Women who Abort as Victims and Prostitutes as “Allegorical Threats to the Nation”

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Introduction

Abortion and prostitution share similarities. Both typically involve two parties, one providing a service and the other paying for the service.\(^1\) Further, abortion and prostitution are typically gendered practices – in cases of abortion the person performing the abortion, also known as the service provider, is typically a male and the customers are always female; in prostitution the prostitute, also viewed as a service provider, is usually a female and her customer usually male.\(^2\) Additionally, abortion and prostitution relate to sex either indirectly or directly.\(^3\) The underlying act that leads to abortion is sex, and the act that directly defines prostitution is sex, yet for some reason the law treats the woman who aborts differently than the woman who engages in prostitution. It goes without saying that women who abort and prostitutes are not exactly the same, and therefore it does not seem unreasonable that under the law they are treated differently. However, this paper seeks to understand why women who abort are treated as victims whereas prostitutes are treated as criminals.

Case law, statutory law, and historical studies show that persons who perform illegal abortions are criminally sanctioned but women who abort are not. These persons include unlicensed physicians or at the time when abortion was criminal anyone who performed an abortion. In fact, it is clear from the case law that women who abort are perceived as victims, and are not even considered to be accomplices in the crime. Many scholars have argued that the

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\(^2\) Id. at 1255.
\(^3\) Id.
absolution of women who abort illustrates a grave logical inconsistency in the law.\textsuperscript{4} Most of the scholars that make this argument are not seeking to push for prosecution of women who abort, but rather, seek to illuminate the weaknesses of the pro-life stance.\textsuperscript{5} These scholars also seek to illustrate the discrepancy between abortion and other sex-related crimes, such as prostitution, where the law punishes participants on both sides of the transaction.\textsuperscript{6}

Why are women who abort exempt from prosecution? Why are prostitutes, conversely, prosecuted? It can be argued that prostitutes are also victims. Many studies show that prostitutes are representative of poor, uneducated women and that prostitutes are dominated by their pimps. Women who abort may also fall into a lower socioeconomic status, but the laws exempting them were created in the end of the nineteenth century – a time when women who aborted came from the middle class to upper echelons of society.\textsuperscript{7} Therefore, treating them as a victim must have had less relation to their socioeconomic status. This paper seeks to explore this discrepancy.

\textsuperscript{4} Rosenbluth, \textit{supra} note 1, at 1253.
\textsuperscript{5} \textit{Id.} at 1251. The author argues that: “Prolife forces have waged their campaign against abortion by basing their opposition to it on the syllogism that killing innocent human life is murder, fetal life is innocent human life, and therefore abortion is murder. Such a contention leads inexorably to the conclusion that women who procure illegal abortions should be subject to criminal prosecution for homicide, for many reasons: to deter women from having abortions, both to save unborn children and to protect the women themselves from potentially fatal, unregulated illegal abortions; to punish moral transgressors and their accomplices; to enable prosecutors to threaten women with criminal charges in order to gain their cooperation in prosecuting illegal providers; and to maintain a logical consistency in the law.”
\textsuperscript{6} \textit{Id.} at 1257. The author points out that, “In virtually all modern-day policing of consensual sex-related crimes, federal and state, the law punishes participants on both sides of the transaction. The only time any sort of exemption from criminal liability is recognized for those who \textit{voluntarily} partake in such proscribed activities is when the consent is deemed invalid because the actor was under age, as in statutory rape prosecutions, or otherwise incompetent. In order to maintain a logical consistency in the law, competent adult women who undergo illegal abortions should be subject to criminal liability.”
\textsuperscript{7} Nicola Beisel and Tamara Kay, \textit{Abortion, Race, and Gender in Nineteenth-Century American}, American Sociological Review, Vol. 69 498, 507 (2004). The authors point out that, “...it was
In seeking to understand this inconsistency the paper is broken up into three parts. The first part, “Abortion and Criminal Law,” discusses the history of abortion laws in an effort to understand why women who aborted were treated as victims. The second part, “Prostitution and Criminal Law,” explores the history of criminalizing prostitution and the prostitute herself – this section focuses on how the prostitute was perceived throughout history and how she continues to be perceived today. Finally, the third part, “Abortion and Prostitution,” attempts to solve the dilemma posed by this paper: Are women who abort victims and prostitutes criminals?

