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9 IN THE UNITED STATES DISTRICT COURT  
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 11 OAKLAND DIVISION

13 **EROTIC SERVICE PROVIDER LEGAL,  
 14 EDUCATION & RESEARCH PROJECT;  
 15 K.L.E.S.; C.V.; J.B.; AND JOHN DOE,**

16 Plaintiffs,

17 v.

18 **GEORGE GASCON, in his official capacity  
 as District Attorney of the City and County  
 19 of San Francisco; EDWARD S.  
 BERBERIAN, JR., in his official capacity as  
 20 District Attorney of the County of Marin;  
 NANCY E. O'MALLEY, in her official  
 21 capacity as District Attorney of the County  
 of Alameda; JILL RAVITCH, in her official  
 22 capacity as District Attorney of the County  
 of Sonoma; and KAMALA D. HARRIS, in  
 23 her official capacity as Attorney General of  
 the State of California,**

24 Defendants.  
 25

4:15-CV-01007 JSW

**ATTORNEY GENERAL'S NOTICE OF  
 MOTION AND MOTION TO DISMISS**

Date: August 7, 2015  
 Time: 9:00 a.m.  
 Dept: 5, 2d Floor  
 Judge: The Hon. Jeffrey S. White  
 Trial Date: None Set  
 Action Filed: March 4, 2015

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE THAT on August 7, 2015 at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Jeffrey S. White in Courtroom 5 of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, California, 94612, Defendant Kamala D. Harris, in her official capacity as Attorney General of the State of California, will move this Court to dismiss without leave to amend plaintiffs' Complaint for Declaratory and Injunctive Relief pursuant to Federal Rule of Civil Procedure 12(b)(6.)

This motion to dismiss is brought on the grounds that the Complaint fails to state a claim as a matter of law. This motion is based on this Notice, the Memorandum of Points and Authorities, the concurrently filed Requested for Judicial Notice the papers and pleadings on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

Dated: May 8, 2015

Respectfully Submitted,

KAMALA D. HARRIS  
Attorney General of California  
TAMAR PACHTER  
Supervising Deputy Attorney General

/s/ SHARON L. O'GRADY

SHARON L. O'GRADY  
Deputy Attorney General  
*Attorney for Defendant Kamala D. Harris*



**MEMORANDUM OF POINTS AND AUTHORITIES****INTRODUCTION/SUMMARY OF ARGUMENT**

1  
2  
3 Prostitution and the solicitation of prostitution are crimes in California, punishable as  
4 misdemeanors under California Penal Code section 647(b). Plaintiffs ask this Court to strike  
5 down section 647(b), claiming that the statute, on its face and as applied, violates their Fourteenth  
6 Amendment rights to substantive due process, their First Amendment rights to free speech and  
7 freedom of association, and analogous provisions of the California Constitution.

8 The complaint should be dismissed for failure to state a claim as a matter of law, without  
9 leave to amend. The standard for review of the statute is rational basis, not heightened or strict  
10 scrutiny. *See Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013). There is no  
11 fundamental right to engage in prostitution or to solicit prostitution. Neither is prostitution or  
12 solicitation expressive conduct protected by the First Amendment. *Arcara v. Cloud Books, Inc.*,  
13 478 U.S. 697, 704-05, 707 (1986). And the relationship between prostitute and client is not an  
14 expressive association protected by the First Amendment. *IDK, Inc. v. County of Clark*, 836 F.2d  
15 1185, 1195-96 (9th Cir. 1988). There also exists no substantive due process right to work as a  
16 prostitute. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). Plaintiffs'  
17 analogous claims under the California Constitution also fail. They are barred by the Eleventh  
18 Amendment, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), and are foreclosed  
19 by multiple California decisions upholding the constitutionality of the statute. Section 647(b) is  
20 rationally related to California's interest in deterring human trafficking and coercion, violence  
21 against prostitutes, the spread of AIDS and venereal disease, and crimes incidental to prostitution,  
22 as well as California's interest in deterring commodification of sex, and is facially constitutional.  
23 Finally, plaintiffs' as-applied challenge fails because their allegations are not directed at a specific  
24 application of the statute. *See, e.g., Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998).

1 **BACKGROUND**

2 **I. PENAL CODE SECTION 647**

3 Prostitution has been illegal in California since at least 1872, with the enactment of Penal  
 4 Code section 647.<sup>1</sup> As originally enacted, section 647 targeted status, providing that “vagrants,”  
 5 defined to include “[e]very lewd or dissolute person,” [e]very person who lives in and about  
 6 houses of ill-fame,” and “[e]very common prostitute,” were subject to punishment by a \$500 fine,  
 7 imprisonment in jail for a term not exceeding six months, or both. RJN, Exh. A; Arthur H. Sherry,  
 8 *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 Cal. L. Rev. 557, 562  
 9 & n.38 (1960) (attached to the Declaration of Sharon O’Grady (“O’Grady Decl.”) as Exhibit 1).<sup>2</sup>  
 10 In 1961, the statute was repealed and replaced with a version that focused on conduct, not status.  
 11 See 1961 Cal. Stat. 1671, Penal Code § 647(b); Exh. B to RJN (version of Penal Code § 647 that  
 12 was replaced by the 1961 statute). The 1961 version of section 647, provided, in pertinent part:

13 Every person who commits any of the following acts shall be guilty of  
 14 disorderly conduct, a misdemeanor:

15 \* \* \*

16 (b) Who solicits or engages in any act of prostitution.

17 1961 Cal. Stat. 1671, Penal Code § 647(b). The current version of subdivision (b) is more  
 18 specific. It states:

19 (b) Who solicits or who agrees to engage in or who engages in any act of  
 20 prostitution. A person agrees to engage in an act of prostitution when, with specific  
 21 intent to so engage, he or she manifests an acceptance of an offer or solicitation to so  
 22 engage, regardless of whether the offer or solicitation was made by a person who also  
 23 possessed the specific intent to engage in prostitution. No agreement to engage in an  
 24 act of prostitution shall constitute a violation of this subdivision unless some act, in  
 25 addition to the agreement, is done within this state in furtherance of the commission  
 26 of an act of prostitution by the person agreeing to engage in that act. As used in this  
 27 subdivision, “prostitution” includes any lewd act between persons for money or other  
 28 consideration.

25 \_\_\_\_\_  
 26 <sup>1</sup> California’s Penal Code was codified in 1872. See Attorney General’s Request for  
 27 Judicial Notice (“RJN”), Exh. A.

28 <sup>2</sup> For the convenience of the Court and the parties, copies of the secondary authority cited  
 in this brief are attached as numbered exhibits to the O’Grady Decl.

1 Cal. Penal Code § 647. Although the solicitation prong of the statute requires both an agreement  
2 to engage in an act of prostitution and an act in addition to the agreement, that further act may be  
3 a verbal one, so long as the statements are “unambiguous and unequivocal in conveying that the  
4 agreed act of prostitution will occur and move the parties toward completion of the act.” *Kim v.*  
5 *Superior Court*, 136 Cal. App. 4th 937, 945 (2006).

## 6 **II. THE ALLEGATIONS OF THE COMPLAINT**

7 Plaintiffs are Erotic Service Provider Legal, Education & Research Project, three former  
8 “erotic service providers” who wish to engage in sexual activity for hire in this district, and a  
9 potential client who wishes to engage an “erotic service provider” for such activity. Complaint  
10 ¶¶ 6, 25-28. Defendants are four district attorneys and the Attorney General of California.  
11 Plaintiffs seek declaratory and injunctive relief based on the following claims.

### 12 **A. The First Claim for Relief – Substantive Due Process Right to Engage in** 13 **Prostitution**

14 The first claim for relief alleges that Penal Code section 647(b) “violates the right to  
15 substantive due process as guaranteed by the Fourteenth Amendment to the United States  
16 Constitution” both facially and as applied to plaintiffs. Complaint ¶ 35. It further alleges that  
17 “the rights of adults to engage in consensual, private sexual activity (even for compensation) is a  
18 fundamental liberty interest,” and that “any regulation regarding the commercial exchange of  
19 private sexual activity is subject to strict scrutiny.” Complaint ¶ 36. Plaintiffs allege that no  
20 legitimate government interest could possibly justify California’s prostitution laws, and that the  
21 law is neither narrowly tailored nor “the least restrictive means for advancing whatever  
22 governmental interest that Defendants may claim the law advances.” Complaint ¶¶ 37-38. They  
23 allege that the law “significantly hinders, if not deprives, many individuals from their ability and  
24 right to engage in sexual intimacy.” *Id.* ¶ 39.

### 25 **B. The Second Claim for Relief – Right to Free Speech**

26 The second claim for relief alleges that, because “words alone may constitute an ‘act in  
27 furtherance’ of an agreement to engage in prostitution,” section 647(b) makes “pure speech a  
28 criminal activity,” and that “the statute utilizes speech to make an otherwise lawful act” – sexual

1 activity or an agreement to engage in sexual activity – “a crime based solely on the speaker’s  
2 message and the content of his or her speech.” Complaint ¶¶ 43-44. Plaintiffs allege that the  
3 “government can assert no compelling or substantial interest in justifying such a regulation on  
4 speech,” and that the law does not advance any compelling or substantial state interest. *Id.* ¶ 45.

5 **C. The Third Claim for Relief – Substantive Due Process Right to Earn a**  
6 **Living**

7 The third claim for relief alleges that section 647(b) violates liberty interests protected by  
8 the Fourteenth Amendment right to substantive due process. Complaint ¶ 51. Plaintiffs allege  
9 that the statute “severely infringes on the ability to earn a living through one’s chosen livelihood  
10 or profession, it unconstitutionally burdens the right to follow any of the ordinary callings of life;  
11 to live and work where one will; and for that purpose to enter into all contracts which may be  
12 necessary and essential to carrying out these pursuits.” *Id.*

13 **D. The Fourth Claim for Relief – Freedom of Association**

14 The fourth claim for relief alleges that by prohibiting prostitution, section 647(b) “severely  
15 infringes on the rights to freedom of association” afforded by the First Amendment. Complaint  
16 ¶¶ 55-56. Plaintiffs allege that the law prevents plaintiffs from entering into and maintaining  
17 “certain intimate and private relationships.” *Id.* ¶ 56.

18 **E. The Fifth Claim for Relief – California Constitution, Article I, Sections 2(a)**  
19 **and 7(a)**

20 The fifth and final claim for relief alleges that section 647(b) violates article 1, section 7(a)  
21 of the California Constitution by depriving plaintiffs of their right to “substantive and procedural  
22 due process” because it “impinges on the fundamental rights to sexual privacy, to live and work  
23 where one will, to pursue any livelihood or vocation, and to associate.” Complaint ¶ 60.  
24 Plaintiffs further allege that the statute violates article I, section 2(a) by “impinging on the right to  
25 free speech.” *Id.* ¶ 61.  
26  
27  
28

## ARGUMENT

### I. LEGAL STANDARD

A complaint may be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). Dismissal is proper where there is no cognizable legal theory or there are insufficient facts alleged to support a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To defeat a Rule 12(b)(6) motion, plaintiffs must allege “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do”; instead, plaintiffs must allege facts sufficient to “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555(2007).

In deciding a Rule 12(b)(6) motion, a court must assume the plaintiffs’ allegations of fact are true and must draw all reasonable inferences in their favor. *See Daniels-Hall v. National Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678. While the court generally looks only to the face of the complaint and its exhibits, *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002), the court may also consider documents that are proper subjects of judicial notice, *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). Leave to amend need not be granted if “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

### II. PLAINTIFFS’ SUBSTANTIVE DUE PROCESS CLAIMS FAIL.

In determining the constitutionality of a statute, absent circumstances triggering a higher level of scrutiny, the statute is subject to rational basis review. *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013). “Such review does not provide ‘a license for courts to judge the wisdom, fairness, or logic of legislative choices.’” *Id.* (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)). The issue is not whether the legislature has chosen the best means for achieving its purpose, but only whether there are plausible reasons for the legislature’s action. *Id.*

1 In order to trigger a higher level of scrutiny, a challenger must show that the law implicates  
2 a fundamental right or targets a suspect class. *Id.* Petitioners' complaint does not include an  
3 equal protection claim or allege that prostitutes and their customers constitute a suspect class, but  
4 it does allege that engaging in prostitution is a fundamental right, based on the Supreme Court  
5 decision in *Lawrence v. Texas*, 539 U.S. 588 (2003). Complaint ¶ 35. As discussed below,  
6 prostitution or its solicitation is not a fundamental right, *Lawrence v. Texas* did not make it so,  
7 and California's law prohibiting prostitution and its solicitation has a rational basis. Plaintiffs'  
8 substantive due process claims fail as a matter of law.

9 **A. There Is No Fundamental Right to Engage in Prostitution or Its**  
10 **Solicitation.**

11 There is no fundamental right to engage in prostitution, or to solicit it. The Fourteenth  
12 Amendment Due Process Clause "unquestionably provides substantive protections for certain  
13 unenumerated fundamental rights." *Raich v. Gonzales*, 500 F.3d 850, 861-62 & n.11 (9th Cir.  
14 2007). But engaging in commercial sex is not among those rights.

15 In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court described the two  
16 part substantive due process analysis: a description of the asserted fundamental right or interest,  
17 and a determination whether it is deeply rooted in the country's history and tradition. *Id.* at 720-  
18 21 (citations omitted); *see Raich*, 500 F.3d at 862, 866. Plaintiffs describe their asserted right as  
19 "the fundamental liberty interest in one's own private sexual conduct," citing *Lawrence v. Texas*,  
20 539 U.S. 558. Complaint ¶ 35. But that defines the interest too broadly; the asserted interest in a  
21 due process analysis must be narrowly drawn. As the Ninth Circuit has held:

22 *Glucksberg* instructs courts to adopt a narrow definition of the interest at stake. See  
23 521 U.S. at 722, 117 S. Ct. 2258 ("[W]e have a tradition of carefully formulating the  
24 interest at stake in substantive-due-process cases."); *see also [Reno v.] Flores*, 507  
25 U.S. [292,] 302 [(1993)] (noting that the asserted liberty interest must be construed  
narrowly to avoid unintended consequences). Substantive due process requires a  
"careful description of the asserted fundamental liberty interest." *Glucksberg*, 521  
U.S. at 721, 117 2258 (quotation and citations omitted).

26 *Raich*, 500 F.3d at 863. For example, in *Raich*, a case in which the Court rejected a substantive  
27 due process challenge to the Controlled Substances Act, plaintiff asserted a "fundamental right to  
28 'mak[e] lifeshaping medical decisions that are necessary to preserve the integrity of her body,

1 avoid intolerable pain, and preserve her life.” *Id.* at 864. The Court concluded that “Raich’s  
2 careful statement does not narrowly and accurately reflect the right that she seeks to vindicate.  
3 Conspicuously missing from Raich’s asserted fundamental right is its centerpiece: that she seeks  
4 the right to use *marijuana* to preserve bodily integrity, avoid pain, and preserve her life.” *Id.* at  
5 864 (emphasis in original, footnote omitted). Here, the missing centerpiece is that plaintiffs seek  
6 to have this Court declare that engaging in *prostitution* is a fundamental right. This case is not  
7 about whether the state can criminalize sex; it is about whether the state can criminalize the  
8 purchase and sale of sex. *See Coyote Publ’g, Inc. v. Miller*, 598 F.3d 592, 596 (9th Cir. 2010)  
9 (“[P]rohibitions on prostitution reflect not a desire to discourage the underlying sexual activity  
10 itself but its *sale*.”) (emphasis in original).

11 Once the liberty interest at stake is properly framed as the right to buy and sell sex, it is  
12 clear that substantive due process does not protect it. No court has recognized prostitution or its  
13 solicitation as a fundamental right or liberty that is “objectively, ‘deeply rooted in this Nation’s  
14 history and tradition.’” *Glucksberg*, 521 U.S. 702, 720-21. To the contrary, prostitution has been  
15 a crime in California since at least 1872. *See* RJN, Exhs. A & B. Nor is there is a trend toward  
16 legalizing prostitution. It is illegal in every State, with the exception of 11 rural counties in the  
17 State of Nevada.<sup>3</sup> In 2008, 59 percent of San Francisco voters rejected Proposition K, which  
18 would have prevented the police from enforcing anti-prostitution laws. RJN, Exhs. C & D. In  
19 2004, more than 63 percent of Berkeley voters rejected a similar initiative. RJN, Exhs. E & F.

20 Federal law also reflects a public policy against prostitution. For example, it is a federal  
21 crime to transport any individual in interstate or foreign commerce “with intent that such  
22 individual engage in prostitution.” 18 U.S.C. § 2421. An alien who has engaged in prostitution  
23

24  
25 <sup>3</sup> Nevada prohibits prostitution in counties with populations of 700,000 or more; other  
26 counties may license brothels if they choose to do so. Nev. Rev. Stat. § 244.345(8); *see Coyote*  
27 *Publ’g, Inc. v. Miller*, 598 F.3d at 596. Prostitution is not legal in Clark County, where Las  
28 Vegas is located and approximately 72 percent of the population resides. *Id.* at 601 n.11. In  
2009, Rhode Island closed a loophole, created in 1980, that allowed indoor prostitution. *See id.* at  
596 n.1.



1 may be denied admission to the United States. 18 U.S.C. § 1182. And prostitution is prohibited  
2 near military establishments. 18 U.S.C. § 1384.

3 *Washington v. Glucksberg*, 521 U.S. 702, and *Raich v. Gonzales*, 500 F.3d 850, are  
4 controlling, and require dismissal of this case. In *Glucksberg*, the Supreme Court upheld the  
5 State of Washington’s prohibition on causing or aiding a suicide against a substantive due process  
6 challenge. 521 U.S. at 706. The Court began by examining the country’s “history, legal  
7 traditions and practices,” noting that in almost every state it is a crime to assist a suicide. *Id.* at  
8 710.<sup>4</sup> The Court observed that Washington voters had rejected a ballot measure that would have  
9 permitted a form of assisted suicide, and that federal law prohibits the use of federal funds in  
10 support of assisted suicide. *Id.* at 716-17. While the Court assumed “that the Due Process Clause  
11 protects the traditional right to refuse unwanted lifesaving medical treatment,” it held that “the  
12 asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected  
13 by the Due Process Clause,” *id.* at 720, 728.<sup>5</sup>

14 Similarly, in *Raich* the Ninth Circuit held that the medical use of marijuana is not a  
15 fundamental right. 500 F.3d at 866. The Court reached that conclusion notwithstanding that the  
16 use of marijuana for medical purposes had been permitted until 1970 when Congress passed the  
17 Controlled Substances Act, and eleven states, including California, had passed laws  
18 “decriminalizing in varying degrees the use, possession, manufacture and distribution of  
19 marijuana for the seriously ill.” 500 F.3d at 864-65.

20 Here, the case for finding that there is a fundamental right to engage in prostitution is far  
21 less compelling than the asserted interests in *Glucksberg* and *Raich*, which the courts rejected.  
22 No final reported judicial decision in the United States has held that the freedom to engage in  
23 commercial sex is a fundamental interest, and as set forth above, there exists no trend among the  
24 states towards its legalization. *See supra* p. 8. Moreover, in an analogous case, the Ninth Circuit

25 \_\_\_\_\_  
26 <sup>4</sup> The Court indicated that forty-four states, the District of Columbia and two territories  
prohibit or condemn assisted suicide. 521 U.S. at 710 n.8.

27 <sup>5</sup> The Court proceeded to hold that the law was rationally related to legitimate government  
28 interests. *Id.* at 728 & n.20.



1 has held that the relationship between paid escort and client is not a relationship protected by the  
2 Fourteenth Amendment. *IDK, Inc. v. County of Clark*, 1185, 1195-96 (9th Cir. 1988).

3 [T]he relationship between escort and client possesses few, if any, of the aspects of an  
4 intimate association. It lasts for a short period and only as long as the client is willing  
5 to pay the fee. . . . While we may assume that the relationship between them is  
6 cordial and that they share conversation, companionship, and the other activities of  
7 leisure, we do not believe that a day, an evening, or even a weekend is sufficient time  
8 to develop deep attachments or commitments. *In fact, the relationship between a  
client and his or her paid companion may well be the antithesis of the highly personal  
bonds protected by the fourteenth amendment. These are not the ties that “have  
played a critical role in the culture and traditions of the Nation by cultivating and  
transmitting shared ideals and beliefs.”*

9 *Id.* at 1193 (emphasis added) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618–19  
10 (1987)). There is no reason to conclude that the relationship between prostitute and client is more  
11 deserving of protection than that of paid escort and client.

12 **B. The Supreme Court Decision in *Lawrence v. Texas* Does Not Apply to  
13 Plaintiffs’ Allegations.**

14 Plaintiffs’ reliance on *Lawrence v. Texas*, 539 U.S. 558, Complaint ¶¶ 35, 37, to support  
15 their claim that prostitution and its solicitation is a fundamental right is misplaced. In *Lawrence*,  
16 the Supreme Court struck down a Texas law making it a crime for two persons of the same sex to  
17 engage in sodomy. 539 U.S. at 565. Employing the same analytic framework used in *Glucksberg*,  
18 the Court noted that same-sex relationships were not singled out for criminal prosecution until the  
19 1970’s, that only nine States had done so, and that “States with same-sex prohibitions have  
20 moved toward abolishing them.” 539 U.S. at 570-571. While the Court recognized that  
21 relationships protected by the Due Process Clause were not limited to marital relationships, and  
22 declined to set the exact boundaries of the term “relationship,” it was focused on personal  
23 relationships, not commercial ones.

24 It suffices for us to acknowledge that adults may choose to enter upon this  
25 relationship in the confines of their homes and their own private lives and still retain  
26 their dignity as free persons. *When sexuality finds overt expression in intimate  
conduct with another person, the conduct can be but one element in a personal bond  
that is more enduring.* The liberty protected by the Constitution allows homosexual  
27 persons the right to make this choice.  
28

1 *Id.* at 567 (emphasis added). The Supreme Court in *Lawrence* was clear that its ruling did not  
2 cover certain activities, *including prostitution*. The Court explained:

3           The present case does not involve minors. It does not involve persons who  
4 might be injured or coerced or who are situated in relationships where consent might  
5 not easily be refused. *It does not involve public conduct or prostitution*. It does not  
6 involve whether the government must give formal recognition to any relationship that  
7 homosexual persons seek to enter. The case does involve two adults who, with full  
8 and mutual consent from each other, engaged in sexual practices common to a  
9 homosexual lifestyle. . . .

