests, or for assuming that one's own principles are morally neutral or the only ones worth having on a subject, what about reasons to take more responsibility for one's affirmative commitments and, in turn, to understand the commitments of others?

This kind of talk will seem to some (no doubt to Posner, for example) hopelessly naive or sentimental; indeed, I find myself embarrassed to engage in it in this forum. This kind of talk is also as potentially oppressive as Posner's own, in that calling for individuals to act "on behalf of" others so easily can become a requirement that some individuals—this has often meant women—sacrifice for the benefit of the larger whole. But I worry about the future of a society whose hierarchy of values derides talk of "true altruism" as naive and deems expressions like "the welfare of others" to be soft and sentimental. As any school teacher knows, we are unlikely to be better than what others (or we ourselves) expect us to be. While other-welfare talk sometimes can be highly cynical and manipulative, it is hard to believe that the welfare of society is maximized by ruling out the possibility of genuine other-welfare behavior. At least not the society in which I think many of us want to live.