Abortion and Criminal Law

*Criminal Abortion and the Common Law*

Abortions performed before “quickening” were not a crime during the eighteenth and early nineteenth centuries. “Quickening” referred to the point at which the pregnant women could feel the fetus moving – this was approximated to be during the fourth month of pregnancy. The reason “quickening” was the turning point for purposes of legality was because it was the moment of recognizable human development. Therefore, the moment of “quickening” where middle-class women who practiced abortion, and so the practice could not be explained by the depravity of the poor.” See also Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine and Law in the United States, 1867-1973* 10 (1997): Abortion clinics run by practitioners who specialized in performing instrumental abortions, were busy and frequented most by upper-class, white, Protestant women.

8 Reagan, supra note 7, at 8.

9 *Id.*

10 *Id.* at 9.
the fetus was recognized as a human carried with it a legal and moral obligation to carry the fetus to term.\footnote{Samuel W. Buell, Note, Criminal Abortion Revisited, 66 N.Y.U. L. Rev. 1774, 1781 (1991). Though, as the author points out, the common law did punish abortion prior to “quickening” in the case where the abortion resulted in the woman’s death.}

Other reasons for using “quickening” as a determinative point were difficulties of proof. English courts realized the difficulty in proving that an attempted abortion caused the death of a living fetus.\footnote{James S. Witherspoon, Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary’s L.J. 29, 31 (1985).} Some examples of the challenges in proof included: 1) the difficulty proving that the woman who sought an abortion was actually pregnant; 2) the challenge in proving that the fetus was alive at the time the abortion was being attempted; and 3) the difficulty in showing that the abortion caused the death of the fetus.\footnote{Id. at 31.} Therefore, “quickening” provided the necessary proof for purposes of a criminal conviction. However, even with proof of “quickening” there remained a level of uncertainty, and therefore the person performing the abortion was not guilty of a homicide but of a “great misprison,” or a “heinous misdemeanor.”\footnote{Witherspoon, supra note 12, at 32.}

\textbf{Early Nineteenth Century State Criminal Abortion Statutes}

However, by the middle of the nineteenth century the common law of criminal abortion was replaced with statutes criminalizing abortion almost everywhere in the United States.\footnote{Buell, supra note 11, at 1783.} The statutes did not do away with the concept of “quickening.”\footnote{Reagan, supra note 7, at 10.} Most of the statutes punished “post-quickening” abortions more severely than “pre-quickening abortions.”\footnote{Witherspoon at 34.} Further, the abortion statutes were classified in different ways depending on the state. States classified the offense as
“homicide,” “offenses against the person,” “crimes against chastity, morality and decency,” and “miscellaneous sex crime.”

Another common theme among the early abortion statutes was that they aimed at punishing the provision of abortifacients or the use of instruments to induce abortion, unless it was necessary to preserve the life of the woman. The sale of abortifacient drugs during the early nineteenth century was common and therefore the early nineteenth century abortion statutes were found to be poison control measures aimed at protecting women by prohibiting the sale of abortifacient drugs, which women often took. The drugs were poison that could be concocted by growing the necessary plants in one’s own garden or by mixing together one’s own home remedy to induce an abortion. Therefore, women induced their own abortion by domestic practices such as these. Yet, the abortion statutes did not punish women for inducing abortions. Even, in the case of the abortifacient drugs, where the women was the only person involved in the abortion, she would not be punished under the abortion statutes in place at the time.