7 *Id.* at 578 (emphasis added).

8           Decisions following *Lawrence* have not extended its decision to prostitution or the other  
9 types of sexual conduct the *Lawrence* Court disclaimed. *See, e.g., People v. McEvoy*, 215 Cal.  
10 App. 4th 431, 439-440 (2013) (holding that the criminalization of incest between two consenting  
11 adults does not violate the due process rights explicated in *Lawrence*); *State v. Romano*, 155 P.3d  
12 1102, 1109-1112 (Haw. 2007) (holding that Hawaii's prostitution statute did not violate  
13 defendant's right to privacy under the Due Process Clause or the Hawaii Constitution); *832 Corp.*  
14 *v. Gloucester Twp.*, 404 F. Supp. 2d 614 (D.N.J. 2005) (holding that police raid on a club where  
15 patrons engaged in consensual sex was not a violation of substantive due process); *People v.*  
16 *Williams*, 811 N.E.2d 1197 (Ill. App. 2004) (holding that *Lawrence* did not apply to acts of  
17 prostitution).

18           **C. The Statute Is Rationally Related to Legitimate Government Interests.**

19           California's ban on prostitution survives scrutiny under the rational basis test because it is  
20 rationally related to legitimate government interests. The federal government recognizes that  
21 there is a link between prostitution and trafficking in women and children. *Coyote Publ'g, Inc. v.*  
22 *Miller*, 598 F.3d at 600. *See* U.S. Dep't of State, *The Link Between Prostitution and Sex*  
23 *Trafficking* (Nov. 24, 2004) (O'Grady Decl., Exh. 2); Bureau of Justice Statistics, U.S. Dep't of  
24 Justice, *Characteristics of Suspected Human Trafficking Incidents, 2008-2010* 1, 3 (April 2011)  
25 (reporting that 82% of suspected incidents of human trafficking were characterized as sex  
26 trafficking, and more than 40% of sex trafficking involved sexual exploitation or prostitution of a  
27 child) (O'Grady Decl., Exh. 3). Prostitution creates a climate conducive to violence against  
28 women. *See United States v. Carter*, 266 F.3d 1089, 1091 (9th Cir. 2001); Melissa Farley,

1 *Prostitution Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the*  
2 *Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 111 & passim  
3 (2006) (addressing pervasive violence in prostitution and concluding that “[r]egardless of  
4 prostitution’s status (legal, illegal, zoned or decriminalized) or its physical location (strip club,  
5 massage parlor, street, escort/home/hotel), prostitution is extremely dangerous for women.”)  
6 (O’Grady Decl., Exh. 4); Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. Cal.  
7 L.Rev. 523, 533 nn.47-48 (2000) (reporting that a “study of 130 prostitutes in San Francisco  
8 found that 82% had been physically assaulted, 83% had been threatened with a weapon, [and]  
9 68% had been raped while working as prostitutes,” and that another study “demonstrate[ed] that  
10 violence is pervasive in the lives of all categories of women who sell sex for money”) (O’Grady  
11 Decl., Exh. 5). Prostitution is linked to the transmission of AIDS and sexually transmitted  
12 diseases. *See, e.g., Love v. Superior Court* 226 Cal. App. 3d 736 (1990) (upholding mandatory  
13 AIDS testing and counseling for person convicted of soliciting where the Legislature “has  
14 determined that those who engage in prostitution activities represent a high-risk group in terms of  
15 their own health, in contracting AIDS, and in terms of the health of others, in spreading the  
16 virus”); *Northern Mariana Islands v. Taman*, 2014 WL 4050021, at \*3 (N. Mar. I. 2014)  
17 (prostitutes pose a health risk for sexually transmitted diseases). A legislature reasonably may  
18 conclude that there is a substantial link between prostitution and illegal drug use. *See Colacucio*  
19 *v. City of Kent*, 163 F.3d 545, 554, 557 (9th Cir. 1998) (holding that requirement that nude  
20 dancers maintain distance from nightclub patrons served state interest in controlling prostitution  
21 and drug sales, and observing that several courts have upheld such requirements for the same dual  
22 purpose); Amy M. Young, et al., *Prostitution, Drug Use, and Coping with Psychological*  
23 *Distress*, J. Drug Issues 30(4), 789-800 (2000) (O’Grady Decl., Exh. 6). California also has a  
24 legitimate interest simply in deterring the commodification of sex. *See Coyote Publ’g, Inc. v.*  
25 *Miller*, 598 F.3d at 603 (observing that the Thirteenth Amendment “enshrines the principle that  
26 people may not be brought and sold as commodities,” and that restrictions on prostitution are  
27 driven by “an objection to their inherent commodifying tendencies – to the buying and selling of  
28 things and activities integral to a robust conception of personhood.”); *People v. Grant*, 195 Cal.

1 App. 4th at 113-15 (holding that anti-pimping statute bore a rational relationship to the proper  
2 legislative goal of suppressing prostitution). Section 647(c) is rationally related to legitimate  
3 government interests and therefore does not violate plaintiffs' substantive due process rights.<sup>6</sup>

4 **III. THERE IS NO FREE SPEECH RIGHT TO SOLICIT THE CRIME OF PROSTITUTION.**

5 Plaintiffs' claim that the prohibition against solicitation violates their First Amendment  
6 right to free expression fails as a matter of law because they do not allege, and fairly cannot  
7 allege, that the First Amendment right to freedom of expression extends to agreements to engage  
8 in illegal activity, including commercial sex. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 478 U.S.  
9 697, 704-05, 707 (1986) (holding that the First Amendment did not preclude closing down an  
10 adult bookstore on the basis that solicitation of prostitution was occurring on the premises, and  
11 that the sexual activity at issue "manifests absolutely no element of protected expression"); *Tily*  
12 *B., Inc. v. City of Newport Beach*, 69 Cal. App. 4th 1, 17 (1998) (holding that the state interest in  
13 combatting prostitution is not inherently related to the right of free expression). The verbal  
14 communications that constitute solicitation under Penal Code section 647(b) are not  
15 constitutionally protected speech. *Kim v. Superior Court*, 136 Cal. App. 4th at 944. *Accord U.S.*  
16 *v. Dhingra*, 371 F.3d 557, 561-62 (9th Cir. 2004) (holding that statute imposing criminal liability  
17 on persons who entice minors into unlawful sexual activity criminalizes conduct, not speech, and  
18 that "speech is merely the vehicle" by which the crime is committed).

19 **IV. THERE IS NO ASSOCIATIONAL RIGHT TO ENGAGE IN SEX FOR HIRE.**

20 The First Amendment protects expressive associations, but the relationship between  
21 prostitute and client is not such an association. The Ninth Circuit decision in *IDK, Inc. v. County*  
22 *of Clark*, 836 F.2d 1185, is controlling.

23 In *IDK*, a group of companies providing escort services claimed that their activities were  
24 protected under the First Amendment because escorts and clients "associate for social, economic,  
25 and cultural ends." 836 F.3d at 1194.<sup>7</sup> The Ninth Circuit disagreed. The Court acknowledged

26 <sup>6</sup> Section 647(b) would pass constitutional muster even under a heightened scrutiny  
27 standard.

28 <sup>7</sup> In contrast, the defendant argued that "most if not all escort services are little more than  
'modified brothels.'" 836 F.2d at 1187.

1 that “the first amendment fully protects expression about philosophical, social, artistic, economic,  
2 literary, ethical and other topics,” but concluded “it has never been deemed an abridgment of  
3 freedom of speech or press to make a course of conduct illegal merely because the conduct was in  
4 part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”  
5 *Id.* (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 477, 456 (1978)). In determining the  
6 extent of First Amendment protection, courts consider whether the association is primarily  
7 expressive or primarily commercial; the Ninth Circuit concluded that escort services were  
8 primarily commercial associations. *Id.* at 1195.

9 [T]he escort services make no claim that expression is a significant or necessary  
10 component of their activities. The services’ advertisements included in the record do  
11 not tout their employees’ skills in conversation, advocacy, teaching, or community  
12 service, and thus we assume that clients select their companions on the basis of other  
13 criteria. . . . If a client does not care to engage in expressive activities while dating,  
14 we must assume that neither the escort services nor the escort compel the client to do  
15 so. The escort services simply do not care what the couples talk about or whether  
16 they talk at all. The escort services cannot claim that expression constitutes anything  
17 but an incidental aspect of their commercial activity.

18 *Id.* at 1195-96. Similarly, prostitutes are not hired for their conversational skills, they are hired  
19 for sex, and section 647(b) does not criminalize meeting with a prostitute, it criminalizes paying a  
20 prostitute for sex. Association for the purpose of sexual commerce is not protected by the First  
21 Amendment. *Arcara v. Cloud Books, Inc.*, 478 U.S. at 704-05, 707. *See FW/PBS, Inc. v. City of*  
22 *Dallas*, 493 U.S. 215, 224 (1990) (indicating escort agencies and sexual encounter centers are not  
23 protected by the First Amendment); *Williams v. Superior Court*, 30 Cal. App. 3d 8, 11 (1973)  
24 (holding that prostitution “does not involve First Amendment nor any other constitutionally  
25 protected rights”).

26 **V. THERE IS NO SUBSTANTIVE DUE PROCESS RIGHT TO EARN A LIVING AS A**  
27 **PROSTITUTE.**

28 The Fourteenth Amendment establishes the right of an individual “to contract, to engage in  
any of the common occupations of life.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564,  
572 (1972). However, “[a] threshold requirement to a substantive or procedural due process  
claim is the plaintiff’s showing of a liberty or property interest protected by the Constitution.” *Id.*  
at 569; *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994).

1 Whether plaintiffs can state a claim for deprivation of a *property* interest because of an  
2 unconstitutional burdening of their right to earn a living turns on whether they have a property  
3 interest in working as prostitutes.<sup>8</sup> Whether a property interest in employment exists is a matter  
4 of state law. *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Black v. Payne*, 591 F.2d 83, 88 (9th Cir.  
5 1979). California law does not recognize a property interest in working as a prostitute, and Penal  
6 Code section 647(b) effectively negates any such interest.

7 Nor is there a protectable *liberty* interest in employment as a prostitute. “[T]he liberty  
8 component of the Fourteenth Amendment’s Due Process Clause includes some generalized due  
9 process right to choose one’s field of private employment, but a right which is nonetheless subject  
10 to reasonable government regulation.” *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1992).<sup>9</sup> A  
11 protectable liberty interest in employment arises only “where not affirmatively restricted by  
12 reasonable laws or regulations of general application.” *Blackburn v. City of Marshall*, 42 F.3d  
13 925 (5th Cir. 1995). A law placing restrictions on employment will be upheld so long as there is  
14 a legitimate state interest in regulating the trade or profession. *Williamson v. Lee Optical of*  
15 *Okla.*, 348 U.S. 483 (1955). As discussed in Section II.C. above, California has such an interest.

## 16 VI. PLAINTIFFS’ STATE CLAIMS FAIL.

17 Plaintiffs’ state constitutional challenges likewise fail. The Eleventh Amendment bars  
18 these claims. “[A] federal suit against state officials on the basis of state law contravenes the  
19 Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State  
20 itself.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). Here, the State is  
21 the real, substantial party in interest to plaintiff’s challenge to section 647(b). *See id.* at 92, 101.  
22 This court’s pendent jurisdiction does not extend to plaintiffs’ state law claims. *Id.* at 118.

23 But even if the Court were to reach the merits of plaintiffs’ state law claims, they fail as a  
24 matter of law. Every legislative enactment is presumptively constitutional, and the party

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25 <sup>8</sup> To the extent plaintiff John Doe is pursuing this claim, it fails for the independent reason  
26 that he has not alleged that he wishes to be employed as a prostitute. Complaint ¶ 28.

27 <sup>9</sup> The power to regulate, of course, includes the power to prohibit altogether. *Gonzales v.*  
28 *Raich*, 545 U.S. 1, 14, 17, 22 (2005) (holding that Congress’ regulatory power included the power  
to make it unlawful to manufacture, distribute or possess marijuana).



1 challenging it has the burden of proving it is not. *Brown v. Community Redev. Agency*, 168 Cal.  
2 App. 3d 1014, 1019 (1985). “[T]he courts should not and must not annul, as contrary to the  
3 [C]onstitution, a statute passed by the Legislature, unless it can be said of the statute that it  
4 positively and certainly is opposed to the [C]onstitution.” *Sav-On Drugs, Inc. v. County of*  
5 *Orange*, 190 Cal. App. 3d 1611 (1987). No California court has held that Penal Code section  
6 647(b) facially violates article I, sections 2(a) or 7(a), and several California courts, including the  
7 California Supreme Court, have rejected constitutional challenges to it. *See, e.g., People v.*  
8 *Caswell*, 46 Cal. 3d 381, 390, 250 515 (1988) (holding that statute prohibit loitering for the  
9 purpose of engaging in or soliciting a lewd or lascivious or unlawful act was not  
10 unconstitutionally vague); *People v. Superior Court (Hartway)*, 19 Cal. 3d 338 (1977) (holding  
11 statute prohibiting solicitation of prostitution satisfies constitutional due process and equal  
12 protection requirements under federal and state constitutions); *People v. Grant*, 195 Cal. App. 4th  
13 at 113-115 (holding that pimping statute prohibiting person from deriving support from the  
14 earnings of a known prostitute did not violate defendants’ substantive due process rights); *People*  
15 *v. Pulliam*, 64 Cal. App. 4th 1430 (1998) (holding that statute proscribing loitering in public place  
16 with intent to commit act of prostitution did not violate due process, is not unconstitutionally  
17 overbroad and is not a form of expression protected by the First Amendment); *Williams v.*  
18 *Superior Court*, 30 Cal. App. 3d at 11 (holding that prostitution “does not involve First  
19 Amendment nor any other constitutionally protected rights”).

## 20 **VII. PLAINTIFFS’ AS-APPLIED CHALLENGES FAIL.**

21 Plaintiffs have not alleged a cognizable as-applied challenge. An as-applied challenge to  
22 the constitutional validity of a statute “contends that the law is unconstitutional as applied to the  
23 litigant’s particular [ ] activity, even though the law may be capable of valid application to  
24 others.” *Foti v. City of Menlo Park*, 146 F.3d 629 (1998). *See Isaacson v. Horne*, 716 F.3d 1213,  
25 1230 (9th Cir. 2013); *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011).

26 An as-applied challenge necessarily fails when the fact situation alleged “is the core fact  
27 situation intended to be covered by [the statute], and it is the same type of fact situation that was  
28 envisioned by [the] court when the facial challenge was denied.” *Hoye v. City of Oakland*, 653

1 F.3d at 857-58. That is the case here. There is no allegation that the law has been enforced  
 2 against plaintiffs in a constitutionally impermissible way.<sup>10</sup> The complaint also does not allege  
 3 that the statute will be enforced against plaintiffs in a way that would render an otherwise valid  
 4 law unconstitutional as applied to their particular circumstances. It simply alleges that, if  
 5 plaintiffs engage in solicitation or prostitution in the future, they may be subject to prosecution.  
 6 Complaint ¶ 29 (“Plaintiffs each fear that they may be prosecuted . . . under California’s  
 7 prostitution or solicitation laws if they do engage in sexual activity for hire. . . .”). That is “the  
 8 core fact situation intended to be covered by” section 647(b). But even if these allegations could  
 9 be construed as identifying specific future activity, and they cannot, the claims are speculative  
 10 and not ripe, and do not state a cognizable claim for relief. *See Hoye v. City of Oakland*, 653 F.3d  
 11 at 857-58 (observing that the court generally declines to entertain an as-applied challenge that  
 12 would require it to speculate as to prospective facts); *Legal Aid Servs. v. Legal Servs. Corp.*, 608  
 13 F.3d 1084, 1096-97 (9th Cir. 2011) (holding that enforcement actions against others is not  
 14 tantamount to an enforcement action against plaintiffs and does not support an as-applied  
 15 challenge); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. at 555 (holding that complaint must  
 16 allege facts sufficient to “raise a right to relief above the speculative level”).

### 17 CONCLUSION

18 The Court should dismiss this action without leave to amend.

19 Dated: May 8, 2015

Respectfully Submitted,

20 KAMALA D. HARRIS  
 Attorney General of California  
 21 TAMAR PACHTER  
 Supervising Deputy Attorney General

22 /s/ Sharon L. O’Grady

23 SHARON L. O’GRADY  
 Deputy Attorney General  
 24 *Attorneys for Defendants*

25  
 26 \_\_\_\_\_  
 27 <sup>10</sup> The only allegation that there has been any enforcement of Penal Code section 647(b)  
 28 against any plaintiff is that plaintiff C.V. was arrested on prostitution charges in 2007, but the  
 charges were dismissed. Complaint ¶ 26.



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8  
 9 IN THE UNITED STATES DISTRICT COURT  
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 11 OAKLAND DIVISION

12  
 13 **EROTIC SERVICE PROVIDER LEGAL,  
 EDUCATION & RESEARCH PROJECT;  
 14 K.L.E.S.; C.V.; J.B.; AND JOHN DOE,**  
 15 Plaintiffs,

4:15-CV-01007 JSW

**DECLARATION OF SHARON L.  
 O'GRADY IN SUPPORT OF MOTION  
 TO DISMISS**

16 v.

Judge: The Hon. Jeffrey S. White  
 Dept: 5, 2d Floor  
 Trial Date: None Set  
 CMC Date: August 7, 2015  
 Action Filed: March 4, 2015

17 **GEORGE GASCON, in his official capacity  
 as District Attorney of the City and County  
 of San Francisco; EDWARD S.  
 18 BERBERIAN, JR., in his official capacity as  
 District Attorney of the County of Marin;  
 19 NANCY E. O'MALLEY, in her official  
 capacity as District Attorney of the County  
 20 of Alameda; JILL RAVITCH, in her official  
 capacity as District Attorney of the County  
 21 of Sonoma; and KAMALA D. HARRIS, in  
 her official capacity as Attorney General of  
 22 the State of California,**

23 Defendants.  
 24  
 25  
 26  
 27  
 28

1 I, Sharon O’Grady, declare as follows:

2 1. I am a Deputy Attorney General and one of the attorneys representing  
3 Defendant KAMALA D. HARRIS, in her official capacity as Attorney General of the State of  
4 California (the “Attorney General”). I am submitting this declaration in support of the Attorney  
5 General’s Motion to Dismiss. The facts set forth herein are based on my personal knowledge,  
6 and I could competently so testify if called as a witness.

7 2. Attached hereto as Exhibit 1 is a true and correct copy of Arthur H. Sherry,  
8 *Vagrants, Rogues and Vagabonds-Old Concepts in Need of Revision*. 48 CAL. L. REV. 557 (Oct.  
9 1960), a true and correct copy of which is attached as hereto as Exhibit 1.

10 3. Attached hereto as Exhibit 2 is a true and correct copy of U.S. Dep’t of State,  
11 *The Link Between Prostitution and Sex Trafficking* (Nov. 24, 2004), *available at* [http://2001-](http://2001-2009.state.gov/r/pa/ei/rls/38790.htm)  
12 [2009.state.gov/r/pa/ei/rls/38790.htm](http://2001-2009.state.gov/r/pa/ei/rls/38790.htm).

13 4. Attached hereto as Exhibit 3 is a true and correct copy of Bureau of Justice  
14 Statistics, U.S. Dep’t of Justice, *Characteristics of Suspected Human Trafficking Incidents, 2008-*  
15 *2010, 1, 3* (April 2011), *available at* [www.bjs.gov/content/pub/pdf/cshti08.pdf](http://www.bjs.gov/content/pub/pdf/cshti08.pdf).

16 5. Attached hereto as Exhibit 4 is a true and correct copy of Melissa Farley,  
17 *Prostitution, Trafficking and Cultural Amnesia: What We Must Not Know in Order to Keep the*  
18 *Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109 (2006).

19 6. Attached hereto as Exhibit 5 is a true and correct copy of Sylvia A. Law,  
20 *Commercial Sex: Beyond Decriminalization*, 73 S. Cal. L.Rev. 523 (2000).

21 7. Attached hereto as Exhibit 6 is a true and correct copy of Amy M. Young, et  
22 al., *Prostitution, Drug Use, and Coping with Psychological Distress*, J. DRUG ISSUES 30(4), 789-  
23 800 (2000).

24 I declare under penalty of perjury under the laws of the State of California that the  
25 foregoing is true and correct. Executed this 8th day of May, 2015, in San Francisco, California.