Most state statutes did not specify that women were not culpable but, rather, left her out of the crime. There were a few states that included a section in their abortion statutes bringing the woman within the abortion prohibition. New York, in 1845, was one of the states that punished a woman for an abortion with a sentence of three months to one year. In addition to New York,
there were fifteen other states that punished a woman who solicited or submitted to an abortion.\textsuperscript{25} However, these provisions against women were never enforced. There are several possible reasons for the lack of enforcement against women, which will be discussed later in this paper. However, before discussing such possibilities it is important to understand how the early nineteenth century abortion statutes were amended to criminalize abortion at all stages, with no distinction between the “pre-quickening” stage and the “post-quickening” stage.

\textit{American Medical Association (AMA) Abortion Campaign}

In 1857, the AMA launched a movement to criminalize abortion at every stage of pregnancy.\textsuperscript{26} In the middle of the nineteenth century the abortion business was at its peak despite the laws prohibiting the sale of abortifacients.\textsuperscript{27} Abortion clinics run by practitioners who specialized in performing instrumental abortions, were busy and frequented most by upper class, white, Protestant women.\textsuperscript{28} Therefore, doctors felt threatened by the practitioners who ran clinics, seeing them as competitors that they needed to “drive out.”\textsuperscript{29} Indeed, there were a number of reasons why doctors rallied to criminalize abortion for all stages of pregnancy, not just “post quickening.” One reason was that scientifically, the “quickening” distinction had no basis.\textsuperscript{30} Other reasons included the desire to create a legal code of ethics that would further the process of professionalization; the objective of promoting racial purity by decreasing abortions among the wealthy; and, the paternalistic tendency to push women into their proper role as child bearers.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{25} Buell, supra note 11, at 1785.
\item \textsuperscript{26} Reagan, supra note 7, at 10.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Reagan, supra note 7, at 10.
\item \textsuperscript{29} Buell, supra note 11, at 1788.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\end{itemize}
The physician’s crusade was effective at a time where the Republican Party’s desire was to use the power of the state, and at a time where great deference was giving to scientific expertise.\textsuperscript{32} Therefore, by the end of the nineteenth century, criminal-abortion laws were ubiquitous in the United States.\textsuperscript{33}

\textbf{Criminal Prosecution for Abortion}

Throughout the nineteenth century and into part of the twentieth century persons who committed abortions, including unlicensed physicians,\textsuperscript{34} were subject to criminal penalties. Criminal abortion laws are still in existence and apply in various scenarios. For instance, a person who is not a physician is subject to criminal penalties for the performance of an abortion.\textsuperscript{35} In addition, a physician whose license has been revoked is subject to criminal penalties as fully as any other unlicensed person.\textsuperscript{36} Further, in a prosecution against an unlicensed physician under a criminal abortion statute, it is not a defense that the statute would be held unconstitutional if applied against a licensed physician.\textsuperscript{37} Under New York Penal Code § 125.40, for example, “A person is guilty of abortion in the second degree when he commits an abortional act upon a female, unless such abortional act is justifiable pursuant to subdivision three of section 125.05."\textsuperscript{38}

\textsuperscript{32} Buell, \textit{supra} note 11, at 1789.
\textsuperscript{33} \textit{Id}.
\textsuperscript{35} \textit{Spears v. State}, 278 So. 2d 443 (Miss. 1973).
\textsuperscript{36} \textit{Brunelle}, 277 N.E.2d 826.
\textsuperscript{37} \textit{Id}.
\textsuperscript{38} NY Penal Code § 125.05(3). "Justifiable abortional act." An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it
Why were mother’s not prosecuted?

The end of the nineteenth century criminal abortion statutes, like the early nineteenth century statutes, did not punish women for the crime of abortion. Though the statutes punished the service provider. The case law that will be elaborated in this section does not provide much reasoning for why women were exempt from prosecution of committing an abortion – though the case law does make one thing very clear: women who aborted were not criminals, but, rather, victim[s] of the crime, which, in the nature of things, [they] could not commit. In addition to courts being clear on the notion that women who aborted were victims, courts were also consistent in not discussing the underlying sexual act that led to the pregnancy. Sex is never described in these cases. The fact that sex was not described is somewhat significant when comparing women who abort to prostitutes, which will be discussed later in the paper.

In looking at the history of criminal abortion laws, through case law and historical studies, this paper seeks to understand what it is about the “nature of things” that immunized the woman who aborted from prosecution. What is it about a woman that makes her exempt from prosecution in such instances?

There are a number of possible reasons for the woman’s “immunity” from criminal charges under the abortion statutes. The common law’s approach to abortion seems to have been aimed at protecting life, whereas the early nineteenth century abortion statutes sought more to promote

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is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy.

39 State v. Carey, 56 A. 632, 636 (Conn. 1904).

40 Other reasons for exempting women who abort from prosecution will be discussed later in the paper.
the safety and health of women.\textsuperscript{41} Therefore, since the goal of the statutes was to protect women it would seem inconsistent and bizarre if they also prosecuted them. In addition to aiming to avoid inconsistency, commentators have suggested that despite the woman’s consent to the abortion, the procedure was considered a crime against women.\textsuperscript{42} Women who aborted were not seen as criminals, but rather as victims.

In \textit{In the Matter of Lillian Del Gobbo Vince}, the Supreme Court of New Jersey reiterated the rule established in \textit{State v. Cooper}, that women who aborted were not subject to New Jersey’s criminal abortion statute.\textsuperscript{43} The court in \textit{In the Matter of Lillian Del Gobbo Vince}, cited Chief Justice Green’s statement in \textit{State v. Murphy} regarding New Jersey’s criminal abortion statute:

\begin{quote}
Nor does the statute make it criminal for the woman to swallow the potion, or to consent to the operation or other means used to procure an abortion. No act of hers is made criminal by the statute. Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child. The offence of third persons, under the statute, is mainly against her life and health. The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment.\textsuperscript{44}
\end{quote}

Not only did courts refuse to regard the woman as the criminal, but they also refused to regard her as an accomplice to the crime. In \textit{Thompson v. United States}, the court, having to decide whether a woman who procured an abortion could be viewed as an accomplice, ruled that a woman who procures an abortion is “regarded as [a] victim, rather than an accomplice.”\textsuperscript{45} In fact, the court analogized the woman who aborted to a female, who was under sixteen years of age, and had

\textsuperscript{41} Buell, supra note 11, at 1787.
\textsuperscript{42} Id.
\textsuperscript{43} \textit{In the Matter of Lillian Del Gobbo Vince}, 67 A.2d 141 (N.J. 1949); see also \textit{State v. Cooper}, 22 N.J.L. 52 (1849).
\textsuperscript{44} \textit{In the Matter of Lillian Del Gobbo Vince}, 67 A.2d 141,145 (1949); see also \textit{State v. Murphy}, 27 N.J.L 112, 114 (1858).
sexual intercourse with a man. In both cases, the women were considered to be victims not accomplices. Likewise, in People v. Blank, the New York Court of Appeals explained that the woman who procured an abortion “did not stand legally in the situation of an accomplice; for although she no doubt participated in the moral offence imputed to the defendant...the law regards her as the victim rather than the perpetrator of the crime.” The court acknowledged the woman’s consent to the abortion but reasoned that nevertheless she could not be indicted.

Consent did not play a particularly significant role in the woman’s culpability (or lack thereof). A woman’s consent was not grounds for culpability as the court in State v. Carey explained:

At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another; and the aid she might give to the offender, in the physical performance of the operation did not make her an accomplice in his crime. The practical assistance she might thus give to the perpetrator, did not involve her in the perpetration of [the] crime. It was in truth a crime, which, in the nature of things, she could not commit.

The court further explained that the public policy reason for not criminally charging women who abort is “protection due to the woman, protection against her own weakness as well as the criminal lust and greed of others.” Moreover, the court explained,

The criminal intent and moral turpitude involved in the violation, by a woman, of the restraint upon her control over her own person, is widely different from that which attends the man who, in clear violation of law and for pay or gain of any

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46 Thompson, 30 App. D.C. at 363.
47 People v. Blank, 29 N.E.2d 73, 74 (N.Y. 1940).
48 Id.
49 Carey, 56 A. at 636.
50 Id. at 637.
kind, inflicts an injury on the body of a woman, endangering health and perhaps life.\textsuperscript{51}

All the cases thus far discussed involved cases of abortions performed on women by a third party – the service provider. The court therefore found the third party criminally liable but not the woman, yet in a Florida case where the woman was the only party involved (self-induced abortion) the court still did not find the woman culpable.