26  
27 /s/ \_\_\_\_\_  
28 Sharon L. O’Grady

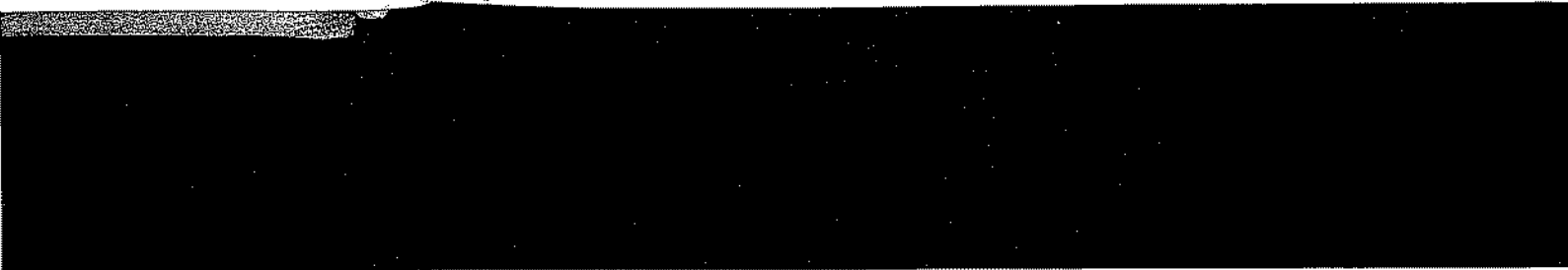
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# CALIFORNIA LAW REVIEW

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## Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision

Arthur H. Sherry\*

*Dogberry . . . You are thought here to be the most senseless and fit man for the constable of the watch; therefore bear you the lanthorn. This is your charge: you shall comprehend all vagrom men . . . .*

Much Ado About Nothing, Act III, Scene III

### I

THE ARCHAIC pattern of Dogberry's speech by which he commissioned the constable of the watch is an inseparable part of the charm and interest so characteristic of the writing of Shakespeare. Transposed to the contemporary American scene, however, and cherished on the pages of what we are pleased to call a modern statutory system, its anachronistic character is ill-suited to the objectives of the administration of justice in a modern world. It has been so transposed, nonetheless, to the vagrancy statutes of virtually every jurisdiction in the United States.<sup>1</sup> If this were merely a matter of style, if phraseology alone were at the heart of the matter, retaining the quaint medieval syntax of old England might be tolerated on grounds of historical sentiment. Unfortunately, the 14th century *wagabund*<sup>2</sup> and Shakespeare's *vagrom men* are not just words for which modern substitutes stand readily at hand, nor are the statutes in which the vagrant, rogue and vagabond of today are identified and defined

\*Professor of Law and Criminology, University of California, Berkeley. I am indebted to my colleague, Professor Rex A. Collings, Jr., for permitting me to read the manuscript of his study of vagrancy-type offenses which he prepared for the American Law Institute's Model Penal Code project. It was an invaluable supplement to the product of my own research.

<sup>1</sup> Vagrancy is a statutory offense in every state except West Virginia where it remains a common law offense. *City of Huntington v. Salyer*, 135 W. Va. 397, 63 S.E.2d 575 (1951); see Foote, *Vagrancy-Type Law and Its Administration*, 104 U.P.A. L. REV. 603, 609 (1956).

<sup>2</sup> "[I]n the year 1311 [in London] we find 'John Blome indicted as a common *wagabund* by night for committing batteries and other mischiefs . . .,'" RIBTON-TURNER, *A HISTORY OF VAGRANTS AND VAGRANCY* 39 (1887).

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so written that their inadequacies may be cured by translating their terms into the prose of the mid-20th century draftsman.

Some such translation has been attempted, some modernization has been accomplished. Essentially, however, the notion persists that an individual living in a land in which the protection of civil rights is a primary objective of government may still be punished as a criminal by virtue of personal condition or of belonging to a particular class.<sup>3</sup> Such a conclusion, inconsistent as it may be with otherwise prevailing standards of criminal responsibility, is not illogical; rather, it is compelled by the concept of feudal paternalism which the first vagrancy laws were consciously designed to foster<sup>4</sup> and which centuries later were uphappily spread upon the statute books of a nation whose legal, political and social principles were of a very different order.<sup>5</sup>

A comparatively recent illustration of the persistence of this antiquated paternalism is found in the following defense of the Virginia vagrancy statute:<sup>6</sup>

Adverting to our vagrancy statutes, it will readily be seen that deserving but unfortunate persons are not likely to suffer. Wide latitude is granted trial courts. If a defendant establishes that he has made reasonable effort to obtain employment and offered his services at reasonable prices and has failed to secure work, he will not be convicted of vagrancy. Or if he has been convicted the court may allow him to give bond and to be discharged from custody conditioned upon his future industry and good conduct for a year. Or if the defendant is physically incapable of supporting himself and is in destitute circumstances, he may, in the discretion of the court, be committed to the poorhouse. With these reasonable safeguards it is not likely that an injustice will be done . . . .<sup>7</sup>

This casual dismissal of the usual safeguards inherent in criminal proceedings, this willingness to assume that no one is likely to suffer as a result and the candidly patronizing attitude of the court is in sharp conflict with prevailing principles of criminal law and procedure, but it is quite consistent with the purpose, spirit and administration of the forbears of the Virginia

<sup>3</sup> Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); with an eye toward Shakespeare, Henshaw, J., in *People v. Lee*, 107 Cal. 477, 480, 40 Pac. 754, 755 (1895), wrote: "A person, for example, charged with vagrancy is of right entitled to know whether he is called upon to meet the charge as being a common drunkard, or as being a dissolute associate of known thieves, or as being a healthy beggar, in short, as belonging to what class, or as having habitually committed what act to lay him liable as a 'vagrom man.'"

<sup>4</sup> 3 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 266-75 (1883).

<sup>5</sup> See, e.g., this reference to the history of the Maine statute in *State v. Burgess*, 123 Me. 393, 394, 123 Atl. 178 (1924): "This is an old statute, somewhat quaint in its phraseology, and has come down in substantially the same form through all the revisions since the establishment of our state. . . . In fact, this statute was copied from the old Massachusetts statute of March 26, 1788 [St. 1788, c. 21]."

<sup>6</sup> VA. CODE ANN. § 63-338 (1950).

<sup>7</sup> *Morgan v. Commonwealth*, 168 Va. 731, 741, 191 S.E. 791, 795 (1937).



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statute. There has been some translation from the ancient forms in this law but a brief comparison will illustrate that the concepts are the same.

The Virginia Code defines nine classes of persons "who shall be deemed vagrants." In the first class are all persons who shall unlawfully return into any county or corporation whence they have been legally removed. As early as 1494, in the reign of Henry VII, it was provided that beggars and idle persons, after appropriate punishment in the stocks, were to be put out of town and directed to return to their homes, there to remain upon pain of further punishment should they return.<sup>8</sup> This became a standard provision of the many statutes which dealt with the problem of shoring up the sagging institution of serfdom thereafter and it appears in substance in the Vagrancy Act of 1824<sup>9</sup> which remains the basic law on the subject in England today.<sup>10</sup> In its present form, however, the English law no longer authorizes banishment as a form of punishment for vagrancy.<sup>11</sup>

The second class defined in the Virginia statute are those who, "not having the wherewithal to maintain themselves," live idly, without employment and refuse to work for the usual and common wages given to other laborers in like work. This provision is recognizable as a paraphrase of the most vital part of the Statute of Laborers which was drafted in 1349.<sup>12</sup> Its survival in this age of NLRB, Taft-Hartley and the complex of labor legislation found in every state would be extraordinary if it were not for the fact that such relics of the past are far more common than otherwise in the vagrancy laws of the United States.

The law of Virginia,<sup>13</sup> in its remaining subdivisions, includes among those who commit the offense of vagrancy persons wandering or strolling about in idleness; persons leading idle, immoral or profligate lives who are propertyless and unwilling to work; able-bodied beggars and those who abandon wife or child; persons who come from without the state and who are found residing or loitering within it and who have no visible occupation or means of subsistence and who are unable to give a reasonable account of themselves; persons having a fixed abode but who live by stealing or bartering stolen goods; persons who hire out their children and live on their earnings although able themselves to work; and all persons without apparent lawful income who consort with idlers, gamblers, bootleggers and other varieties of sinners, or with persons "having the reputation of any of the above named."

<sup>8</sup> Statute of Westminster, 1494, 2 Hen. 7, c. 2.

<sup>9</sup> The Vagrancy Act, 1824, 5 Geo. 4, c. 83.

<sup>10</sup> 18 HALSBURY, STATUTES OF ENGLAND 202 (2d ed. 1950).

<sup>11</sup> It is not a permissible form of punishment in California. *In re Scarborough*, 76 Cal. App. 2d 648, 173 P.2d 825 (1946); *cf. Edwards v. California*, 314 U.S. 160 (1941).

<sup>12</sup> 23 Edw. 3, c. 7; see 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 458 (1923); PUTNAM, THE ENFORCEMENT OF THE STATUTES OF LABOURERS (1908).

<sup>13</sup> VA. CODE ANN. § 63-338, subdvs. 1-9 (1950).

As in the case of the first two subdivisions of the statute, these are in all essentials faithful adaptations of the principal English vagrancy statutes which were enacted during the three or four centuries preceding the Industrial Revolution.

It must be repeated, however, that Virginia is by no means unique in clinging to a law that long since lost any reasonable relationship to the social, political, economic and legal conditions which prevail in the modern world. The Alabama statute,<sup>14</sup> for example, is very much the same. It adds "common drunkard" to the list of vagrants (a classification, incidentally, which does not appear in the English vagrancy laws)<sup>15</sup> and it makes at least one concession to the world of today by excluding idleness resulting from strikes or lockouts as a condition of vagrancy.<sup>16</sup> Connecticut is faithful to the ancient models;<sup>17</sup> Delaware, like Connecticut, includes the category of "tramp" to describe the idle wanderer and adds to the list of vagrants "all persons roaming about the country, commonly known as gypsies."<sup>18</sup> The District of Columbia Code lists nine categories, among them fornicators; the ninth includes all persons who are vagrants by the common law whether or not named specifically in the statute.<sup>19</sup> Florida<sup>20</sup> and Illinois<sup>21</sup> are distinctly Elizabethan; they condemn persons who use juggling or unlawful games or plays,<sup>22</sup> common pipers and fiddlers, common railers

<sup>14</sup> ALA. CODE tit. 14, §§ 437-44 (1941).

<sup>15</sup> Common drunk was not an offense known to the common law. *In re Newbern*, 53 Cal. 2d 786, 3 Cal. Rptr. 364, 350 P.2d 116 (1960). See note 41 *infra*.

<sup>16</sup> ALA. CODE tit. 14, § 440 (1941).

<sup>17</sup> CONN. GEN. STAT. REV. §§ 53-336, 53-340 (1958). In the first of these sections, the transient beggar and the idle vagrant "who stroll over the country without lawful occasion" are classified as "tramps." The second makes those punishable who go about begging, who travel without lawful occasion, who sleep in outhouses or barns or in the open air and can give no good account of themselves, those who camp on the public highways or on private property without permission, "all brawlers and fortune tellers and all common drunkards."

<sup>18</sup> DEL. CODE ANN. tit. 11, § 881 (1953).

<sup>19</sup> D.C. CODE ANN. § 22-3302 (1951).

<sup>20</sup> FLA. STAT. § 856-02 (1957).

<sup>21</sup> ILL. ANN. STAT. ch. 38, § 578 (Smith-Hurd 1935).

<sup>22</sup> In the time of Elizabeth, actors or players were licensed under the patronage of the great lords. It was for their protection that unlicensed competition was made unlawful by the phrase "unlawful games or plays." RIBTON-TURNER, *op. cit. supra* note 2, at 110. As for unlawful games the following instruction which appears in A COMPLETE GUIDE FOR CONSTABLES, anon., London, printed near Temple Bar, 1707, is revealing: "And for distinguishing what are unlawful Games, and who are unlawful Gamesters, it is enacted the said Statute, 33 H. 8. cap. 9. That no Artificer, or his Journeyman, no Husbandman, Apprentice, Labourer, Servant at Husbandry, Mariner, Fisherman, Waterman, or Servingman shall play at Tables, Tennis, Dice, Cards, Bowis, Clash, Coyting, Loggating, or any other unlawful Game, out of Christmas, or then out of their Masters house or presence . . . But this Act shall not restrain a Servant, by his Masters License, to Play at Cards, Dice, or Table with the Master himself, or other Gentleman resorting to his Masters House." The GUIDE's references to rogues and vagabonds, together with indignant comment, may be found in PARRY, THE LAW AND THE POOR 4 (1914).



## VAGRANTS

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the statute, these are principal English vagrancy laws of our centuries preceding

by no means unique in their relationship to the law which prevail in the modern world, much the same. It adds to the classification, incidentally, (laws) and it makes at least including idleness resulting from Connecticut is faithful to the list of vagrants which are known as gypsies.<sup>18</sup> Among them fornicators by the common law of Florida<sup>20</sup> and Illinois<sup>21</sup> who use juggling or jugglers, common railers

Newbern, 53 Cal.

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and brawlers, the idlers, the loafers and other assorted rascals which seem to have been selected more or less at random from the provisions of the Statute of Elizabeth as it was enacted in 1597-98.<sup>23</sup>

At least one jurisdiction includes those who are found in possession of weapons or instruments with intent to commit a crime.<sup>24</sup> This category was an innovation in the law of England in 1824.<sup>25</sup> Others make special provision, usually under the designation "tramp," for the trespasser found armed in a building or the trespasser who threatens injury to the person or property of the occupants of land or buildings.<sup>26</sup>

Massachusetts defined vagrancy in 1788 by conforming to the then current English style.<sup>27</sup> A hesitant step toward modernization was made in 1943 when the words "Rogues and vagabonds, persons who use any juggling . . . common pipers and fiddlers" were stricken; in 1953 the category of common drunkard was dropped, but of the classes which remain condemned by the statute "stubborn children" lead all the rest.<sup>28</sup>

Window peepers,<sup>29</sup> persons diseased from drunkenness or debauchery,<sup>30</sup> fortune tellers "and such other like impostors,"<sup>31</sup> idlers who are not Indians,<sup>32</sup> frequenters of "low dens,"<sup>33</sup> persons who paint or discolor their faces,<sup>34</sup> persons who act as callers of figures for dances in houses of ill fame,<sup>35</sup> sturdy beggars<sup>36</sup> and, in Hawaii, persons who practice "hoopiopio, hoounauna, boomanamana, anaana, or pretend to have the power of praying persons to death,"<sup>37</sup> are categories included in American vagrancy statutes which serve to give some indication of the style in which they are written and the great range of human activity which they purport to sweep within their ambit.

<sup>23</sup> 39 Eliz., c. 4.

<sup>24</sup> E.g., GA. CODE ANN. § 26-7101 (1953) which deems such a person to be "a rogue and a vagabond."

<sup>25</sup> The Vagrancy Act, 1824, 5 Geo. 4, c. 83; See 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 273-74 (1883); KENNY, OUTLINES OF CRIMINAL LAW 411-15 (17th ed. 1958).

<sup>26</sup> IND. ANN. STAT. § 10-4603 (Burns 1956); IOWA CODE § 746.3 (1958); ME. REV. STAT. ANN. ch. 137, § 34 (1954); MD. ANN. CODE art. 27, § 490 (1957); N.H. REV. STAT. ANN. 576:2 (1955); N.Y. PEN. LAW § 2371; N.C. GEN. STAT. § 14-339 (1953).

<sup>27</sup> Note 5 *supra*.

<sup>28</sup> MASS. GEN. LAWS ANN. ch. 272, § 53 (1956).

<sup>29</sup> MICH. COMP. LAWS § 750.167 (1948, as amended by Pub. Law 110, 1956).

<sup>30</sup> MINN. STAT. ANN. § 614.57[2] (1947).

<sup>31</sup> MINN. STAT. ANN. § 614.57 [6] (1947); and see note 17 *supra*.

<sup>32</sup> ARIZ. REV. STAT. ANN. § 13-991 (1) (1956); CAL. PEN. CODE § 647 (1); MONT. REV. CODES ANN. § 94-35-248 (1) (1947); UTAH CODE ANN. § 76-61-1 (1953).

<sup>33</sup> NEV. REV. STAT. § 207.030 (10b) (1957).

<sup>34</sup> N.Y. CODE CRIM. PROC. § 887 (7).

<sup>35</sup> OKLA. STAT. ANN. tit. 21, § 1141 (4) (1958).

<sup>36</sup> R.I. GEN. LAWS ANN. § 11-45-1 (1956).

<sup>37</sup> HAWAII REV. LAWS § 314-1 (1955).

## II

The vagrancy law of California is a direct descendant of the ancestors of the statutes of the older states.<sup>38</sup> It is faithful to the concept of status as a basis for punishment,<sup>39</sup> and, while its language may not be as colorful as those which are more faithful to the original models, it is just as vague, just as indiscriminate and just as subject to abuse as any of the others.<sup>40</sup> It has received frequent consideration in the appellate courts, but in com-

<sup>38</sup> CAL. PEN. CODE. § 647. The statute is essentially the same as it was when first enacted in 1872. The prototype for the 1872 version (Cal. stat. 1855, ch. 175, p. 217, as amended by Cal. stat. 1863, ch. 525, p. 770) contains the Indian exception but limits it to "Digger Indians." It also contains a provision, wisely dropped in 1872, that persons "commonly known as 'Greasers' or the issue of Spanish and Indian blood" who are vagrants and who go armed may be punished. In its present form, the statute reads:

1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; or,
  2. Every beggar who solicits alms as a business; or
  3. Every person who roams about from place to place without any lawful business; or,
  4. Every person known to be a pickpocket, thief, burglar or confidence operator, either by his own confession, or by his having been convicted of any such offenses, and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop or crowded thoroughfare, car, or omnibus, or any public gathering or assembly; or,
  5. Every lewd or dissolute person, or every person who loiters in or about public toilets in public parks; or,
  6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; or,
  7. Every person who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; or,
  8. Every person who lives in and about houses of ill-fame; or,
  9. Every person who acts as a runner or capper for attorneys in and about police courts or city prison; or,
  10. Every common prostitute; or,
  11. Every common drunkard; or,
  12. Every person who loiters, prowls or wanders upon the private property of another, in the nighttime, without visible or lawful business with the owner or occupant thereof; or who while loitering, prowling or wandering upon the private property of another, in the nighttime, peeks in the door or window of any building or structure located thereon and which is inhabited by human beings, without visible or lawful business with the owner or occupants thereof;
- Is a vagrant, and is punishable by a fine of not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

<sup>39</sup> *People v. Denby*, 108 Cal. 54, 40 Pac. 1051 (1895); *District of Columbia v. Hunt*, 163 F.2d 833 (D.C. Cir. 1947); *State v. Suman*, 216 Minn. 293, 12 N.W. 620 (1943); *State v. Harlowe*, 174 Wash. 227, 24 P.2d 601 (1933); *Rex v. Oiseberg*, 56 Can. Crim. Cas. Ann. (1931).

<sup>40</sup> See Hall, *The Law of Arrest In Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936); Note, *Use of Vagrancy-Type Laws For Arrest and Detention Of Suspicious Persons*, 59 YALE L.J. 1351 (1950); Foote, *Vagrancy-Type Law And Its Administration*, 104 U. PA. L. REV. 603 (1956).



mon with the laws of other jurisdictions it has withstood attack and survived all manner of criticism with a remarkable degree of endurance. The reasons for the existing state of arrested development in this branch of the criminal law are matters for speculation that need not be touched upon here; of far more importance is the obvious necessity to devise new legislation that accords with modern concepts and harmonizes with the main body of the law.

This necessity, so far as California is concerned, became clear with the decision of the supreme court in the case of *In re Newbern*.<sup>41</sup> Although this case went no further than to hold the classification "common drunkard" to be void for vagueness, by necessary implication it left the parallel classification, "common prostitute," equally bereft of legal meaning and quite plainly indicated that a forthright application of the "void for vagueness" standard<sup>42</sup> may hereafter be expected when other provisions of the statute are called into question.

In its opinion the court defines the requirement for reasonable certainty in legislation by adopting the language of the United States Supreme Court in *Lanzetta v. New Jersey*.<sup>43</sup> So tested, it concluded that the term "common drunk" was ambiguous on its face. In support of this result, the court pointed out that Webster<sup>44</sup> assigns some fourteen definitions to the term "common" but that no dictionary consulted by the court so much as lists "common drunkard." It conceded that other courts had interpreted "common drunkard" in terms of habitual intoxication but this, in the opinion of the court, left the meaning in an equally imprecise and uncertain state. At common law, the offense of being a common drunk was unknown; it is not mentioned in Blackstone. In fact, "habitual drunkard" is a term found for the first time in English law in what the court characterizes as a "fairly recent" statute, the Habitual Drunkards Act of 1879.<sup>45</sup>

Language from a single precedent in the case law of other jurisdictions, *State ex rel. Larkin v. Ryan*,<sup>46</sup> is quoted with emphasis to illustrate that "habitual drunkenness" is not a term of clear definition. Apt as the language in *Ryan* is, it should be noted that it is not squarely in point and that it was, in effect, overruled by the Wisconsin court in *Pollon v. State*.<sup>47</sup>

In the only prior California decision directly in point, *People v.*

<sup>41</sup> 53 Cal. 2d 786, 3 Cal. Rptr. 364, 350 P.2d 116 (1960). See note 15 *supra*.

<sup>42</sup> *People v. McCaughan*, 49 Cal. 2d 409, 414, 317 P.2d 974, 977 (1957).

<sup>43</sup> *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). *Lanzetta* is particularly significant because it held that the New Jersey vagrancy-type statute which made certain persons punishable who were members of a "gang" was "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ."

<sup>44</sup> WEBSTER, *NEW INTERNATIONAL DICTIONARY* (2d ed. 1952).

<sup>45</sup> 42 & 43 Vict., c. 19, § 3.

<sup>46</sup> 70 Wis. 676, 36 N.W. 823 (1888).

<sup>47</sup> 218 Wis. 466, 261 N.W. 224 (1935).

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*Daniel*,<sup>48</sup> an opinion of the appellate department of the Stanislaus County superior court which held that the term "common" in the California statute defining a common drunkard as a vagrant was synonymous with "habitual or frequent," the court cited *Pollon* to this effect. *Daniel*, however, is disapproved by *Newbern*, the supreme court finding no compelling reason to accept the definition suggested in that case.

In an earlier opinion, the appellate department of the San Joaquin County superior court considered the meaning of "common prostitute" as that term is used in the vagrancy section of the Penal Code.<sup>49</sup> As in *Daniel*, the court felt that the term "common" was used to designate repetitive conduct. For that reason and because "common prostitution is undoubtedly a way of life . . ." the court held that this kind of vagrancy could not be inferred from a single act. In the course of this opinion, it is pointed out that the concept of vagrancy has been "arbitrarily expanded (or perverted)" in both Great Britain and the United States. In its pristine sense, the court believed, vagrancy included nothing more than the idle, wandering loafer.