In \textit{State v. Ashley}, an unmarried, pregnant teenager in her third trimester, shot herself in the abdomen.\textsuperscript{52} The teenager survived, but the fetus did not and the court held that the teenagers action could not be criminalized because Florida's statutory law regarding abortions has not explicitly changed the women's immunity from being prosecuted.\textsuperscript{53} The court's reasoning as to why this is Florida's policy is that "criminalizing such actions by a pregnant woman raises a number of policy, social, moral and legal implications."\textsuperscript{54}

The fact that women were not (and continue not to be) prosecuted for criminal abortion is perplexing given our nation's criminal justice system. For example, in a case of a contracted crime where a person pays another to commit a crime, both the actual perpetrator and the person paid to have the crime committed are equally liable under the law.\textsuperscript{55} In addition, in cases of prostitution, individuals who patronize prostitutes as well as the prostitutes themselves are subject to prosecution.\textsuperscript{56} In fact, under our national's criminal justice system, women who abort are treated very differently from prostitutes. Women who abort are not completely analogous to

\textsuperscript{51} \textit{Carey}, 56 A. at 637.
\textsuperscript{52} \textit{State v. Ashley}, 701 So.2d 338 (Fla. 1997).
\textsuperscript{53} \textit{Id}.
\textsuperscript{54} \textit{Ashley}, 701 So. 2d at 343.
\textsuperscript{55} Rosenbluth, \textit{supra} note 1, at 1253.
\textsuperscript{56} \textit{Id}.
prostitutes, but rather, the comparison lies in that abortion and prostitution both involve sex, service providers, and notions of woman’s role in society. Though, women are depicted very differently in the abortion context as opposed to the prostitution context.

Prostitution and Criminal Law

Criminal Prostitution Laws

Before prostitution was made a statutory offense it was recognized as a vagrancy offense. Courts summarily tried vagrants since 1414 and prostitutes were viewed as a “vagrant with an all too visible means of employment which offended public decency and morals.” Prostitution became a statutory offense in the middle of the nineteenth century to the early twentieth century, when anti-prostitution statutes and anti-disorderly house statutes were passed. The period after 1870 illustrated a growing awareness and concern of an urban prostitution problem and state statutes emerged that defined and forbade the business of prostitution. By 1910, a body of common law was produced that was directed at prostitution and disorderly houses. However, societal interference by anti-commercialized sex abolitionists resulted in integrated prostitution laws into the already existing law of nuisance. These laws were called the “Red Light Laws” and aimed at dismantling the municipally tolerated or sponsored red light districts. In addition, laws

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58 Id.
59 Id. at 7.
60 Id.
61 Id. at 8.
62 Id.
63 Id.
directed at the individual prostitutes were also revised during this period to add to the criminal penalties and to expand the definitions of which persons these statutes applied to.64

The Mann Act

The Mann Act (“The Act”) also known as the White Slave Traffic Act of 1910 is a United States law, which prohibits white slavery and the interstate transport of females for “immoral purposes.” Its primary stated intent was to address prostitution, immorality, and human trafficking. While its ambiguous language allowed selective prosecutions for many years, it was later amended by Congress to apply only to actual criminal offenses.65

Although women were meant to be the protected class of the Mann Act, they became its chief victims.66 The male legislators responsible for promulgating the Act perceived women as the passive victims and assumed that men generally were the villains.67 Part of the reason that women were perceived as victims at the time of enactment was because of the concern that women were being drugged and unwillingly carried off to become prostitutes.68 However, the notion of feminine weakness started to fall a part when the number of Mann Act cases involving coercion were found to be quite small.69 In fact, there were madams who took prostitutes across a state line and were prosecuted for transporting other women.70 And, in noncommercial cases women were “in a strange twilight in which they were both victims and villains.”71 They were victims in that

64 Mackey, supra note 57, at 9.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
they were regarded as “weak.” Yet between 1915 and 1932, women were prosecuted along with their boyfriends for conspiracy to arrange their own transportation by agreeing to go along on the trip.\footnote{Langum, supra note 65, at 10.} In this instance, consent to go along on the trip was a factor in a woman’s culpability, yet in cases of women who sought/seek an abortion and thereby agreed/e to it, consent did/does not play the same role in culpability.

**The Prostitute**

Historians, such as Alain Corbin, found through the study of prostitution that the prostitute was often (metaphorically speaking) linked to “rotting flesh, corpses, and filth.”\footnote{Timothy J. Gilfoyle, Review Essay Prostitutes in History: From Parables of Pornography to Metaphors of Modernity, The American Historical Review, Vol. 104, 117, 118 (1999).} Further, prostitutes were considered to represent a moral, social, sanitary and political threat - symbolizing disorder, excess, pleasure, and improvidence.\footnote{Id. at 121.} Historical studies showed how prostitutes, who were considered women outside traditional family structures, were depicted as “allegorical threats to the nation.”\footnote{Id. at 122.} However, studies of prostitution in other nations, raises different notions. For example, Luise White, a historian, studied prostitution in Nairobi and found that prostitutes actually engaged in commercial sex to preserve the family.\footnote{Id. at 125.} In such instances prostitution was not seen as “social pathology, moral decay, or male dominance,” but rather as woman’s job.\footnote{Id.}
In fact, in the United States prostitutes may also be engaging in commercial sex to preserve the family. Studies show that the majority of street prostitutes are poor, single, and less educated. Therefore, these women view prostitution as an avenue by which they can attain some success because their limited skills and education leave them with few other choices. John Brown McCarty Professor of Family Law, Lynne Marie Kohm, further argues that, “[prostitutes] are not engaging in commercial sex] to exercise rights of autonomy, power, and control over their bodies and lives, but to attempt to overcome an upbringing of poverty and possible abuse or lack of parental (particularly paternal) nurturing.” She further contends that the prostitute is viewed as a “disdainful figure due to general assumptions that prostitutes are in control of their situation, but evidence shows that this is quite far from the truth.” Prostitution, according to Kohm, does not afford women ultimate control over their bodies, but rather results in a loss of autonomy, power, and control over their bodies.

Prostitutes are in many cases controlled by pimps, male companions who entice the women onto the street and into the trade, take all or part of their earnings, often supply them with drugs, and frequently physically abuse them. Yet, prostitutes are not treated as “victims” in the criminal law context, but rather as criminals, “even though they may have far less in control of their actions than adult women who voluntarily engage in sexual intercourse, become pregnant, and actively

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78 Gilfoyle, supra note 72, at 125.
80 Id.
81 Id.
82 Id. at 419.
83 Rosenbluth, supra note 1, at 1256.
seek out someone to perform an abortion on them."\textsuperscript{84} There is an understanding by individuals on both sides of the “decriminalizing prostitution” debate that prostitutes are vulnerable to violence from police, pimps, and customers and without any health services, legal protection, or recourse.\textsuperscript{85} Yet, unlike women who abort, prostitutes are not viewed as victims under the United States criminal justice system, when, in fact, they are in many cases in such vulnerable positions that they very well are victims.