This is historically questionable since the earliest statutes included a cast of characters adequate to a production of *The Beggars' Opera*,<sup>50</sup> but it is accurate in the sense that in essence those described as vagrants, rogues and vagabonds were regarded by society as nonproductive drones who were dangerous because of their potential criminality.<sup>51</sup> It is worth noting, however, that England's Vagrancy Act of 1824,<sup>52</sup> in contrast to the statutes in this country, placed almost exclusive emphasis on *conduct* and did not purport to attach criminality to *status* alone. Thus, although it identified the common prostitute as does the California statute, she was not made punishable unless she wandered in the public streets "behaving in a riotous or indecent manner;" the wanderer was punishable if he wandered for the purpose of begging or if he entered another person's property without permission and could not give a good account of himself; the loiterer only if he was found in certain specified places with intent to commit a felony or if in possession of tools for the purpose of breaking and entering another's property.

Before *Newbern* was decided the California decisions were written so as to suggest that the validity of the vagrancy statute was taken for granted. Those convictions which were not sustained generally resulted in reversal because the evidence was found to be insufficient to support

<sup>48</sup> 168 Cal. App. 2d 788, 337 P.2d 247 (1959).

<sup>49</sup> *People v. Brandt*, 306 P.2d 1069 (App. Div. Cal. Super. Ct. 1956).

<sup>50</sup> For a complete and fascinating inventory, see ADELLOTTE, *ELIZABETHAN ROGUES AND VAGABONDS* (1913).

<sup>51</sup> See Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958).

<sup>52</sup> 5 Geo. 4, c. 83.



the Stanislaus County  
the California statute  
synonymous with "habitual  
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of the San Joaquin  
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Code.<sup>53</sup> As in *Daniel*,  
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ROGUES AND

the charge.<sup>53</sup> In the rare cases in which doubt was expressed or limitations imposed on the scope of the law, the courts were concerned with the extent to which idleness and loitering could be included within the vagrancy concept. Thus, when the district court of appeal sustained the provisions of the second part of Penal Code Section 647a,<sup>54</sup> which prohibit loitering about a school, Justice McComb dissented by invoking the words of Chief Justice Beatty in the case of *In the Matter of Williams*:<sup>55</sup> "As to the provisions relating to 'loitering,' I have very serious doubts. They are so vaguely comprehensive . . ." In an earlier case it was said that it is not competent for the legislature to denounce mere inaction as a crime without some qualification, but the court found that idleness was so qualified in the statute because it was coupled with lewdness and dissoluteness.<sup>56</sup> Similarly, the word "roaming" as it is used in the third subdivision of the code section is not to be understood as unqualified idleness since it is coupled with the condition "without any lawful business."<sup>57</sup> The most pertinent expression of judicial reservation, made just four years before *Newbern*, is found in *People v. Wilson*. There, with reference to idleness as an element of vagrancy, the court wrote:

That subdivision of the section is apparently based on the outdated concept that it is a criminal offense not to work. Under it, every unemployed person, every housewife and every retired person conceivably could be arrested for vagrancy. If it be assumed that the section is constitutional, we certainly do not think it should be interpreted as broadly as respondent contends.<sup>58</sup>

As doubts and limitations go, these few are of little substance or effective consequence. Most of the cases reflect an attitude of almost unques-

<sup>53</sup> E.g., *People v. Brandt*, note 49 *supra*; *People v. Carskaddon*, 49 Cal. 2d 423, 318 P.2d 4 (1957), construing a supplementary vagrancy statute, CAL. PEN. CODE § 647a.(1). See note 54 *infra*; similarly, the United States Supreme Court held that a conviction under the terms of a municipal loitering ordinance deprived the defendant of due process because "it was totally devoid of evidentiary support." The validity of the ordinance itself was unquestioned. *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

<sup>54</sup> *Phillips v. Municipal Court*, 24 Cal. App. 2d 453, 75 P.2d 548 (1938). The code section reads: "Every person who loiters about any school or public place at or near which children attend or normally congregate is a vagrant." To the contention that these words may embrace far more than criminal conduct, the majority wrote: "the mere fact that some innocent people may desire to loiter near a public school does not deprive the legislature of its power to prohibit loitering at such a place if the safety of school children require [sic] such legislative action." *Id.* at 455, 75 P.2d at 549. Compare *State v. Starr*, 57 Ariz. 270, 113 P.2d 356 (1941).

<sup>55</sup> 158 Cal. 550, 111 Pac. 1035 (1910).

<sup>56</sup> *In re McCue*, 7 Cal. App. 765, 96 Pac. 110 (1908). In *Edelman v. California*, 344 U.S. 357 (1953), Mr. Justice Black, dissenting, expressed the opinion that "dissolute person," as used in the California vagrancy law was both ambiguous and vague, particularly as applied to the defendant for making street-corner speeches expressing criticism of the police. The origin of "lewd or dissolute" probably lies in the description "loose and dissolute" which appears as early as 1656 in Cromwell's statute (Commonwealth, c. 21).

<sup>57</sup> *In re Cutler*, 1 Cal. App. 2d 273, 36 P.2d 441 (1934).

<sup>58</sup> 145 Cal. App. 2d 1, 6, 301 P.2d 974, 977-78 (1956).

tioning acceptance of the theory and application of the vagrancy law. This characteristic serves to point up the fact that the decision in *Newbern* is not only the first successful attack on the constitutionality of Penal Code Section 647, but that it also marks a clear break with traditional judicial tolerance of the propositions that it is permissible for vagrancy to differ from other crimes, that one who comes within its categories acquires a continuing status as a petty criminal and that, for this offense, the otherwise indispensable elements of a crime, act and intent, need not apply.<sup>59</sup>

There is little dissent from the conclusion that the vagrancy law is archaic in concept, quaint in phraseology, a symbol of injustice to many and very largely at variance with prevailing standards of constitutionality. It has survived, nonetheless, and survived not only in its antique forms but with a variety of curious accretions that have been added from time to time as the particular needs of social change and regional customs have required. To note this fact in terms of social requirement is not inadvertent; the vagrancy laws, bad as they may be, serve a necessary purpose and remain as essential means by which law enforcement agencies discharge their primary function of preserving law and order and preventing the commission of crime. The realization of this fact makes the police tenacious in their defense of the law and judges unwilling to impose limitations, which might have serious implications for the public safety.<sup>60</sup>

The beggar or "moocher" need not and cannot be tolerated in the modern community; persons found in public places so intoxicated as to endanger their safety or to be unable to control their behavior must be restrained and protected; the pimp, the panderer and the prostitute cannot be permitted to flaunt their services at large; the lewd and dissolute must be halted when their conduct outrages public decency or threatens harm to the schoolchild; and the loiterer in dark places, the Peeping Tom and the prowling trespasser are obvious dangers to the public peace and the safety of persons and property.

These categories of antisocial conduct however, call for review and for re-examination. It surely is no longer necessary for the security of peace and good order to denounce as a criminal the non-California Indian who is voluntarily unemployed. There are thousands of pensioners in the modern welfare state who fall within the literal meaning of this definition of vagrant but who are not regarded, for that reason, as being guilty of any offense against the public economy. Nor is it either necessary or consistent

<sup>59</sup> *People v. Craig*, 152 Cal. 42, 47, 91 Pac. 997, 1000 (1907). The following extract from the opinion is frequently quoted: "Vagrancy differs from most other offenses in the fact that it is chronic rather than acute; that it continues after it is complete, and thereby subjects the offender to arrest at any time before he reforms."

<sup>60</sup> See Ames, *A Reply to "Who Is a Vagrant in California,"* 23 CALIF. L. REV. 616 (1935). This was written in response to a Note which appears in the same volume at 506.



tion of the vagrancy law. This at the decision in *Newbern* is a constitutional question. The constitutionality of Penal Code sections 646.1 and 646.2 break with traditional judicial precedent in that they make it possible for vagrancy to differ from other offenses in its categories and in its categories acquires a new meaning. It, for this offense, the other offenses, need not apply.<sup>59</sup> It is on that the vagrancy law is a symbol of injustice to many standards of constitutionality. It is only in its antique forms but it has been added from time to time and traditional customs have required. The intent is not inadvertent; the offenses are necessary purpose and remain in force. The agencies discharge their duties and preventing the commission of offenses makes the police tenacious in imposing limitations, which is a matter of safety.<sup>60</sup>

It cannot be tolerated in the places so intoxicated as to control their behavior must be controlled and the prostitute cannot be controlled and the lewd and dissolute must be controlled and decency or threatens harm to the public peace and the

Therefore, call for review and for a study for the security of peace and order. Non-California Indian who are pensioners in the modification of this definition of vagrancy, as being guilty of any offense, is either necessary or consistent

(1907). The following extract from the California Penal Code, section 646.1, is complete, and thereby subjects the

1," 23 CALIF. L. REV. 616 (1935). See also the same volume at 506.

with reasonable standards of personal liberty to hold that mere wandering about under the stimulus of wanderlust may be made a crime by legislative fiat.<sup>61</sup> As for runners or cappers for attorneys "in and about police courts and city prisons," police courts have not only been abolished in California<sup>62</sup> but the conduct denounced is far more effectively and comprehensively dealt with in the State Bar Act.<sup>63</sup> Finally, while it may be said that the resident of the house of ill fame perhaps ought to be made punishable, at least for his deplorable taste, such establishments have long been outlawed and are subject to speedy closure by the application of an uncomplicated and drastically effective abatement law.<sup>64</sup> If the foregoing categories be added to those of "common drunk" and "common prostitute" which were erased by the supreme court in *Newbern*, it will be apparent that there isn't much left in the California vagrancy statute that is either necessary or useful to law enforcement or removed from the prospect of successful challenge in the courts.

In these circumstances the time is surely at hand to modernize the vagrancy concept or, better yet, to abandon it altogether for statutes which will harmonize with notions of a decent, fair and just administration of criminal justice and which will at the same time make it possible for police departments to discharge their responsibilities in a straightforward manner without the evasions and hypocrisies which so many of our procedural rules force upon them. This may be done by drafting legislation having to do with conduct rather than status, legislation which will describe the acts to be proscribed with precision and which will be free of the hazy penumbra of medieval ideas of social control characteristic of existing law.

### III

So to state the solution is simple; the drafting of the terms of statutes, however, which will meet such specifications is a task of some difficulty, and one for which there are no models in the law which may be looked to as a point of beginning. This fact became apparent in California in July of 1958 when a subcommittee of the Assembly Interim Committee on Judiciary met in San Francisco and heard, among other things, protests against alleged repressive police practices. Arrests for vagrancy became a subject

<sup>61</sup> "[I]t is within the legislative power to define vagrancy and to provide that those who indulge in pointless, useless wandering from place to place within the state without any excuse for such roaming other than the impulse generated by what is sometimes denominated wanderlust, shall come within the definition and that such individuals may properly be penalized as the statute ordains." Jennings, J., in *In re Cutler*, 1 Cal. App. 2d 273, 280, 36 P.2d 441, 445 (1934).

<sup>62</sup> CAL. CONST. art. VI, § 11 (amend. 1950); See Gibson, *Reorganization of Our Inferior Courts*, 24 CALIF. S.B.J. 382 (1949).

<sup>63</sup> See CAL. BUS & PROF. CODE § 6151.

<sup>64</sup> CAL. PEN. CODE §§ 11225-235.

of inquiry and this in turn led to a consideration of the vagrancy statute. In common with a number of others who were present, I told the members of the committee that the law was seriously defective, outmoded and very much in need of amendment. Heedless of what should have been easily foreseeable consequences, I added the observation that the matter of drafting a modern vagrancy statute ought to be relatively free of difficulty and well within the competence of anyone with a modicum of experience in the field.

An invitation to demonstrate the validity of this opinion was promptly extended by the chairman of the subcommittee.<sup>65</sup> Acceptance was quickly followed by renewed appreciation of the perils of heedless volunteering since it became evident at once that the dearth of useful precedent in contemporary legislation meant that the work of drafting would present unusual problems. In the end, a draft of a proposed statute was produced. It was intended to be tentative, since there was little opportunity to discuss the subject with others, and to serve as an outline of the topics and subject matter which appeared to require study in the course of revising the law. As events occurred, however, these purposes were only partially served. Instead, a few of the proposals embodied in the draft were incorporated in a legislative bill<sup>66</sup> which was, in other respects, so defective as to be unacceptable to those responsible for law enforcement in California. Nevertheless, the bill generated wide and unexpected interest in the legislature and

<sup>65</sup> The Honorable John A. O'Connell, Member of the Assembly for the 23rd Assembly District (San Francisco).

<sup>66</sup> Assembly bill 2712. (Introduced in the 1959 regular session of the California legislature.) The text follows:

"SECTION 1. Section 647 of the Penal Code is repealed.

SEC. 2. Section 647 is added to said code, to read:

647. Every person who:

(a) Engages in lewd, lascivious or dissolute conduct in any public place or in any place open to the public or exposed to the public view;

(b) For pecuniary profit, solicits or engages in any act of prostitution;

(c) Accosts other persons in any public place or in any place open to the public and begs or solicits alms as a business;

(d) While loitering, prowling or wandering upon the private property of another, peeps into any inhabited building or structure without lawful authority and without the permission and consent of the owner or occupant thereof;

(e) Lodges in any building, structure or place, whether public or private, without lawful authority and without the permission and consent of the owner or occupant thereof, or of the person in control thereof;

(f) Loiterers in or about public toilets or parks;

is guilty of a misdemeanor and is punishable by a fine of not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

SEC. 3. Section 647.1 is added to said code, to read:

647.1. With respect to the matters covered by Section 647 of the Penal Code as enacted in 1872 and subsequently amended, repealed by the Legislature at its 1959 Regular Session, and the matters covered by Section 647 of the Penal Code as enacted at said session, the Legislature declares the policy of the State to be that persons shall be punished for their acts, not their status."



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Code as enacted in  
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among the public before it succumbed to the veto of a reluctant Governor.<sup>67</sup>

There is every prospect now that renewed efforts will be made in the 1961 legislative session to carry on the work of revision and reform. For the purpose of making the record clear and to widen understanding of the genesis of last year's vagrancy bill, the draft which inspired its introduction is set out hereafter together with brief commentaries outlining the purpose and background of its various sections.

As a matter of convenience and to facilitate comparison with Assembly bill 2712, the suggested statute appears here in the same legislative form in which it was originally drafted. It was not then nor is it now intended as a final solution nor is it offered as the best of all possible alternatives. It is designed rather, as a starting point for discussion, as a stimulus which may evoke more satisfactory solutions and in the hope that it may serve in some measure as a contribution to the development of the law. The draft follows:

*The people of the State of California do enact as follows:*

- Section 1. Section 647 of the Penal Code is repealed.*
- Section 2. Section 647 of the Penal Code is enacted to read:*

*647. Disorderly Conduct. Every person who commits any of the following acts shall be guilty of disorderly conduct.<sup>68</sup>*

- 1. Who engages in lewd or dissolute conduct in any public place or in any place (open to the public or) exposed to public view;*

This provision is drafted to cover the subject matter of existing subsection 5 which provides that a "lewd and dissolute person" is a vagrant. It departs from the concept of status and deals directly with socially harmful lewd or dissolute conduct, that is, such conduct when it occurs in public view. It is based in part upon a similar approach in the Michigan vagrancy statute.<sup>69</sup> Except for the addition of the words in parenthesis, the first section of the assembly bill is identical.

<sup>67</sup> "I am sympathetic to the overall purpose of the bill which was to punish individuals only for wrongful actions and not simply because of their status. But I found that in accomplishing this laudable objective the proposed legislation unfortunately removed from police control certain dangerous conduct, regulation of which is necessary in the public interest." Letter From Governor Edmund G. Brown to Ernest Besig, Esq., Director of the American Civil Liberties Union of Northern California, August 26, 1959.

<sup>68</sup> It is not necessary, of course, to use the label "disorderly conduct." Assembly bill No. 2712 simply provided that every person who committed certain specified acts was guilty of a misdemeanor. There is an advantage, however, in furnishing a label beforehand; otherwise California's many police agencies (or the press) will invent a variety of labels as a matter of record keeping and statistical convenience. The resulting lack of uniformity obviously would be undesirable.

<sup>69</sup> See note 29, *supra*; the following have been held to come within the description of "lewd or dissolute" as the words are used in CAL. PEN. CODE § 647 (5): a narcotic addict,

2. *Who solicits or who engages in any act of prostitution;*

This is a simple description of the conduct to be proscribed. It was drafted before the decision in the *Newbern* case which has, by necessary implication, deleted the term "common prostitutes" from the list of those who are vagrants. The qualification "for pecuniary profit" added by the Assembly bill seems unnecessary.<sup>70</sup>

3. *Who accosts other persons in any public place (or in any place open to the public) for the purpose of begging or soliciting alms (as a business);*

This section is drafted to meet the problem of controlling begging by describing specific acts. It is aimed at the conduct of the individual who goes about the streets accosting others for handouts. It is framed in this manner in order to exclude from the ambit of the law the blind or crippled person who merely sits or stands by the wayside, the Salvation Army worker who solicits funds for charity on the streets at Christmas time and others whose charitable appeals may well be left to local control. The bracketed words, which were added in Assembly bill 2712, improve the original draft.

4. *Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious (or any unlawful) act;*

The existing law classes as a vagrant every person who "loiters in or about public toilets in public parks." Assembly bill 2712 left these words unchanged except that it substituted "or" for "in," thus making it an offense to loiter in a public park. This is hardly an improvement. The original proposal, as it appears above, excluding the words in brackets, requires that the loitering which is proscribed be that which is accompanied by lewd intent. This is precisely what the present law is aimed towards, hence there is little or no reason for not being specific.<sup>71</sup> It seems undesirable too to limit the application of the statute to what may be construed to be only publicly maintained facilities as is the case with the existing law. The words in brackets are suggested as an alternative in the event it may appear to be desirable to widen the scope of the draft so that it would include, for example, those situations in which automobile service station toilet facilities are used for the sale or administration of narcotics.

5. *Who loiters or wanders upon the streets or from place to place with-*

People v. Jaurequi, 142 Cal. App. 2d 535, 298 P.2d 896 (1956); a sodomist, People v. Babb, 103 Cal. App. 2d 326, 229 P.2d 843 (1951); a window peeper, People v. Allington, 103 Cal. App. 2d 911, 229 P.2d 495 (1951); and a nude dancer, People v. Scott, 113 Cal. App. 778, 296 Pac. 601 (1931); see Note, 39 CALIF. L. REV. 579 (1951).

<sup>70</sup> By definition, a prostitute is one who engages in sexual intercourse for hire. People v. Head, 146 Cal. App. 2d 744, 304 P.2d 761 (1956).

<sup>71</sup> Fountain v. State Board of Education, 157 Cal. App. 2d 463, 320 P.2d 899 (1958).



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out apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do;

This provision was not included in Assembly bill 2712. It is a difficult subject to treat with any degree of satisfaction but one which requires serious and careful consideration because of the practical necessities of police responsibility for the preservation of law and order. The draft is designed to replace subdivisions 3 and 6 of the present code section by providing a more specific description of the kind of suspicious person that the police are bound to deal with. At the heart of the problem here is the great desirability of stating the terms of police authority in such a way as to minimize abuse without impairing the ability to take necessary action.<sup>72</sup> To write any law in complete accord with this standard is probably impossible but this is not a valid argument for simply denying the police power to take any action with respect to the "suspicious person." The draft attempts to spell out the limits of the policeman's authority and to declare some obligation on the part of the citizen to account for himself when his loitering arouses suspicion.<sup>73</sup>

6. Who is found in any public place in such a condition of drunkenness (intoxication) that he is unable to exercise care for his own safety, or, by reason of his drunkenness (intoxication) interferes with (or obstructs or prevents) the free use of any street, sidewalk or other public way;

This provision was also omitted from Assembly bill 2712. It would fill the gap left by the decision in *Newbern* by providing a uniform, definite standard for police control of the public drunk who is a nuisance to others and a danger to himself. The words in brackets are suggested as alternatives.

<sup>72</sup> The provision in the draft requiring the suspicious loiterer to identify himself and to explain the reason for his actions upon the request of a peace officer is consistent with the authority which such officers have long possessed in California. A dictum in the earliest case in which the private person's responsibility to respond to reasonable police inquiry is discussed is in point with respect to the suspicious loiterer: "A police officer has a right to make inquiry in a proper manner of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification." *Gisske v. Sanders*, 9 Cal. App. 13, 16, 98 Pac. 43, 45 (1908). Years later, the California Supreme Court adopted this conclusion in *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955). For an illustrative suspicious person case and a useful summary of the law, see *People v. West*, 144 Cal. App. 2d 214, 300 P.2d 729 (1956).

<sup>73</sup> "The bill proposed to repeal subdivisions 3 and 6 of the present law without substituting any kind of control over those whose conduct afforded occasion for legitimate suspicion. I am aware that police action in this regard has led to criticism, and I agree that the present law should be revised. But I do not think that the possibility of abuse justifies completely denying any controls at all. Legislation in this area would be effective if it gave some definition of authority and obligation to which the private citizen and the policeman could reasonably and fairly conform." Letter From Governor Edmund G. Brown to Ernest Besig, Esq., Director of the American Civil Liberties Union of Northern California, August 26, 1959.

7. *Who loiters, prowls or wanders upon the private property of another, in the nighttime, without visible or lawful business with the owner or occupant thereof; or who while loitering, prowling or wandering upon the private property of another, in the nighttime, peeks in the door or window of any inhabited building or structure located thereon, without visible or lawful business with the owner or occupant thereof;*

This is substantially the same as subdivision 12 of the code section as it now reads. Only the superfluous specification of habitation "by human beings" is dropped. In Assembly bill 2712 the section was greatly modified by restricting its application to the Peeping Tom alone. Both types of conduct denounced by the law, however, carry the same threat to the public peace, thus making any such limitation appear to be nothing more than arbitrary.

8. *Who lodges in any building, structure or place, whether public or private, other than one, which is maintained for lodging purposes, without the permission of the owner or person entitled to the possession or in control thereof.*

This is the last section or category that appeared in the draft. It is a simplification of the wording of subdivision 7 of the present statute and an extension of its reach to cover public as well as private property. Assembly bill 2712 carries an almost identical provision which is better than the draft because of its omission of the unnecessary lodging house exception.

#### CONCLUSION

The abandonment of the concept of status as a basis for the imposition of penal sanctions which was advanced in the draft and adopted in the Assembly bill marks a break from the traditional vagrancy pattern and opens at least one door to the development of legislation in this field that will be responsive to the needs of and in accordance with the legal and social standard of contemporary society. The failure of the bill to become law was not because of this break. Its fatal imperfection was the fact that it was incomplete. It did not face up to the problem of defining law enforcement authority with respect to the person whose conduct is strongly suggestive of incipient criminality; it left unfilled the need for uniform, state-wide legislation for the control of public intoxication; and it would have disarmed the citizen as well as the police in the presence of the furtive, prowling, nighttime trespasser.

Each of these situations involves conduct, not status. In each instance the conduct carries a serious threat to the public peace and safety. To impair the ability of the police to act in such cases would not be wise nor would it serve the ends of justice. Furthermore, the underlying problem of finding a means for coping with conduct of this nature would still remain



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even if the state legislature were to abandon the search for solutions. Such abandonment in California would merely transfer the burden to local government<sup>74</sup> whose several hundred city councils and boards of supervisors would respond with an uncoordinated patchwork of hastily drafted ordinances. This would be worse than no change at all.

The task of revision, difficult as it may be, must go forward. The ancient vagrancy concept has been with us overlong. The antique statutes with their absurd categories of common drunkards, pipers and fiddlers, sturdy beggars and all their raffish companions await their retirement. To achieve this end, as the draft indicates, it is not necessary to sacrifice tools that are essential to the proper enforcement of the law nor to remove existing controls over conduct that threatens the public safety. There is no real obstacle in the way of progress here. All that is needed is a wise discretion and a firm adherence to the fundamental principles upon which a fair and effective system of criminal justice must depend.

<sup>74</sup> CAL. CONST. art. XI, § 11; Simpson v. City of Los Angeles, 40 Cal. 2d 271, 253 P.2d 464 (1953).

# **EXHIBIT 2**

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1-1-2004

## The Link Between Prostitution and Sex Trafficking

U.S. Department of State

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## THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING

The U.S. Government adopted a strong position against legalized prostitution in a **December 2002 National Security Presidential Directive** based on evidence that prostitution is inherently harmful and dehumanizing, and fuels trafficking in persons, a form of modern-day slavery.

Prostitution and related activities—including pimping and patronizing or maintaining brothels—fuel the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate.

Where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.

Of the estimated 600,000 to 800,000 people trafficked across international borders annually, 80 percent of victims are female, and up to 50 percent are minors. Hundreds of thousands of these women and children are used in prostitution each year.

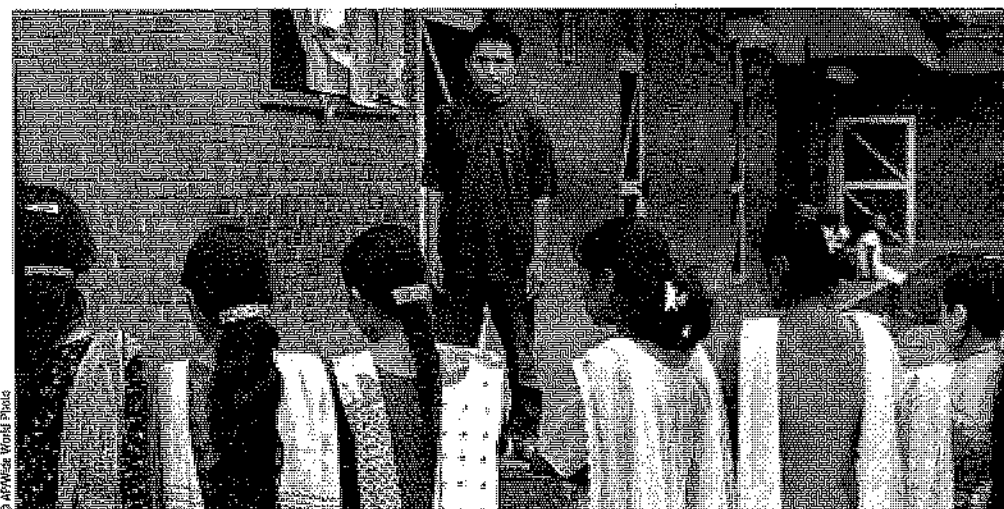
### Women and children want to escape prostitution

The vast majority of women in prostitution don't want to be there. Few seek it out or choose it, and most are



*Moldovan and Romanian trafficking victims freed after a raid of a Bosnian brothel.*

desperate to leave it. A 2003 study first published in the scientific *Journal of Trauma Practice* found that 89 percent of women in prostitution want to escape.<sup>1</sup> And children are also trapped in prostitution—despite the fact that international covenants and protocols impose upon state parties an obligation to criminalize the commercial sexual exploitation of children.



*Women and girls rescued from brothels in Indian cities line up to identify an alleged trafficker at a shelter in Nepal.*

### Prostitution is inherently harmful

Few activities are as brutal and damaging to people as prostitution. Field research in nine countries concluded that 60-75 percent of women in prostitution were raped, 70-95 percent were physically assaulted, and 68 percent met the criteria for post traumatic stress disorder in the same range as treatment-seeking combat veterans<sup>2</sup> and victims of state-organized torture.<sup>3</sup> Beyond this



shocking abuse, the public health implications of prostitution are devastating and include a myriad of serious and fatal diseases, including HIV/AIDS.

A path-breaking, five-country academic study concluded that research on prostitution has overlooked “[t]he burden of physical injuries and illnesses that women in the sex industry sustain from the violence inflicted on them, or from their significantly higher rates of hepatitis B, higher risks of cervical cancer, fertility complications, and psychological trauma.”<sup>4</sup>

State attempts to regulate prostitution by introducing medical check-ups or licenses don’t address **the core problem: the routine abuse and violence that form the prostitution experience** and brutally victimize those caught in its netherworld. Prostitution leaves women and children physically, mentally, emotionally, and spiritually devastated. Recovery takes years, even decades—often, the damage can never be undone.

#### Prostitution creates a safe haven for criminals

Legalization of prostitution expands the market for commercial sex, opening markets for criminal enterprises and creating a safe haven for criminals who traffic people into prostitution. Organized crime networks do not register with the government, do not pay taxes, and do not protect prostitutes. Legalization simply makes it easier for them to blend in with a purportedly regulated sex sector and makes it



A brothel where the borders of Paraguay, Argentina, and Brazil meet, creating a hub for human trafficking.



©AP/Wide World Photos

Suspected leader of sex trafficking in Macedonia.

more difficult for prosecutors to identify and punish those who are trafficking people.

The Swedish government has found that much of the vast profit generated by the global prostitution industry goes into the pockets of human traffickers. The Swedish government said, “International trafficking in human beings could not

flourish but for the existence of local prostitution markets where men are willing and able to buy and sell women and children for sexual exploitation.”<sup>5</sup>

To fight human trafficking and promote equality for women, Sweden has aggressively prosecuted customers, pimps, and brothel owners since 1999. As a result, two years after the new policy, there was a 50 percent decrease in women prostituting and a 75 percent decrease in men buying sex. Trafficking for the purposes of sexual exploitation decreased as well.<sup>6</sup> In contrast, **where prostitution has been legalized or tolerated, there is an increase in the demand for sex slaves<sup>7</sup> and the number of victimized foreign women—many likely victims of human trafficking.<sup>8</sup>**

#### Grant-making implications of the U.S. government policy

As a result of the prostitution-trafficking link, the U.S. government concluded that no U.S. grant funds should be awarded to foreign non-governmental organizations that support legal state-regulated prostitution. Prostitution is not the oldest profession, but the oldest form of oppression.

*For more information, please log on to the Web site of the State Department’s Office to Monitor and Combat Trafficking in Persons at [www.state.gov/g/tip](http://www.state.gov/g/tip).*

<sup>1</sup> Farley, Melissa et al. 2003. “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder.” *Journal of Trauma Practice*, Vol. 2, No. 3/4: 33-74; and Farley, Melissa, ed. 2003. *Prostitution, Trafficking, and Traumatic Stress*. Haworth Press, New York.

<sup>2</sup> Farley, et al.

<sup>3</sup> Ramsay, R. et al. 1993. “Psychiatric morbidity in survivors of organized state violence including torture.” *British Journal of Psychiatry*. 162:55-59.

<sup>4</sup> Raymond, J. et al. 2002. *A Comparative Study of Women Trafficked in the Migration Process*. Ford Foundation, New York.

<sup>5</sup> Swedish Ministry of Industry, Employment, and Communications. 2004. *Fact Sheet: Prostitution and Trafficking in Women*.

<http://www.sweden.gov.se/content/1/c6/01/87/174/6bc6c972.pdf>

<sup>6</sup> Ekberg, G.S. 2001. “Prostitution and Trafficking: The Legal Situation in Sweden”. Paper presented at Journées de formation sur la mondialisation de la prostitution et du trafic sexuel. Association québécoise des organismes de coopération internationale. Montréal, Quebec, Canada.

<sup>7</sup> Malarek, Victor. *The Natasha: Inside the New Global Sex Trade*. Arcade Publishing, New York, 2004.

<sup>8</sup> Hughes, Donna M. 2002. *Foreign Government Complicity in Human Trafficking: A Review of the State Department’s 2002 Trafficking in Persons Report*. Testimony before the U.S. House Committee on International Relations. Washington, D.C., June 19, 2002.

# **EXHIBIT 3**





## SPECIAL REPORT

APRIL 2011

NCJ 233732

# Characteristics of Suspected Human Trafficking Incidents, 2008-2010

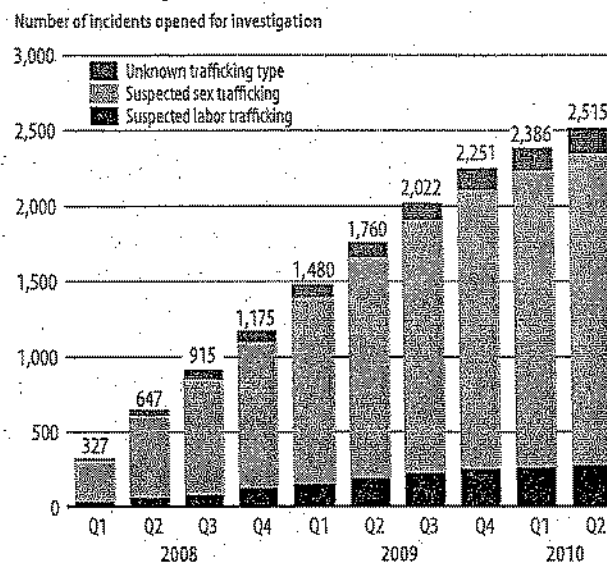
by Duren Banks and Tracey Kyckelhahn, *BJS* Statisticians

Federally funded human trafficking task forces opened 2,515 suspected incidents of human trafficking for investigation between January 2008 and June 2010 (figure 1). Most suspected incidents of human trafficking were classified as sex trafficking (82%), including more than 1,200 incidents with allegations of adult sex trafficking and more than 1,000 incidents with allegations of prostitution or sexual exploitation of a child. Eleven percent of the suspected incidents opened for investigation were classified as labor trafficking, and 7% had an unknown trafficking type.

Data in this report are from the Human Trafficking Reporting System (HTRS), which was designed to measure the performance of federally funded task forces. HTRS is currently the only system that captures information on human trafficking investigations conducted by state and local law enforcement agencies in the United States. This report is the second in a Bureau of Justice Statistics (BJS) series about the characteristics of human trafficking investigations, suspects, and victims. It reports about case outcomes, including suspect arrests and the visa status of confirmed victims, and describes the characteristics of incidents entered into the HTRS prospectively by the task forces beginning in 2008. The *Methodology* details the HTRS data collection procedures and data quality issues.

FIGURE 1

Cumulative number of incidents of human trafficking between January 2008 and June 2010, by suspected trafficking type and reported investigation start date



## HIGHLIGHTS

- Federally funded task forces opened 2,515 suspected incidents of human trafficking for investigation between January 2008 and June 2010.
- About 8 in 10 of the suspected incidents of human trafficking were classified as sex trafficking, and about 1 in 10 incidents were classified as labor trafficking.
- Federal agencies were more likely to lead labor trafficking investigations (29%) than sex trafficking investigations (7%).
- Among the 389 incidents confirmed to be human trafficking by high data quality task forces—
  - There were 488 suspects and 527 victims.
  - More than half (62%) of the confirmed labor trafficking victims were age 25 or older, compared to 13% of confirmed sex trafficking victims.
  - Confirmed sex trafficking victims were more likely to be white (26%) or black (40%), compared to labor trafficking victims, who were more likely to be Hispanic (63%) or Asian (17%).
- Four-fifths of victims in confirmed sex trafficking incidents were identified as U.S. citizens (83%), while most confirmed labor trafficking victims were identified as undocumented aliens (67%) or qualified aliens (28%).
- Most confirmed human trafficking suspects were male (81%). More than half (62%) of confirmed sex trafficking suspects were identified as black, while confirmed labor trafficking suspects were more likely to be identified as Hispanic (48%).
- Among trafficking incidents opened for at least one year, 30% were confirmed to be human trafficking, 38% were confirmed not to be human trafficking, and the remaining incidents were still open at the end of the study period.
- The confirmed human trafficking incidents open for at least a year led to 144 known arrests.



## The Trafficking Victims Protection Act of 2000 is the first comprehensive federal law to combat human trafficking and help victims.

Under the Trafficking Victims Protection Act of 2000 (TVPA, 2000), human trafficking is defined as the recruitment, harboring, transportation, provision, or obtaining of a person for one of three purposes:<sup>1</sup>

- Labor or services, through the use of force, fraud, or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery.
- A commercial sex act through the use of force, fraud, or coercion.
- Any commercial sex act, if the person is under 18 years of age, regardless of whether any form of coercion is involved.

The Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA, 2005) requires biennial reporting on the scope and characteristics of human trafficking in the U.S., using available data from state and local authorities.<sup>2</sup> As part of an effort to meet these congressional mandates, the Bureau of Justice Statistics (BJS), in partnership with the Bureau of Justice Assistance (BJA), Northeastern University (NEU), and the Urban Institute (UI), developed the Human Trafficking Reporting System (HTRS).

The HTRS system is designed to capture information on human trafficking incidents investigated by federally funded task forces, and is the first to focus specifically on state and local human trafficking investigations in the U.S. BJA provides support for state and local law enforcement to work more collaboratively with victim services organizations, federal law enforcement, U.S. Attorneys' Offices, and the Civil Rights Division of the U.S. Department of Justice in the identification and rescue of human trafficking victims who are in the United States. This report is based on information collected from these BJA-funded task forces through the HTRS.

The first report developed from HTRS information, *Characteristics of Suspected Incidents of Human Trafficking*,

<sup>1</sup>Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

<sup>2</sup>Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3566.

2007-2008, described characteristics of cases entered into the system between January 1, 2007, and September 30, 2008.<sup>3</sup>

Since 2008, HTRS has captured information from 42 jurisdictions covering nearly 25% of the U.S. resident population at midyear 2010. Although the task forces are not representative of the entire nation, they are widely dispersed geographically.

The HTRS is an incident-based data collection system:

- An incident is any investigation into a claim of human trafficking, or any investigation of other crimes in which elements of potential human trafficking were identified.
- An investigation is any effort in which members of the task force spent at least one hour investigating (e.g., collecting information, taking statements, and writing reports).

Each incident is uniquely identified by an incident date (date of occurrence) and incident number. Once entered into the system, an incident upon further investigation may or may not be determined to involve human trafficking. All incidents, regardless of outcome, are retained in the HTRS.

To be confirmed as human trafficking—

- The case must have led to an arrest and been subsequently confirmed by law enforcement, or
- The victims in the case must 1) have had a "continuing presence" requested on their behalf, or 2) have received an endorsement for a T or U visa application.<sup>4</sup>

<sup>3</sup>In this report, case, incident, and investigation are used interchangeably.

<sup>4</sup>Congress created the T and U nonimmigrant classifications with the passage of the TVPA, 2000. The T nonimmigrant status was created to provide protection to victims of severe forms of human trafficking. The U nonimmigrant status was designated for victims of certain crimes who had suffered mental or physical abuse and who were willing to assist in the investigation of human trafficking activity.

### Most suspected incidents of human trafficking involved allegations of prostitution of an adult or child

Federally funded human trafficking task forces opened a total of 2,515 suspected incidents of human trafficking for investigation between January 1, 2008, and June 30, 2010. These suspected incidents include allegations that, through subsequent investigation, may or may not be determined to meet the definition of human trafficking according to the TVPA, 2000. (See box on page 2.)

Nearly half of all incidents investigated between January 1, 2008, and June 30, 2010, involved allegations of adult prostitution (48%). Forty percent involved prostitution of a child or child sexual exploitation (table 1). Elements of sexualized labor, including exotic dancing and unlicensed massage parlors, were found in 6% of the incidents reported.

**TABLE 1**  
Human trafficking incidents opened for investigation between January 2008 and June 2010, by type of trafficking

Type of trafficking <sup>a</sup>	Number	Percent <sup>b</sup>
All incidents	2,515	100.0%
Sex trafficking	2,065	82.1%
Adult prostitution/commercial sex act	1,218	48.4
Prostitution or sexual exploitation of a child	1,016	40.4
Sexualized labor	142	5.6
Other	61	2.4
Labor trafficking	350	13.9%
Commercial industry labor	132	5.2
Unregulated industry labor	230	9.1
Other	26	1.0
Other suspected trafficking	65	2.6%
Unknown	172	6.8%

<sup>a</sup>Type of trafficking is identified as the type of suspected incident reported to or investigated by the law enforcement agency. The type of trafficking investigated is not necessarily the same type of trafficking that may be confirmed, charged at arrest, or prosecuted. Where the type of alleged trafficking may suggest elements of sex or labor trafficking, BJS classified the type through an analysis of the other characteristics of those cases, as identified by the investigative agencies. For example, sexualized labor was categorized as a type of alleged sex trafficking after further analyses found that investigations into sexualized labor were most commonly associated with characteristics of sex trafficking as opposed to labor trafficking.

<sup>b</sup>Percent will add to more than 100 because incidents may involve more than one type of trafficking.

Fourteen percent of cases contained allegations of labor trafficking, including 9% with suspected labor trafficking in potentially unregulated industries, such as day labor, drug sales, forced begging, roadside sales, or domestic workers (e.g., nannies). Approximately 5% of the incidents involved suspected labor trafficking in more commercial industries, such as hair salons, hotels, and bars.

Nine percent of incidents involved allegations of an unknown human trafficking type or allegations that could not be defined as either labor or sex trafficking, such as mail order brides, child selling, and unspecified Internet solicitations.

Task forces may have entered multiple types of human trafficking per incident. Among the incidents described in this report, up to six different types of trafficking were identified per incident, although most (77%) incidents involved allegations of one type of human trafficking.

Cases were classified by whether they included allegations of sex trafficking or labor trafficking. Cases that had elements of both sex and labor trafficking (72 cases, or 3% of the total) were classified as sex trafficking cases for analysis purposes. Cases that did not include allegations that could be defined as sex or labor trafficking were classified as an unknown trafficking type and reported in total statistics throughout the report. Most investigations were classified as suspected sex trafficking (82%), followed by 11% as suspected labor trafficking and 7% unknown (table 2).

The types of trafficking cases differed between task forces located in a vice unit and those located in another type of unit within the law enforcement agency. (Vice units in law enforcement commonly pursue crimes related to prostitution, pornography, gambling, alcohol, and drugs.) Task forces classified as located in vice were in units either dedicated solely to investigating vice crimes or in units focused on vice and other crimes, such as sexual assault or domestic violence. Those task forces not located in vice units were located in divisions specializing in human trafficking, intelligence units, or units dedicated to investigating organized crime. Eighty-nine percent of incidents reported by task forces located in a vice unit were incidents of suspected sex trafficking, compared to 73% of incidents reported by task forces located outside of vice units.

**TABLE 2**  
Human trafficking incident cases opened for investigation between January 2008 and June 2010, by type of trafficking and task force location

Type of trafficking	Total incidents		Task force located in—			
	Number	Percent	Vice unit		Another unit	
	Number	Percent	Number	Percent	Number	Percent
Total incidents	2,515	100.0%	1,377	100.0%	1,138	100.0%
Sex trafficking	2,065	82.1%	1,230	89.3%	835	73.4%
Labor trafficking	278	11.1	92	6.7	186	16.3
Unknown	172	6.8	55	4.0	117	10.3



Federal agencies were more likely to lead labor trafficking investigations (29%), compared to sex trafficking investigations (7%)

A law enforcement agency was identified as the lead agency for nearly all suspected sex trafficking cases (98%). Among suspected labor trafficking cases, 88% had a law enforcement lead agency, and 11% had a victim advocacy lead agency (table 3).

In sex trafficking cases, 92% involved a lead agency identified as a state, local, or territorial level government agency, while 7% of lead agencies were identified as federal agencies, such as the FBI, U.S. Attorneys' Offices, or Immigration and Customs Enforcement. Labor trafficking investigations were more likely to have a federal lead agency (29%) than sex trafficking investigations (7%).

The number and type of task force agencies involved in suspected human trafficking incidents varied more for labor trafficking cases than for sex trafficking cases. Among suspected labor trafficking incidents, 82% involved multiple agencies as part of the task force team; 49% of suspected sex trafficking incidents involved multiple agencies.

In a review of all types of agencies involved in the case, 99% of sex trafficking cases included a law enforcement agency, and 16% included a victim advocacy agency. Most labor trafficking incidents also included a law enforcement agency in the case (91%); however, labor trafficking incidents were more likely to include a victim advocacy agency (40%) and a regulatory agency (10%), such as a code enforcement or professional licensing agency, when compared to suspected sex trafficking cases.