Abortion and Prostitution

\textit{A Comparative Piece}

Historically and even today the prostitute is viewed as “disrupting femininity”\textsuperscript{86} – yet it can be argued that abortion and prostitution both disrupt “archaic notions of virginal femininity and the family as sacred.”\textsuperscript{87} The woman in need of an abortion clearly engaged in sex and is therefore not a virgin; neither is she embracing the role of motherhood that women are supposed to embrace.\textsuperscript{88} The prostitute in engaging in sex is also not a virgin, and she is not engaging in sexual acts for purposes of procreation, but rather is engaging in sexual acts in exchange for money. Further, in thinking about motherhood, the woman who aborts can be seen as defying the very concept by deciding to not have a child, and the prostitute can be seen as not having any of the

\textsuperscript{84} Rosenbluth, \textit{supra} note 1, at 1256.
\textsuperscript{86} \textit{Id}. at 164.
\textsuperscript{87} \textit{Id}. at 163.
\textsuperscript{88} Beisel and Kay, \textit{supra} note 7, at 507: “As one physician asserted, abortion was a moral and social gangrene that pervades the community, and threatens its life, by destroying its very roots which nature intended should cluster around the domestic hearth. Women who aborted denied their moral responsibility to the family.”
proper elements to encompass such a role, by engaging in sex in exchange for money as opposed as a means to procreate.\textsuperscript{89} If women who abort and prostitutes both challenge the female role and perhaps even the very concept of motherhood then why are they treated differently in the criminal law context? Is one really a victim while the other is a criminal?

\textbf{Solving the Dilemma}

There are a number of possible explanations for why the United States criminal justice system treats women who abort and prostitutes differently:

\textit{Protection & Paternalism:}

Perhaps paternalism and the desire to protect the woman is an argument for why courts treated the woman who aborted as a victim. As courts have stated, “The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment.”\textsuperscript{90} Or as was discussed in many cases, a public policy reason for not criminally charging women who abort was: “protection due to the woman, protection against her own weakness as well as the criminal lust and greed of others.”\textsuperscript{91} But, what are they protecting the woman who aborts from? Perhaps the court saw the laws role as protecting the woman from the person who commits the abortion upon her – but what can explain not prosecuting women who induced abortions upon themselves? For example, abortifacient drugs were a popular abortion inducer, yet the courts were still not willing to prosecute the woman in that scenario: “Nor does the state make it criminal to swallow the potion....”\textsuperscript{92}

\textsuperscript{89} These statements are not the opinions of the author; they are merely used as a device to explore the possible similarities of women who abort and prostitutes.
\textsuperscript{90} \textit{Vince}, 67 A.2d at 145.
\textsuperscript{91} \textit{Carey}, 56 A. at 637.
\textsuperscript{92} \textit{Vince}, 67 A.2d at 145.
Further, courts conceded women’s consent to abort and despite her consent still did not prosecute her. Perhaps, if the consent of the woman who aborted was questioned, the paternalism argument would hold more weight. In other words, if the courts suggested that women could not really consent to an abortion therefore their culpability is put into question, then, not prosecuting them starts to make more sense. Yet, time and time again, courts conceded the consent of the woman who aborted.  

On the other hand, consent in the prostitution context is a strong point of contention amongst feminists (whether or not a prostitute can actually consent to sex in exchange for money) but under the Mann Act we see that consent was a factor in prosecuting women. For example, under the Mann Act, women who “went along with their boyfriends” were prosecuted. Why does consent serve as a factor determining culpability for prostitutes but not for women who abort? Further, why are prostitutes not being protected? As was discussed, prostitutes are in many cases victims – they are poor, single, less educated. On the other hand, abortion laws were drafted at a time when most of the women getting the abortion were of the middle to upper class. What were middle to upper class women being protected from?

The paternalism argument is too easy. For one thing, it does not explain why prostitutes should not be protected. Prostitutes engage in commercial sex because in many cases this may be the only choice they have, therefore their consent is strongly put into question. The consent of the woman who aborts, on the other hand, has rarely, if ever, been questioned. Further, in looking at socioeconomic status it seems counterintuitive to want to protect women from the middle to

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93 Carey, 56 A. at 636.
94 Gilfoyle, supra note 72, at 125.
95 Id.
upper class and yet not protect poor women, whose means of survival is engaging in sex with strangers.