**TABLE 3**  
Agencies involved in human trafficking investigations between January 2008 and June 2010, by type of trafficking

Type of agency	Total <sup>a</sup>		Sex trafficking		Labor trafficking	
	Number	Percent	Number	Percent	Number	Percent
Number of incidents	2,515	100.0%	2,065	100.0%	278	100.0%
Lead agency						
Law enforcement/prosecution/corrections	2,425	96.9%	2,018	98.1%	242	88.3%
Victim advocacy	63	2.5	30	1.5	29	10.6
Human services agency	3	0.1	3	0.1	0	0.0
Regulatory agency	11	0.4	7	0.3	3	1.1
Unknown	13	:	7	:	4	:
Lead agency level						
State, local, or territorial	2,204	88.1%	1,885	91.6%	167	60.9%
Federal	235	9.4	143	6.9	78	28.5
Nongovernmental organization/private	63	2.5	30	1.5	29	10.6
Unknown	13	:	7	:	4	:
Number of agencies						
1	1,161	46.3%	1,039	50.4%	49	17.7%
2-3	1,009	40.2	781	37.9	143	51.6
4-6	304	12.1	215	10.4	77	27.8
7 or more	33	1.3	25	1.2	8	2.9
Unknown	8	:	5	:	1	:
Type of agencies involved <sup>b</sup>						
Law enforcement/prosecution/corrections	2,462	97.9%	2,040	98.8%	254	91.4%
Victim advocacy/defense	465	18.5	334	16.2	112	40.3
Human services agency	25	1.0	23	1.1	2	0.7
Regulatory agency	44	1.7	14	0.7	28	10.1
Level of agencies involved <sup>b</sup>						
State, local, or territorial	2,377	94.5%	2,002	96.9%	216	77.7%
Federal	688	27.4	484	23.4	157	56.5
Nongovernmental organization/private	464	18.4	334	16.2	111	39.9

:Percent not calculated for missing or unknown data.

<sup>a</sup>Includes incidents with an unknown trafficking type.

<sup>b</sup>Percents add to more than 100% because more than one type of agency could be involved.

## Data quality and consistency in reporting

The HTRS project team identified a number of data quality issues despite efforts to ensure consistent and complete reporting.

The most significant issues were—

- Missing individual-level information about suspects and victims, and
- Failure to update cases as the investigations progressed.

The type of trafficking suspected and the agencies involved were entered into the system because this information was typically available at the outset of an investigation (figure 2). The availability of information on case confirmation, victims, and suspects was not necessarily a function of the length of time the case was open, and was missing for a significant number of the incidents (table 4).

Cases observed for 12 or more months generally had more valid data about whether the incident was confirmed to be human trafficking. Among all cases opened for investigation between January 2008 and June 2010, confirmation of the outcome was pending for 39% of the incidents at the conclusion of the study period (June 2010). Among cases open for at least 12 months in task forces that consistently updated case information and provided individual-level data, 38% had not reached a confirmation outcome at the conclusion of the study period. However,

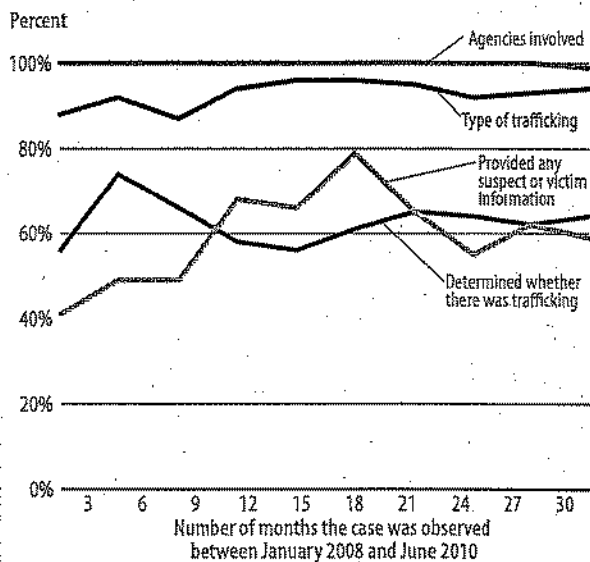
83% of the cases that ultimately reached an outcome were able to do so within 12 months.

Identifying the characteristics of individuals involved in human trafficking was problematic overall. The quality of the data was associated more with the task force itself than with the date the case was opened or the type of suspected trafficking. Valid suspect and victim data were clustered in certain task forces identified as providing high data quality.

- High data quality task forces (18 of 42) met three criteria: 1) regularly entered new cases into the system, 2) provided individual-level information for at least one suspect or victim, and 3) updated case information on a regular basis. Individual-level information for at least one suspect was available for 75% of the confirmed human trafficking investigations open for at least one year in selected task forces.
- Low data quality task forces (24 of 42) did not meet any of the three criteria listed above.

Case confirmation outcomes and individual-level statistics are therefore restricted to data provided by selected task forces (18 of the 42). These task forces regularly entered new cases into the system, provided individual-level information for at least one suspect or victim, and updated case information on a regular basis.

**FIGURE 2**  
Percentage of cases with valid data for critical variables, by number of months the cases were observed



**TABLE 4**  
Percentage of incidents with valid information entered between January 2008 and June 2010, by quality of task force data

Type of information	Quality of task force reporting identified as—	
	Low	High
Type of trafficking	91%	95%
Human trafficking confirmed (or not)	61%	62%
Incident status is closed or inactive	57%	65%
Agencies involved	100%	100%
Information associated with the incident		
Any individual-level information (suspect or victim)	35%	88%
Any suspect information	20	62
Any victim information	30	75

Note: High data quality task forces (18 of the 42) regularly entered new cases into the system, provided individual-level information for at least one suspect or victim, and updated case information on a regular basis. Low data quality task forces (24 of 42) did not demonstrate one or more of these data quality indicators.



Confirmed victims of labor trafficking were more likely to be male, older, and foreign than confirmed victims of sex trafficking

Federally funded high data quality task forces entered 389 confirmed incidents of human trafficking during the study period. These cases had consistently complete reporting on case outcome and individual-level information. The selected task forces identified 527 confirmed human trafficking victims in the 389 confirmed incidents. Confirmed sex trafficking victims were overwhelmingly female (94% of victims with known gender). Of the 63 confirmed labor trafficking victims, 20 were male and 43 were female (table 5).

Confirmed labor trafficking victims were more likely to be older than confirmed sex trafficking victims. Sixty-two percent of confirmed labor trafficking victims were identified as 25 years of age or older, compared to 13% of confirmed sex trafficking victims, based on victims with known age.

**TABLE 5**

Victim characteristics in cases confirmed to be human trafficking by high data quality task forces, by type of trafficking

Victim characteristic	Total <sup>a</sup>	Sex trafficking	Labor trafficking
<b>Sex</b>			
Male	49	27	20
Female	477	432	43
<b>Age</b>			
17 or younger	257	248	6
18-24	159	142	17
25-34	68	46	22
35 or older	27	12	15
Unknown	16	12	3
<b>Race/Hispanic origin</b>			
White <sup>b</sup>	106	102	1
Black/African American <sup>b</sup>	167	161	6
Hispanic/Latino origin	129	95	34
Asian <sup>b,c</sup>	26	17	9
Other <sup>b,d</sup>	35	23	11
Unknown	63	61	2
<b>Citizenship</b>			
U.S. Citizen/U.S. National	346	345	1
Permanent U.S. resident <sup>e</sup>	6	6	0
Undocumented alien <sup>f</sup>	101	64	36
Qualified alien <sup>e</sup>	19	1	15
Temporary worker	2	0	2
Unknown	50	41	9
<b>Number of victims identified</b>	<b>527</b>	<b>460</b>	<b>63</b>

Note: Analysis restricted to cases opened and observed between January 2008 and June 2010 in high data quality task forces. See definition of high data quality task forces on page 5.

<sup>a</sup>Includes cases of unknown trafficking type.

<sup>b</sup>Excludes persons of Hispanic or Latino origin.

<sup>c</sup>Asian may include Native Hawaiian and other Pacific Islanders or persons of East Asian or Southeast Asian descent.

<sup>d</sup>Includes persons of two or more races.

<sup>e</sup>Permanent residents and qualified aliens are legal residents in the U.S., but do not have citizenship.

<sup>f</sup>Undocumented aliens reside in the U.S. illegally.

In addition, confirmed labor trafficking victims were more likely to be identified as Hispanic (63% of victims with known race) or Asian (17%) compared to sex trafficking victims, who were more likely to be white (26%) or black (40%). Four-fifths of victims in confirmed sex trafficking cases were identified as U.S. citizens (83%), while most confirmed labor trafficking victims were identified as undocumented aliens (67%) or qualified aliens (28%).

More than half of confirmed sex trafficking suspects were black, while confirmed labor trafficking suspects were more likely to be Hispanic

Overall, individual information was collected for 488 suspects in confirmed human trafficking incidents in high data quality task forces (table 6).

**TABLE 6**

Suspect characteristics in cases opened between January 2008 and June 2010 and confirmed to be human trafficking by high data quality task forces, by type of trafficking

Suspect characteristic	Total <sup>a</sup>	Sex trafficking	Labor trafficking
<b>Sex</b>			
Male	368	314	54
Female	88	71	17
Unknown	32	25	7
<b>Age</b>			
17 or younger	11	10	1
18-24	147	145	2
25-34	114	105	9
35 or older	100	65	35
Unknown	116	85	31
<b>Race/Hispanic origin</b>			
White <sup>b</sup>	24	22	2
Black/African American <sup>b</sup>	224	219	5
Hispanic/Latino origin	119	89	30
Asian <sup>b,c</sup>	28	18	10
Other <sup>b,d</sup>	20	5	15
Unknown	73	57	16
<b>Citizenship</b>			
U.S. Citizen/U.S. National	276	269	7
Permanent U.S. resident <sup>e</sup>	12	2	10
Undocumented alien <sup>f</sup>	44	39	5
Qualified alien <sup>e</sup>	8	2	6
Unknown	148	98	50
<b>Number of suspects identified</b>	<b>488</b>	<b>410</b>	<b>78</b>

Note: Analysis restricted to cases opened and observed between January 2008 and June 2010 in high data quality task forces. See definition of high data quality task forces on page 5.

<sup>a</sup>Includes cases of unknown trafficking type.

<sup>b</sup>Excludes persons of Hispanic or Latino origin.

<sup>c</sup>Asian may include Native Hawaiian and other Pacific Islanders or persons of East Asian or Southeast Asian descent.

<sup>d</sup>Includes persons of two or more races.

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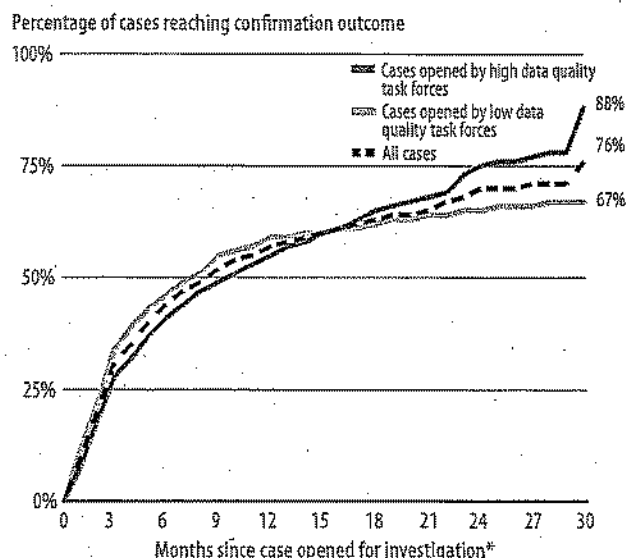


Most confirmed human trafficking suspects were male (81%), while 19% were female. Based on cases in which race was known, nearly two-thirds (62%) of confirmed sex trafficking suspects were identified as black. Confirmed labor trafficking suspects were more likely to be identified as Hispanic (48%). Most suspects in confirmed sex trafficking incidents were between the ages of 18 and 34 (77%) and were U.S. citizens (86%).

**Analysis of case outcomes was restricted to incidents opened by high data quality task forces and observed for one year**

Seventy-six percent of human trafficking cases had reached a confirmation outcome at the conclusion of the study period, including 88% of cases opened in high data quality task forces and 67% in the remaining task forces (figure 3).

**FIGURE 3**  
Percentage of cases reaching confirmation outcome, by months observed and by task force data quality



Note: See box on page 5 for definition of high data quality task forces.

\*Fewer than 50 cases were observed for at least 29 months and still pending confirmation outcome.

### Victim service providers report serving more labor trafficking victims than sex trafficking victims.

The HTRS collects information on human trafficking cases opened for investigation by state and local law enforcement agencies that received federal funding to support task force activities. The data described in this report reflect the information that was available to, and entered by, these state and local law enforcement agencies, which receive support from the Bureau of Justice Assistance (BJA) in the Office of Justice Programs, U.S. Department of Justice.

The Office for Victims of Crime (OVC), also in the Office of Justice Programs, provides grant funding to victim service agencies in many of the BJA-funded task force locations. The OVC funds support comprehensive services to human trafficking victims. Between January 2008 and June 2009, OVC awarded grants to 32 task force agencies to provide services to foreign national victims of human trafficking.

OVC data are compiled through the Trafficking Information Management System (TIMS). Between 2003 and June 2009, the OVC initiative provided services to a total of 2,699 pre-certified foreign national suspected victims of trafficking.

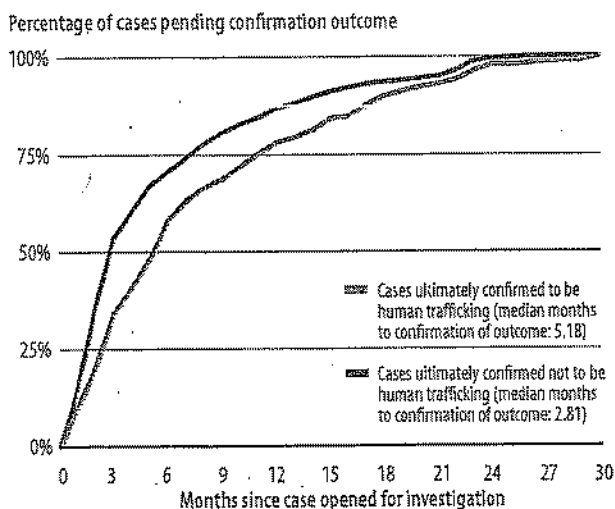
TIMS data consistently show that the majority of victims served are classified as labor trafficking victims. Between January 2008 and June 2009, 64% of the victims served by OVC-funded service providers were identified as victims of labor trafficking only, 22% as victims of sex trafficking only, and 10% as victims of both labor and sex trafficking.

Among confirmed victims of human trafficking identified by high data quality task forces in the HTRS, approximately 43% of undocumented aliens and qualified aliens were victims of labor trafficking, compared to 64% of the foreign national suspected victims of human trafficking served by the OVC task forces.

OVC expanded the victim services initiative to include U.S. citizens who are minors beginning in late 2009, and in 2010 began to include all victims of trafficking, regardless of citizenship or age. In 2010, BJA and OVC began joint support of an enhanced collaborative task force model that included support for victim service agencies and law enforcement agencies to take a comprehensive approach to investigating all trafficking crimes and providing services to trafficking victims regardless of citizenship or age.

Cases that were ultimately confirmed to be human trafficking in high data quality task forces were open for a median of five months before the case was confirmed. Cases that were ultimately confirmed not to be human trafficking in these selected task forces were open for a median of 3 months before the allegations were determined to be unfounded (figure 4).

**FIGURE 4**  
Percentage of cases reaching confirmation outcome, by months observed and ultimate confirmation status



Most (83%) of the cases that ultimately reached an outcome were able to do so within 12 months of observation (not shown in table). Statistics about the outcomes of cases are therefore restricted to incidents observed for at least 12 months in the study period, and opened by task forces that reliably updated information.

**Approximately a third of cases opened for investigation were confirmed to be human trafficking**

Among cases opened for at least one year in selected task forces, 30% were confirmed to be human trafficking and 38% were confirmed not to be human trafficking as defined in the TVPA, 2000. Nearly a third of the cases had a pending confirmation outcome (table 7).

Any commercial sex act if the person is under 18 years of age, regardless of whether any form of coercion is involved, is defined as human trafficking by the TVPA, 2000. (Adult prostitution is not considered human trafficking unless it is proven that the victim was coerced.) Of cases confirmed to be human trafficking, 64% involved allegations of prostitution or sexual exploitation of a child, and 42% involved allegations of adult prostitution. Most cases confirmed not to be human trafficking (64%) or pending confirmation status (66%) involved allegations of adult prostitution (table 8).

**TABLE 7**  
Outcome of human trafficking incidents opened for at least 12 months by high data quality task forces, by type of trafficking

Outcome	Total		Sex trafficking		Labor trafficking	
	Number*	Percent	Number	Percent	Number	Percent
All human trafficking cases	849	100.0%	714	100.0%	101	100.0%
Confirmed	257	30.3%	218	30.5%	39	38.6%
Not confirmed	322	37.9	267	37.4	32	31.7
Pending or unknown confirmation status	270	31.8	229	32.1	30	29.7

Note: Analysis restricted to cases opened and observed between January 2008 and June 2009. See definition of high data quality task forces on page 5.

\*Includes cases of an unknown trafficking type.

**TABLE 8**  
Human trafficking incidents opened for at least 12 months by high data quality task forces, by outcome

Incident type	Confirmed to be human trafficking		Confirmed not to be human trafficking		Pending confirmation	
	Number	Percent	Number	Percent	Number	Percent
Total	257	100.0%	322	100.0%	270	100.0%
Sex trafficking						
Adult prostitution	108	42.0	205	63.7	178	65.9
Prostitution or sexual exploitation of a child	164	63.8	80	24.8	83	30.7
Sexualized labor	6	2.3	18	5.6	19	7.0
Other	1	0.4	4	1.2	3	1.1
Labor trafficking						
Labor trafficking in commercial or public industry	24	9.3	19	5.9	16	5.9
Labor trafficking in unregulated industry	37	14.4	24	7.5	28	10.4
Other/Unknown	7	2.7	33	10.2	38	14.1

Note: Analysis restricted to cases opened and observed between January 2008 and June 2009. See definition of high data quality task forces on page 5.



### About a quarter of foreign nationals confirmed as victims received U.S. visas

Nearly 90 victims identified in confirmed human trafficking incidents open for at least a year were described as undocumented or qualified aliens. Of these 87 foreign victims, 21 received T visas, while 46 visa applications were still pending or had an unknown status. (See footnote 4 on page 2.) Most confirmed victims in cases open for at least a year were described as U.S. citizens, U.S. nationals, or permanent U.S. residents (67%)(not shown in table).

### Nearly 150 arrests were reported by law enforcement agencies in confirmed human trafficking incidents

Law enforcement agencies in the selected task forces reported arresting 144 suspects in confirmed human trafficking incidents open for at least a year during the study period, including 139 sex trafficking suspects and 5 labor trafficking suspects (table 9). Most sex trafficking arrests occurred at the state level (114), while all 5 labor trafficking arrests occurred at the federal level.

The HTRS relies primarily on local law enforcement to update information about arrests. Local law enforcement may not always have current or complete information about arrests made by other agencies. (See *Methodology*.)

**TABLE 9**

**Victim and suspect outcomes in incidents opened between January 2008 and June 2009 and confirmed to be human trafficking by high data quality task forces, by type of trafficking**

Type of incidents	Total	Sex trafficking	Labor trafficking
Number of selected confirmed incidents	257	218	39
Victims in confirmed incidents			
Foreign victims identified	87	43	44
T or U visa status <sup>a</sup>			
Yes	21	9	12
No	20	8	12
Pending/unknown	46	26	20
Suspects in confirmed incidents			
Suspects identified	343	279	64
Suspects arrested	144	139	5
State arrest	114	114	0
Federal arrest	21	16	5
Both	9	9	0
Suspects not arrested	19	13	6
Unknown	180	127	53

Note: Analysis restricted to cases opened and observed between January 2008 and June 2009 in high data quality task forces. See definition of high data quality task forces on page 5.

<sup>a</sup>Congress created the T and U nonimmigrant classifications with the passage of the TVPA, 2000. The T nonimmigrant status was created to provide protection to victims of severe forms of human trafficking. The U nonimmigrant status was designated for victims of certain crimes who had suffered mental or physical abuse and who were willing to assist in the investigation of human trafficking activity.

### Methodology

This report relies on information from task forces receiving federal support from the Bureau of Justice Assistance (BJA). Since the Human Trafficking Reporting System (HTRS) was implemented in 2008, a total of 45 jurisdictions have received funds from BJA to provide support for state and local law enforcement to work more collaboratively with victim services organizations, federal law enforcement, U.S. Attorneys' Offices, and the Civil Rights Division of the U.S. Department of Justice in the identification and rescue of human trafficking victims who are in the United States. The HTRS was designed to facilitate incident-level management and tracking of human trafficking investigations opened by BJA-funded task forces.

Between January 1, 2008, and June 30, 2010, 42 of the 45 federally funded human trafficking task forces reported at least one human trafficking incident in the HTRS. The task forces involve partnerships with varying coverage areas, including entire states/territories and regions, multiple counties, single counties, and metropolitan areas. Combined, the task forces operated in jurisdictions that were home to nearly 25% of the nation's resident population at midyear 2010. Although the task forces are not representative of the entire nation, they are widely dispersed geographically.

### Collection procedures

Each task force designated a person for data collection and reporting. Reporters were responsible for adding new human trafficking incidents on a monthly basis, updating information for existing records with new activity, and submitting data automatically through an online data portal. Reporters were provided training and follow-up technical assistance via phone or onsite as needed by Northeastern University (NEU) and Urban Institute (UI) staff. Task forces began entering data in January 2008.

Task force reporters enter information about investigations into the HTRS if they have spent at least one hour of investigation time on a potential trafficking case. At the time that data are originally entered into the system, many investigations are still ongoing. As investigations proceed, additional information may become available or the original information may be updated. As a result, the HTRS provides a snapshot of information currently known and reported.

Once an investigation has progressed to the point of having information about potential suspects or victims, task force reporters are instructed to enter this information into the HTRS. Information for each suspect and each victim is then added by completing automated data entry screens identified as a *Suspect Information Form* or a *Victim Information Form*. As more information becomes available, task force reporters are asked to update the information on each screen. (For additional details, see the Human Trafficking Reporting System User's Manual at <https://www.humantrafficking.neu.edu>.)

*Data quality*

Every effort was made to ensure consistency and completeness in task force reporting to the HTRS. NEU and UI developed a detailed HTRS Users' Guide to introduce the platform to task forces and promote consistency in reporting. Training and onsite technical assistance was provided to all task forces. An advisory board made up of task force representatives helped guide the development and implementation of the data management system. Three sites were also funded to provide immersion training to task forces that did not update the HTRS regularly. NEU and UI also conduct random data quality audits and provide quarterly data quality reports to BJS.

Finally, random audits are conducted to compare paper files from closed human trafficking investigations with the data that are reported to the HTRS. BJS and its partners continue to implement enhancements to the HTRS to improve data reliability and consistency in reporting.

Despite these efforts, consistency and completeness in reporting vary across task forces (see text box on page 5). The statistics described in this report should be examined

in light of this variability. Although all task forces received federal funding during the study period from BJA, the ability to collect and report data varied by task force. Some task forces indicated that they were unable to provide individual-level information due to the sensitivity of the information, and others stated that they did not have access to many of the case outcome measures collected through HTRS. The volume of incidents reported varied between task forces (ranging from 1 to 483). Seven of the participating task forces reported fewer than 10 cases of suspected human trafficking between January 2008 and June 2010, while six task forces reported 100 or more cases during this same period.

Task forces that were classified as having high data quality (18 of 42) regularly entered new cases into the system, provided individual-level information for at least one suspect or victim, and updated case information on a regular basis. Task forces classified as having low data quality did not meet any of these three criteria. High and low data quality task forces reported similar information with respect to human trafficking type, lead investigative agency level, and lead investigative agency type. High quality task forces were more

**TABLE 10**  
Human trafficking case characteristics by quality of task force data

Case characteristic	Quality of task force reporting identified as—			
	Low		High	
	Number	Percent	Number	Percent
Total number of cases opened for investigation	1,209		1,306	
Type of trafficking				
Sex trafficking	978	80.9%	1,087	83.2%
Labor trafficking	127	10.5	151	11.6
Unknown	104	8.6	68	5.2
Location of human trafficking task force in law enforcement agency				
Vice unit	803	66.4%	574	44.0%
Criminal intelligence, organized crime, or human trafficking-dedicated unit	406	33.6	732	56.0
Lead investigative agency level				
State/local territorial	1,061	87.8%	1,143	87.5%
Federal	93	7.7	142	10.9
Private/NGO	48	4.0	15	1.1
Missing/unknown	7	0.6	6	0.5
Lead investigative agency type				
Law enforcement/prosecution/corrections	1,149	95.0%	1,276	97.7%
Victim advocate	48	4.0	15	1.1
Health/human/education services	1	0.1	2	0.2
Regulatory agency	4	0.3	7	0.5
Missing/unknown	7	0.6	6	0.5
Number of agencies involved				
1	733	60.6%	428	32.8%
2-3	376	31.1	633	48.5
4-6	89	7.4	215	16.5
7 or more	7	0.6	26	2.0
Unknown	4	0.3	4	0.3
Any victims identified	362	29.9%	982	75.2%
Any suspects identified	247	20.4%	814	62.3%
Confirmation outcome				
Confirmed to be human trafficking	146	12.1%	389	29.8%
Confirmed not to be human trafficking	589	48.7	420	32.2
Pending confirmation	474	39.2	497	38.1

likely to be located in criminal intelligence, organized crime, or human trafficking-dedicated units (56%) than low quality task forces (34%). Low quality task forces were typically in vice units (66%) compared to high quality task forces (44%). High data quality task forces also reported a greater percent of cases that involved multiple agencies, had at least one victim identified, had at least one suspect identified, and were confirmed to be human trafficking (table 10). Analyses that included any data on victims, suspects, or confirmed cases were restricted to information provided by selected task forces.

As of June 30, 2010, the HTRS included information on more than 3,100 cases of suspected incidents of human trafficking. However, this report covers cases opened in January 2008 to minimize variations in reporting over time due to changes in data collection methodology. The HTRS project team collected retrospective case information on investigations opened prior to the launch of the system in 2008.

Analyses of the retrospective data collected by the project team prior to 2008 found that this information was not consistently updated by the task forces once prospective data collection began. Therefore, the characteristics of these incidents (652) are fully described in the previous report, *Characteristics of Suspected Human Trafficking Incidents, 2007-2008*. There is an overlap of cases opened between January 2008 and September 2008 between the previous report and the current report, as many of these incidents were entered prospectively by the task forces, and were updated following the release of the previous report.

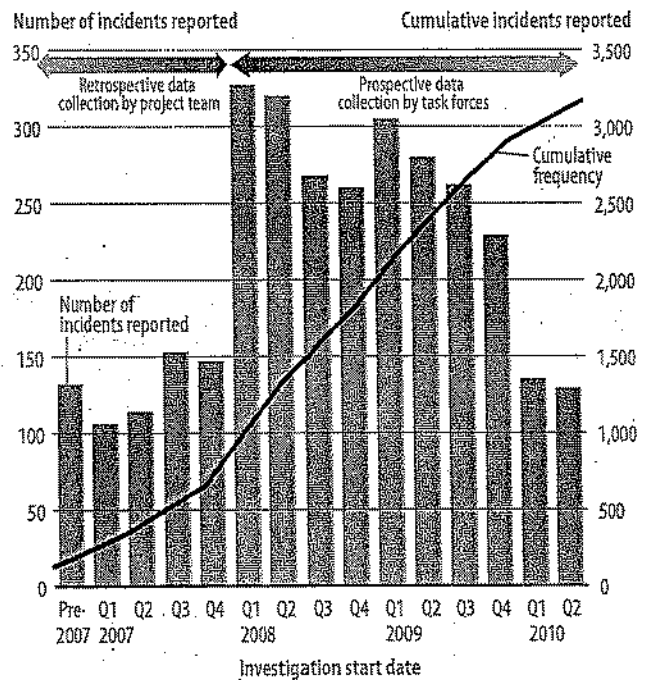
During the first year (2008) of prospective voluntary data collection, task forces opened at least 250 suspected cases of human trafficking for investigation in each quarter. This volume of new cases continued well into 2009, yet dropped to less than 150 new cases per quarter in 2010 (figure 5).

Modifications designed to help alleviate many of the data quality issues described in this report went into effect in October 2009. Participation in HTRS became a requirement of continued federal funding from BJA. Several HTRS fields were converted from "non-required" to "required" data elements. Additionally, a task force is unable to close a case unless individual-level information about victims and suspects is entered for those incidents with identified

numbers of victims and suspects in investigation records. Open cases that have not been updated during the previous six months are now automatically flagged for task forces whenever they log into the system. Not only does this new feature facilitate the updating of open investigations for task forces, it also helps project staff track the number of open but inactive cases for each task force, which could affect the quality of data extracted from the HTRS.

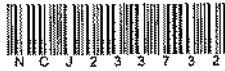
The requirement to update cases once they have been entered into the system may in part explain the decrease in new cases entered in quarters one and two of 2010. In addition, six of the 42 task forces had let their funding expire as of December 31, 2009. The project team continues to work with these task forces to update information on cases already entered into the HTRS, but no new cases were entered into the HTRS from these six task forces as of January 1, 2010.

**FIGURE 5**  
Suspected incidents of human trafficking, by reported investigation start date





U.S. Department of Justice  
Office of Justice Programs  
Bureau of Justice Statistics  
Washington, DC 20531  
Official Business  
Penalty for Private Use \$300



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The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. James P. Lynch is the director.

This report was written by Duren Banks and Tracey Kyckelhahn. Ron Malega verified the report.

Vanessa Curto and Jill Thomas edited the report, Tina Dorsey and Barbara Quinn produced the report, and Jayne Robinson prepared the report for final printing, under the supervision of Doris J. James.

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This report in portable document format and in ASCII and its related statistical data and tables are available at the website: <http://bjs.gov/index.cfm?ty=pbdetail&iid=2372>.



# **EXHIBIT 4**

## Prostitution, Trafficking, and Cultural Amnesia: What We Must *Not Know* in Order To Keep the Business of Sexual Exploitation Running Smoothly

Melissa Farley†

### INTRODUCTION

“Wise governments,” an editor in the *Economist* opined, “will accept that paid sex is ineradicable, and concentrate on keeping the business clean, safe and inconspicuous.”<sup>1</sup> That third adjective, “inconspicuous,” and its relation to keeping prostitution “ineradicable,” is the focus of this Article. Why should the sex business be invisible? What is it about the sex industry that makes most people want to look away, to pretend that it is not really as bad as we know it is? What motivates politicians to do what they can to hide it while at the same time ensuring that it runs smoothly? What is the connection between not seeing prostitution and keeping it in existence?

There is an economic motive to hiding the violence in prostitution and trafficking. Although other types of gender-based violence such as incest, rape, and wife beating are similarly hidden and their prevalence denied, they are not sources of mass revenue. Prostitution is sexual violence that results in massive

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On the one-year anniversary of her death, I note that Andrea Dworkin’s life and her words changed my life. Catharine MacKinnon’s wisdom about exactly how women get hurt by men, her generous heart, and her fabulous critical reviews, have made it possible for me to keep writing. Margaret Baldwin, a brilliant and compassionate attorney who is in the process of setting up a state-of-the-art treatment center for women escaping prostitution, has been a joy to work with. Nikki Craft’s vigilance, her devotion to cyberspace, and her saucy attitude are an inspiration to me. And thank you to Dorchen Leidholdt for saying to me in the back of that bus near Beijing, “why don’t you compare other countries to the US—that hasn’t been done before? And write about the emotional harm, why don’t you?”

I thank the editors at the *Yale Journal of Law and Feminism* for their assistance and their dedication in editing this paper.

1. *The Sex Business*, *ECONOMIST*, Feb. 14, 1998, at 17.

economic profit for some of its perpetrators.<sup>2</sup> The sex industry, like other global enterprises, has domestic and international sectors, marketing sectors, a range of physical locations out of which it operates in each community, is controlled by many different owners and managers, and is constantly expanding as technology, law, and public opinion permit. Many governments protect commercial sex businesses because of the monstrous profits. Like slavery, prostitution is a lucrative form of oppression.<sup>3</sup> And both slavery and prostitution are rife with every imaginable type of physical and sexual violence.

The institutions of prostitution and slavery have existed for thousands of years, and are so deeply embedded in cultures that they are invisible to some. In Mauritania, for example, there are 90,000 Africans enslaved by Arabs. Human rights activists have traveled to Mauritania to report on slavery, but because they think they know what slavery looks like and because they do not see precisely that stereotype in action—for example, if they do not see bidding for shackled people on auction blocks—they conclude that the Africans working in the fields in front of them are voluntary laborers who are receiving food and shelter as salary.<sup>4</sup>

Similarly, if people do not see exactly the stereotype of what they think “harmful” prostitution/trafficking is, for example, if they do not see a girl being dragged at gunpoint from one location to another, or if they see an eighteen year old who says, “I like this job and I’m getting rich,” then they do not see the harm. Prostitution tourists and local johns see smiling girls waving at them from windows in Amsterdam, brothels in Mumbai, or strip clubs in Las Vegas. Johns and their friends decide that prostitution is a free choice.

On the other hand, survivors of prostitution have described it as “volunteer slavery”<sup>5</sup> and as “*the choice made by those who have no choice.*”<sup>6</sup> If you’re a woman or girl, global forces that *choose you* for prostitution are sex discrimination, race discrimination, poverty, abandonment, debilitating sexual

2. In Las Vegas, Nevada, three law enforcement sources and one investigative reporter have separately estimated that the sex industry and its ancillary operations (including both legal and illegal activities such as legal lapdancing, extortion monies paid to taxi drivers for delivery of customers to specific strip clubs, and tips to valets and bartenders for procuring women) generate between \$1 and \$5 billion per year. This research is forthcoming in a report on Nevada prostitution/trafficking to be released by the author in 2006. Melissa Farley, *Prostitution and Trafficking in Nevada*, 2006 (unpublished manuscript, on file with author).

3. See, e.g., KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979); KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* (1995) [hereinafter *PROSTITUTION OF SEXUALITY*]; CATHARINE A. MACKINNON, *SEX EQUALITY* 1447-72 (2001) (discussing prostitution and slavery).

4. See Elinor Burkett, *God Created Me to Be a Slave*, N.Y. TIMES MAG., Oct. 12, 1997, at 56. Since Burkett wrote the article, there has been increasing awareness of different manifestations of slavery, sometimes including prostitution. See, e.g., U.S. DEP’T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *RESCUING VICTIMS OF MODERN-DAY SLAVERY* (2005), <http://www.state.gov/g/tip/rls/fs/2005/55233.htm>.

5. INE VANWESENBEECK, *PROSTITUTES’ WELL-BEING AND RISK* 149 (1994).

6. CHRISTA WISTERICH, *THE GLOBALIZED WOMAN: REPORTS FROM A FUTURE OF INEQUALITY* 63 (2000).

and verbal abuse, poor education or no education, and a job that does not pay a living wage. All drive girls and women into the commercial sex industry.<sup>7</sup> Defined as whores when they were young, women who appear to choose prostitution have been sexually abused as children at much higher rates than other women. One way that women end up 'choosing' prostitution is that they are paid for the abuse that they have already grown up with. They assume that's all they are good for.<sup>8</sup>

In this analysis, prostitution is a gendered survival strategy based on the assumption of unreasonable risks by the person in it. Regardless of prostitution's legal status (legal, illegal, zoned, or decriminalized) or its physical location (strip club, massage parlor, street, escort/home/hotel), prostitution is extremely dangerous for women. Prostituted women are unrecognized victims of intimate partner violence by customers as well as pimps.<sup>9</sup> Pimps and customers use methods of coercion and control like those of other batterers: economic exploitation, social isolation, verbal abuse, threats, physical violence, sexual assault, captivity, minimization and denial of their use of physical violence and abuse.<sup>10</sup>

Prostitution/trafficking/pornography thus systematically discriminate against women, against the young, against the poor and against ethnically subordinated groups. When prostitution is conceptually morphed into sex work, brutal exploitation by pimps becomes an employer-employee relationship. When prostitution is defined as labor, the predatory, pedophilic purchase of a human being by a john becomes a banal business transaction.<sup>11</sup> Prostitution is sometimes embraced in the media, in public health, and in the

7. The sex industry changes and expands constantly. It includes phone sex, internet prostitution via live video chat, massage brothels, escort prostitution, gentlemen's clubs, topless clubs, the commercial marriage market, ritual abuse of children, sauna and nail parlor prostitution, street prostitution, strip clubs, lap dancing, peep shows, and pornography.

8. As a teen, one woman felt safer and more in control turning tricks in the street than she did inside her home where her stepfather regularly raped her and stole her epilepsy medication. Interview with anonymous prostituted woman, in San Francisco, Cal. (Sept. 20, 2000).

9. See Christine Stark & Carol Hodgson, *Sister Oppressions: A Comparison of Wife Battering and Prostitution*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS 17 (Melissa Farley ed., 2003).

10. See EVELINA GIOBBE ET AL., A FACILITATOR'S GUIDE TO PROSTITUTION: A MATTER OF VIOLENCE AGAINST WOMEN (Denise Gamache ed., 1990)[hereinafter GIOBBE, FACILITATOR'S GUIDE]; Evelina Giobbe, *An Analysis of Individual, Institutional and Cultural Pimping*, 1 MICH. J. GENDER & L. 33 (1993); Evelina Giobbe, *Prostitution: Buying the Right to Rape*, in RAPE AND SEXUAL ASSAULT III: A RESEARCH HANDBOOK 143 (Ann Wolbert Burgess ed., 1991).

11. See Appendix A. Women Hurt in Systems of Prostitution Engaged in Revolt (WHISPER) demystified the "job" of prostitution with a tongue-in-cheek job application for prostitution. This satirical job description has been widely used in agencies that provide emotional support and alternatives to women escaping prostitution. For example, the author learned that women at SOS (Sisters Offering Support) in Honolulu tacked the job description onto the door of their group meeting room and that it led to much laughter.

The job application is © WHISPER & Evelina Giobbe. All rights reserved. Permission granted to reprint. Previously printed in Melissa Farley, *Preface: Prostitution, Trafficking, and Traumatic Stress*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS xi, xx (Melissa Farley ed., 2003); MACKINNON, SEX EQUALITY, *supra* note 3, at 1437.



academy as “sex work,” and in that one word—work—the sexism, racism, and violent degradation of prostitution fade from sight.

U.S. prostitution can be understood in the context of the cultural normalization of prostitution as a glamorous and wealth-producing “job” for girls who lack emotional support, education, and employment opportunities. The sexual exploitation of children and women in prostitution is often indistinguishable from incest, intimate partner violence, and rape.<sup>12</sup> Indian feminist Jean D’Cunha asked, “What will be the . . . outcome of struggles against sexual harassment and violence in the home, the workplace, or the street, if men can buy the right to perpetrate these very acts against women in prostitution?”<sup>13</sup>

This Article discusses and analyzes some of the empirical data on the harms of prostitution, pornography and trafficking. This information has to be culturally, psychologically, and legally denied because to know it would interfere with the business of sexual exploitation.

1. In order to view prostitution as a job, and in order to keep the business of sexual exploitation running smoothly, *we can not know that prostitution is extremely violent.*

Each act of violence that has been made visible as a result of the women’s movement—incest, sexual harassment, misogynist verbal abuse, stalking, rape, battering, and sexual torture—is one point on the continuum of violence occurring in prostitution. As one survivor explained:

There are thousands of books and classes that provide women with information on self-defense and rape “avoidance” strategies. Some of the basic lessons they teach us are not to walk alone at night on dark deserted streets, not to get into cars with strange men, not to pick up guys in a bar, not to even let a delivery man into your home when you’re by yourself. Yet this is what the “job” of prostitution requires; that women put themselves in jeopardy every time they turn a trick. And then we ask, “How do you prevent it from leading to danger?” The answer is, you can’t. Count the bodies.<sup>14</sup>

In the past two decades, a number of authors have documented or analyzed the sexual and physical violence that is the normative experience for women in

12. See Marjolein Gysels et al., *Women Who Sell Sex in a Ugandan Trading Town: Life Histories, Survival Strategies and Risk*, 54 *SOCIAL SCIENCE & MEDICINE* 179, 179-192 (2002).

13. Jean D’Cunha, *Legalizing Prostitution: In Search of Alternatives From a Gender and Rights Perspective* 39 (Seminar on the Effects of Legalisation of Prostitution Activities, Stockholm, Swed., Nov. 5-6, 2002).

14. Evelina Giobbe, *The Vox Fights*, *VOX*, Winter 1991, at 34 [hereinafter Giobbe, *The Vox Fights*]. See also Evelina Giobbe, *Confronting the Liberal Lies about Prostitution*, in *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* 67, 76 (Dorchen Leidholdt & Janice Raymond eds., 1990).



prostitution.<sup>15</sup> Today, there is a significant peer-reviewed literature documenting the violence in prostitution. Familial sexual abuse functions as a training ground for prostitution. Survivors link childhood physical, sexual, and emotional abuse as children to later prostitution.<sup>16</sup> Many studies lend support to this analysis. Seventy percent of the adult women in prostitution in one study said that their childhood sexual abuse led to entry into prostitution.<sup>17</sup> Early adolescence is the most frequently reported age of entry into any type of prostitution. As one girl said,

We've all been molested. Over and over, and raped. We were all molested and sexually abused as children, don't you know that? We ran to get away. . . . We were thrown out, thrown away. We've been on the street since we were 12, 13, 14."<sup>18</sup>

According to the empirical data (but not according to single-person, 'happy-hooker' narratives) familial abuse or neglect is almost universal among prostituted women. Of fifty-five survivors of prostitution at the Council for Prostitution Alternatives in Portland, eighty-five percent reported a history of incest, ninety percent a history of physical abuse, and ninety-eight percent a history of emotional abuse.<sup>19</sup> Multiple perpetrators of sexual and physical abuse were the rule rather than the exception.

Sexual violence and physical assault are the norm for women in all types of prostitution. One Canadian observer noted that ninety-nine percent of women in prostitution were victims of violence, with more frequent injuries "than workers in [those] occupations considered . . . most dangerous, like mining, forestry, and firefighting."<sup>20</sup> Prostituted women in Glasgow said that violence

15. For summaries of this literature, see BARRY, *THE PROSTITUTION OF SEXUALITY*, *supra* note 3; RYAN BISHOP & LILLIAN S. ROBINSON, *NIGHT MARKET: SEXUAL CULTURES AND THE THAI ECONOMIC MIRACLE* (1998); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981) [hereinafter DWORKIN, *MEN POSSESSING WOMEN*]; MACKINNON, *SEX EQUALITY*, *supra* note 3; SHEILA JEFFREYS, *THE IDEA OF PROSTITUTION* (1997); Andrea Dworkin, *Pornography, Prostitution, and a Beautiful and Tragic Recent History*, in NOT FOR SALE: FEMINISTS RESISTING PROSTITUTION AND PORNOGRAPHY 137 (Rebecca Whisnant & Christine Stark eds., 2004); Melissa Farley et al., *Prostitution in Nine Countries*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS 33 (Melissa Farley ed., 2003) [hereinafter *Prostitution in Nine Countries*]. There is also a wealth of relevant information available at <http://www.catwinternational.org>.

16. Dworkin described incest as "boot camp" for prostitution. ANDREA DWORKIN, *LIFE AND DEATH* 143 (1997) [hereinafter DWORKIN, *LIFE AND DEATH*].

17. Mimi H. Silbert & Ayala M. Pines, *Early Sexual Exploitation as an Influence in Prostitution*, 28 *SOCIAL WORK* 285 (1983). See also MIMI H. SILBERT ET AL., *SEXUAL ASSAULT OF PROSTITUTES* (National Center for the Prevention and Control of Rape, National Institute of Mental Health, San Francisco, CA, 1982).

18. NORTHWEST RESOURCE ASSOC., *SURVIVAL SEX IN KING COUNTY*, REPORT SUBMITTED TO KING COUNTY WOMEN'S ADVISORY BOARD 16 (1993).