Even though the paternalism argument seems too easy it does stand for something. The language used in the abortion context is paternalistic unlike the language seen in discussing prostitution. The real question, therefore, is why the different language? The language may provide some insight, or rather illuminate, why the law was/is more sympathetic towards women who abort/ed than to prostitutes – it further shows that there was/is an inherent abhorrence towards prostitutes that simply did/does not exist towards women who abort (at least under the law). Further, as will be discussed later, this abhorrence may be linked to notions of motherhood.

Language:

The language that is used in case law, or historical studies regarding abortion and prostitution is strikingly different. For example, words such as, “filth,” “improvidence,” and “rotting” are seen in the prostitution context. However, in the abortion context it is very unlikely to come across such language. Rather, the language that repeatedly comes up is, “victim,” or “victim in need of protection.”

Further, the word “morality” is different conceptually in discussing prostitution versus discussing abortion. For example, in an abortion case, the court stated that, “the criminal intent and moral turpitude involved in the violation, by a woman, of the restraint upon her control over her own person, is widely different from that which attends the man... (emphasis added)” Why is the person who performs the abortion held to a different level of morality then the woman who is actually seeking out the abortion? Further, why is the prostitute, like the abortion service provider,

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96 Gilfoyle, supra note 72, at 118.
97 Carey, 56 A. at 637.
held to a higher standard of morality? Is it because they are both providing a service and should therefore be expected to know more about the very consequences of their actions? Yet, doesn’t the fact that the prostitute is in many cases poor and uneducated question how much of a standard we should really be holding her to? More importantly though, what is it about the prostitute that evokes language such as, “social pathology and moral decay.”

**Motherhood:**

Maybe motherhood has something to do with the way women who abort are described versus the way prostitutes are described. Perhaps the image of a pregnant women, even one who aborts, is more compelling than the image of a prostitute, because one looks like a mother and the other does not. The pregnant woman suggests the possibility of motherhood, whereas the prostitute appears completely delinked from motherhood and the family. Even though the pregnant woman is not having the child, she may evoke sympathy because her choice is not viewed as whether or not to have a baby, but rather whether or not to have a baby now. There may also be a desire to delink women who abort from the word criminal – motherhood and criminal do not resonate, yet motherhood and victim make more sense. Prostitutes on the other hand evoke no such link to motherhood, but rather are portrayed as sexual beings. The motherhood idea may explain the different language used to describe women who abort versus prostitutes, but it still does not completely solve the paternalism puzzle. What were women who aborted being protected from?

**Marital Rape:**

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98 Gilfoyle, *supra* note 72, at 125.
The concept of marital rape in the nineteenth-century may have something to do with the reluctance to prosecute women who aborted. In the nineteenth-century, “supposedly civilized men who should protect their wives were instead brutally raping them.”99 Women risked their lives aborting because extant laws about marriage and social expectations of marital sexuality gave women no control over the use of their bodies.100 Husbands would force themselves upon their wives, and leave her with little choice but to give in to the demands of her husband’s passion. Therefore, women were forced into maternity because they could not refuse their husband’s forceful acts. A man could consider himself a devoted husband because he provided for his family, but he was only devoted “to self-gratification at the expense of the respect of his wife.”

The concept of victimhood comes in full-circle if we think about women in the nineteenth century essentially being forced into pregnancy at the hands of their husbands. Perhaps the reason that criminal laws were forgiving to women who sought to abort is because there was an implicit knowledge that women who sought to abort were actually doing so because their husbands raped them. Prostitution on the other hand may be seen as an act that a woman has control over – once again, the image of the prostitute as a sexual being who is in full control of her body is evoked.

Conclusion

Paternalism, language, motherhood, and marital rape are merely possible reasons for the inconsistency the law faces in exempting women who abort from prosecution while not exempting the person who performs the abortion. They are also possible reasons for why women who abort are treated differently from prostitutes. At the core of this comparison is the question of what it

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100 Id.
means to be a woman who aborts and what it means to be a woman who has sex in exchange for money. What this paper sought to do was illustrate the different ways society perceives the woman who aborts and the prostitute. Furthermore, in exploring what it means to be a woman the concept of motherhood arises and stands like a mountain in front of a woman’s ability to define her role in society, as she perceives it.