19. E-mail from Susan Hunter to Melissa Farley (Apr. 4, 2006) (on file with author). See also Susan K. Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 *MICH. J. GENDER & L.* 91, 103 (1993) (discussing another phase of this series of studies that demonstrate similar high rates of childhood trauma among women escaping prostitution).

20. Erin Gibbs Van Brunschot et al., *Images of Prostitution: The Prostitute and Print Media*, 10 *WOMEN & CRIM. JUST.* 47, 47 (1999).

from customers was their primary fear.<sup>21</sup> Physical abuse was considered part of the job of prostitution, with the payment sometimes determined by each individual blow of a beating or whipping.<sup>22</sup>

Violence is commonplace in prostitution whether it is legal or illegal.<sup>23</sup> Eighty-five percent of prostituted women interviewed in Minneapolis-St. Paul had been raped in prostitution.<sup>24</sup> Another study found that eighty percent of women who had been domestically or transnationally trafficked suffered violence-related injuries.<sup>25</sup> Of 854 people in prostitution in nine countries, eighty-nine percent wanted to leave prostitution but did not have other options for survival.<sup>26</sup> Researchers have found that two factors are consistently associated with greater violence in prostitution: poverty and length of time in prostitution. The more customers serviced, the more women reported severe physical symptoms.<sup>27</sup> The longer women remained in prostitution, the higher their rates of sexually transmitted diseases.<sup>28</sup> When prostitution is assumed to be a reasonable "job option," women's intense longing to escape it is made invisible.<sup>29</sup>

Violence is common in prostitution whether it is located indoors or outdoors. The boundary between stripping, dancing, and prostitution no longer exists as it did twenty-five years ago.<sup>30</sup> In today's strip clubs, johns who buy

21. See S. T. Green & D. J. Goldberg, *Female Streetworker-Prostitutes in Glasgow: A Descriptive Study of Their Lifestyle*, 5 AIDS CARE 321, 328 (1993).

22. See *id.* at 328.

23. See generally VANWESENBEECK, *supra* note 5.

24. Ruth Parriott, *Health Experiences of Twin Cities Women Used in Prostitution* 20 (1994) (unpublished manuscript, on file with WHISPER, Minneapolis, MN).

25. JANICE G. RAYMOND ET AL., A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS: PATTERNS, PROFILES AND HEALTH CONSEQUENCES OF SEXUAL EXPLOITATION IN FIVE COUNTRIES (INDONESIA, THE PHILIPPINES, THAILAND, VENEZUELA AND THE UNITED STATES) (2002), available at <http://action.web.ca/home/catw/readingroom/shtml?x=17062>.

26. See *Prostitution in Nine Countries*, *supra* note 15. Women in prostitution note that shelters and services may be available to battered women but not to prostituted women. Speaking of the need to include prostituted women in the battered women's movement, Evelina Giobbe testified,

[W]omen who are in prostitution, myself and my sisters . . . have been subjected to the same abuse that every battered woman has spoken about in this room, except men paid for the right to do it. It's not a job. We're abused, and we need help.

Joshua M. Price, *Violence Against Prostitutes and a Re-evaluation of the Counterpublic Sphere*, 34 GENDERS 32 (2001), [http://www.genders.org/g34/g34\\_price.html](http://www.genders.org/g34/g34_price.html) (quoting from a speech printed in an educational manual from the Massachusetts Coalition of Battered Women Service Groups Inc.).

27. See VANWESENBEECK, *supra* note 5.

28. See Parriott, *supra* note 24, at 14.

29. See, e.g., GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, HANDBOOK FOR HUMAN RIGHTS ACTION IN THE CONTEXT OF TRAFFIC IN WOMEN 3 (1997), available at <http://apnsw.org/apnsw.htm> ("Women have the right to make a bad decision."); see also Melissa Farley & Sunjean Seo, *Prostitution and Trafficking in Asia*, 8 HARV. ASIA PAC. REV. 8 (2006) (discussing the role of the World Health Organization and other groups in normalizing prostitution as labor); Stark & Hodgson, *supra* note 9.

30. For documentation of the increasing sexual and physical violence by men against women who strip, see Melissa Farley, *Bad for the Body, Bad for the Heart*, 10 VIOLENCE AGAINST WOMEN 1087, 1102 (2004), available at <http://www.prostitutionresearch.com/laws/000073.html>; see also BRENT K. JORDAN, STRIPPED: TWENTY YEARS OF SECRETS FROM INSIDE THE STRIP CLUB (2004) (discussing the roles of bouncers in strip clubs: to respond to customers' sexual assaults on dancers, and to ensure that

lapdances assume they'll be permitted to ejaculate with their pants on. When the sexual performance is more private, as in VIP rooms or champagne rooms, the probability of violent sexual harassment including rape dramatically increases.<sup>31</sup>

Prostitution can be lethal.<sup>32</sup> A Canadian commission found that the death rate of women in prostitution was forty times higher than that of the general population.<sup>33</sup> A study of Vancouver prostitution reported a thirty-six percent incidence of attempted murder.<sup>34</sup>

The verbal abuse that is commonplace in prostitution is often minimized as a source of serious and longlasting harm. Despite its social invisibility, eighty-eight percent of women in one study described verbal abuse as an intrinsic part of prostitution.<sup>35</sup> When women are turned into objects that men masturbate into, profound psychological harm results for the person who is acting as receptacle.<sup>36</sup> In prostitution, a woman does not stay whole; she loses her name, her identity, and her feelings.<sup>37</sup>

Over time, the commodification and objectification of her body by pimps and johns are internalized. Portions of her body are numbed and compartmentalized. Eventually she also views her body as a commodity, rather than as integral to the rest of herself. Trauma and torture survivors commonly experience this profound disconnectedness.<sup>38</sup>

Continuous assaults on the woman's body in prostitution cause revulsion

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customers are beaten up if they attempt to "trick" women out of their pay); see also Jacqueline Lewis, *Lap Dancing: Personal and Legal Implications for Exotic Dancers*, in PROSTITUTION: ON WHORES, HUSTLERS, AND JOHNS 376 (James A. Elias et al. eds., 1998) (noting that the amount and type of physical contact in stripping removes the boundary between it and prostitution); Eleanor Maticka-Tyndale et al., *Exotic Dancing and Health*, 31 WOMEN & HEALTH 87, 104 (2000).

31. Holsopple documented the verbal, physical, and sexual abuse experienced by women in strip club prostitution including physical and sexual assaults on breasts, buttocks, and genitals. Women are kicked, bitten, slapped, spit on, and penetrated vaginally and anally during lap dancing. See Kelly Holsopple, *Stripclubs According to Strippers: Exposing Workplace Violence* (1998) (unpublished manuscript, on file with author).

32. See John J. Potterat et al., *Mortality in a Long-Term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778 (2004).

33. Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada*, 2 PORN. & PROSTITUTION CAN. 350, 350 (1985).

34. Leonard Cler-Cunningham & Christine Christenson, *Studying Violence to Stop It: Canadian Research on Violence Against Women in Vancouver's Street Level Sex Trade*, 4 RESEARCH FOR SEX WORK 25, 26 (2001).

35. Melissa Farley et al., *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 TRANSCULTURAL PSYCHIATRY 242, 250 (2005). As one woman explained, "It is internally damaging. You become in your own mind what these people do and say with you. You wonder how could you let yourself do this and why do these people want to do this to you?" Interview with anonymous prostituted woman, in San Francisco, Cal. (May 8, 2004).

36. See generally CECILIE HØIGARD & LIV FINSTED, *BACKSTREETS: PROSTITUTION, MONEY AND LOVE* 51 (1986).

37. See DWORKIN, *LIFE AND DEATH*, *supra* note 16, at 139-51.

38. See HARVEY L. SCHWARTZ, *DIALOGUES WITH FORGOTTEN VOICES: RELATIONAL PERSPECTIVES ON CHILD ABUSE TRAUMA AND THE TREATMENT OF SEVERE DISSOCIATIVE DISORDERS* (2000).



and repeated traumatization. Williams described her response to the rape/sex of prostitution:

[I] started getting physically ill whenever I turned a trick. My vagina closed on me again like it did when I was 15 years old [during a rape]. . . . One night a man tried to force himself inside of me and damaged his penis in the process.<sup>39</sup>

Reviewing four studies of dissociation among women in prostitution, researchers concluded that dissociation is a common psychological defense in response to the trauma of prostitution.<sup>40</sup> The dissociation necessary to survive rape, battering, and prostitution in adulthood is the same as that used to survive familial sexual assault. Dissociation has been observed as a consequence of torture and a means of surviving it.<sup>41</sup>

Most women report that they cannot prostitute unless they dissociate.<sup>42</sup> When they do not dissociate, they are at risk for being overwhelmed with pain, shame, and rage. One woman explains:

It's almost like I trained my mind to act like I like [prostitution] but not have any thoughts. I have the thoughts like 'What is this doing to my body and my mind and my self-esteem?' a few days later but not as it's happening. . . . Even though the guys are paying me for it, I feel like they're robbing me of something personal. And I wonder, 'Why are they doing this?'<sup>43</sup>

Posttraumatic stress disorder (PTSD) commonly occurs among prostituted women, and is indicative of their extreme emotional distress. PTSD is characterized by anxiety, depression, insomnia, irritability, flashbacks, emotional numbing, and hyperalertness. In nine countries, we found that sixty-eight percent of those in prostitution met criteria for a diagnosis of PTSD,<sup>44</sup> a prevalence that was comparable to battered women seeking shelter,<sup>45</sup> rape survivors seeking treatment,<sup>46</sup> and survivors of state-sponsored torture.<sup>47</sup>

39. Anonymous, *Stories, in SOLD OUT: A RECOVERY GUIDE FOR PROSTITUTES* 77 (J. L. Williams ed., 1991).

40. Colin A. Ross et al., *Dissociation Among Women in Prostitution, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS*, *supra* note 11, at 199.

41. See JUDITH L. HERMAN, *TRAUMA AND RECOVERY* (1992); Colin A. Ross et al., *Dissociation and Abuse Among Multiple Personality Patterns, Prostitutes and Exotic Dancers*, 41 *HOSP. & COMMUNITY PSYCHIATRY* 328 (1990).

42. Drugs and alcohol function as chemical dissociation, facilitating psychological dissociation. Substance abuse also functions as an analgesic for physical injuries from violence in prostitution.

43. Virginia Vitzthum, *Selling Intimacy*, [http://archive.salon.com/sex/feature/2000/07/25/girl\\_part\\_iii/index1.html](http://archive.salon.com/sex/feature/2000/07/25/girl_part_iii/index1.html) (July 25, 2000) (quoting a prostituted woman). See generally MARIANNE WOOD, *JUST A PROSTITUTE* (1995) (discussing the rage that is a consequence of tolerating johns' behaviors).

44. *Prostitution in Nine Countries*, *supra* note 15, at 44.

45. Beth M. Houskamp & David W. Foy, *The Assessment of Posttraumatic Stress Disorder in Battered Women: A Shelter Sample*, 6 *J. INTERPERSONAL VIOLENCE* 367 (1991) (citing a forty-five percent incidence rate); Anita Kemp et al., *Post-Traumatic Stress Disorder (PTSD) in Battered Women: A Shelter Sample*, 4 *J. TRAUMATIC STRESS* 137, 143 (1991) (citing an eighty-four percent incidence rate).

46. I.T. Bownes et al., *Assault Characteristics and Post-Traumatic Stress Disorder in Rape*

Across widely varying cultures on five continents, the traumatic consequences of prostitution were similar.<sup>48</sup> Vanwesenbeeck noted comparable symptoms among women in legal Dutch prostitution.<sup>49</sup> Results from two studies of prostituted Korean women reflect the women's intense psychological distress with PTSD prevalence rates of seventy-eight and eighty percent.<sup>50</sup>

Most people who have been in prostitution for any length of time have difficulty with sexual intimacy.<sup>51</sup> Sex becomes a job, rather than an act of love or passion. It's difficult to see one's chosen partner as anything but a john. A woman who danced naked behind glass for johns who watched and masturbated noted that over a period of time "the glass had dissolved and [my partner] had become one of them."<sup>52</sup> Men who prostitute experience similar damage to their sexuality and to their sense of self, as well as symptoms of traumatic stress that are identical to women's. As one man said,

I got into it because I thought sex was about love, and underneath it all I was looking for a dad. It's done me no good mentally. A few years ago I thought it was a good way to make money, but it's not worth the price. . . . I wouldn't recommend it to anyone. . . . I got beaten up lots of times. I was forced to have sex and I was ripped off. . . . I was abused loads of times.<sup>53</sup>

2. In order to consider prostitution a job, and in order to keep the business of sexual exploitation running smoothly, *we can not know that racism and class prejudice, like sexism, are intrinsic to prostitution.*

Women who are marginalized because of a lack of education, because of

*Victims*, 83 ACTA PSYCHIATRICA SCANDINAVICA 27, 27-30 (1991)(citing a seventy percent incidence rate).

47. R. Ramsay et al., *Psychiatric Morbidity in Survivors of Organised State Violence Including Torture*, 162 BRIT. J. PSYCHIATRY 55, 55 (1993) (citing a fifty-one percent incidence rate).

48. Farley, *Prostitution in Nine Countries*, *supra* note 15, at 44.

49. Vanwesenbeeck found that ninety percent of women who were prostituted primarily in clubs, brothels, and windows reported "extreme nervousness." VANWESENBEECK, *supra* note 5, at 82.

50. Farley & Seo, *supra* note 29, at 9-12. See also Hyun Sun Kim, *The Violent Characteristics of Prostitution and PTSD of Prostituted Women* (June 2002) (unpublished thesis, Sungkonghoe University, Seoul, Korea) (on file with Sungjean Seo, Seoul, Korea); Letter from Jeong-Ho Chae (Nov. 22, 2005) (regarding preliminary data from a study of Trauma and Psychological Health of Women in Prostitution) (on file with Sungjean Seo, Seoul, Korea).

51. See Parriott, *supra* note 24.

52. Vicky Funari, *Naked, Naughty, Nasty: Peepshow Reflections*, in WHORES AND OTHER FEMINISTS 19, 32 (Jill Nagle ed., 1997). Funari goes on to write, "Last night, lying in bed after work, I touched my belly, my breasts. They felt like Capri's [her peep show name] and they refused to switch back. When [my partner] kissed me I inadvertently shrunk from his touch." *Id.*

53. BARBARA GIBSON, *MALE ORDER: LIFE STORIES FROM BOYS WHO SELL SEX* 86 (1995) (quoting a prostituted boy). See also GARY INDIANA, *RENT BOY* (1994); ROBERTA PERKINS & GARRY BENNETT, *BEING A PROSTITUTE* (1985); Christopher N. Kendall & Rus Ervin Funk, *Gay Male Pornography's 'Actors': When 'Fantasy' Isn't*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 11, at 93.

race and ethnic discrimination, poverty, previous physical and emotional harm and abandonment *are* the people purchased in prostitution. Prostitution is “chosen” as a job by those who have the fewest real choices available to them.<sup>54</sup> Women in legal Dutch prostitution describe it as “volunteer slavery.”<sup>55</sup>

Until conditions of sex and race equality exist, laws must protect people from exploitation that might appear to be voluntary or consenting.<sup>56</sup> The critical question with respect to sex, race, and class-based discrimination in prostitution is not “did she consent?” but “has she been offered the real choice to exist *without* prostituting?” In the following three cases, each woman said that she consented to prostitution but in each situation, her living conditions made prostitution necessary for survival. An Indian woman said that prostitution was “better pay for what was expected of her in her last job, anyway,” women in most jobs in West Bengal, India, were expected to tolerate bosses’ sexual exploitation in order to keep their jobs.<sup>57</sup> A woman in Zambia, which had a ninety percent unemployment rate at the time, stated that she volunteered to prostitute in order to feed her family.<sup>58</sup> A Turkish woman was divorced, and had no means of support because she was discouraged from working outside the home. She applied to work in a state-run brothel where police guarded the entrance.<sup>59</sup>

Sexist and racist economic policies in the United States such as a lack of educational opportunity for poor families and a lack of sustainable income from many jobs contribute to women’s and girls’ entry into prostitution. The economic and legal vulnerability of undocumented immigrant women in the United States is exploited in prostitution/pornography. For example, the 8<sup>th</sup> Street Latinas website advertises, “See hot, young & brown Latinas that will do absolutely anything to get their citizenship!”<sup>60</sup>

The intersection of racism, sexism and class is apparent in sex tourism. The prostitution tourist denies the racist exploitation of women in someone else’s culture. Promoting this denial, travel agencies assure male tourists that Thai culture is ‘overtly sexual’ and that Thai people are child-like sensual people who never grow up.<sup>61</sup> The prostitution tourist denies sexual exploitation by rationalizing that he is helping women escape poverty: “These girls gotta eat, don’t they? I’m putting bread on their plate. I’m making a contribution.

54. See Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993).

55. VANWESENBEECK, *supra* note 5, at 149.

56. Telephone Interview with Jessica Neuwirth, Equality Now, in New York, N.Y. (Apr. 24, 2006).

57. Molly Chatopadhyay et al., *Biosocial Factors Influencing Women to Become Prostitutes in India*, 41 SOCIAL BIOLOGY 252 (1994).

58. Interview with anonymous prostituted woman in Lusaka, Zambia (Feb. 17, 1996).

59. Interview with anonymous prostituted woman in Istanbul, Turkey (June 6, 1999).

60. 8th Street Latinas, <http://www.8thstreetlatinatas.com/main.htm?id=faxxaff> (last visited Apr. 25, 2006).

61. See generally BISHOP & ROBINSON, *supra* note 15, at 149.



They'd starve to death unless they whored."<sup>62</sup> However, the Thai perspective of this situation is diametrically opposed: "Thailand is like a stage, where men from around the world come to perform their role of male supremacy over Thai women, and their white supremacy over Thai people."<sup>63</sup>

Pornography, prostitution, and trafficking are rooted in sexism, racism and class prejudice, all of which are sexualized. Women in prostitution are purchased for their appearance, including skin color and characteristics based on ethnic stereotyping. Racist stereotypes in prostitution are driven by johns' demand for "something different." Forced by pimps to accommodate stereotypes of the submissive exotic with nowhere to run, one Korean-American survivor faked poor English even though she had grown up in the United States.<sup>64</sup> The World Sex Guide recently linked to a website titled "Bangkok street whores," with a john's contemptuous description of Thai women in poverty as "dumb and desperate."<sup>65</sup>

Although pornography of Grace Quek being serially raped by 251 men was billed as liberation from a stereotype of Asian women as sexually passive; in fact, the pornography of Quek—who referred to herself as a "fortune cookie"<sup>66</sup>—was a familiar racist and sexist portrayal of slave-like, sexually subordinate Asian women.<sup>67</sup> Quek seemed unclear about the film's racism when she was asked by an interviewer if she felt insulted or objectified. With a postmodern perspective that locates racism in the mind but not in the world, Quek responded, "No, I don't think so. . . . *Without any stereotypes, everything would collapse into nothingness.* That's why I have no problems with people who in friendly banter, out of humor, go 'Chink, nigger, faggot,' whatever."<sup>68</sup>

62. *Id.* at 168–69 (quoting a sex tourist in Thailand).

63. JEREMY SEABROOK, TRAVELS IN THE SKIN TRADE: TOURISM AND THE SEX INDUSTRY 89 (1996) (quoting Siriporn Skrobanek).

64. See Melissa Farley, Unequal, available at [http://www.prostitutionresearch.com/how\\_prostitution\\_works/000111.html](http://www.prostitutionresearch.com/how_prostitution_works/000111.html) (last visited Apr. 20, 2006).

65. World Sex Guide, Prostitution in United States, <http://www.worldsexguide.org/united-states.html> (last visited, Apr. 20, 2006). The site has changing advertising banners. On October 28, 2005, the World Sex Guide advertised "Bangkok street whores: Click to see these Asian whores get nailed by a big white dick!" with a link to Bangkok Street Whores, <http://www.bangkokstreetwhores.com/1/bangkokwhore1.html> (last visited Apr. 25, 2006). The web location provided one john's voyeuristic and homoerotic description of a Thai woman who "tried to talk her way out of getting fucked but as soon as he shut her up by stuffing his cock in her mouth, the peace talks were over. Then he split her wide open! We all know that [another john] brings the pain, but damn she's bleeding!" See also Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1408–1409 nn.48–49 (1993).

66. Kimberly Chun, *Sex: The Annabel Chong Story*, ASIANWEEK, May 4, 2000, [http://www.asianweek.com/2000\\_05\\_04/ae\\_annabelchong.html](http://www.asianweek.com/2000_05_04/ae_annabelchong.html) (quoting Grace Quek).

67. See Pamela Kaskinen, *Pornstar or a Feminist?*, YLIOPPILASLEHTI, Apr. 2000, at 1 ("At its core, the film is yet another attempt to capitalize on the racist, sexist and worn-out fantasy that Asian women are subordinate sex slaves.") (quoting Jill Nelson).

68. D.A. Clark, *The Tao of the Gangbang*, SPECTATOR, July 12, 1996, at 13 (emphasis added). Another perspective on the racism in the filming of Quek's sexual abuse by 251 men was noted by Darrell Y. Hamamoto, *The Joy Fuck Club*, 20 NEW. POL. SCI. 3 (1998), who observed that no Asian men were in the 300-men lineup to "gangbang" Quek. The only Asian American in attendance was a



Compared to their numbers in the United States as a whole, women of color are overrepresented in prostitution. For example, in Minneapolis, a city which is ninety-six percent white European-American, more than half of the women in strip-club prostitution are women of color.<sup>69</sup>

Racially constructed pornography made of prostituted women in other parts of the world influences how women of color are treated at home. For example, Asian-American women reported rapes after men viewed pornography of Asian women.<sup>70</sup>

Families who have been subjected to race and class discrimination in housing may be economically driven to live near gangs or pimps. Strip clubs and pornography outlets are zoned into poor neighborhoods, which also tend to be neighborhoods of immigrants and/or people of color. The sex businesses create a hostile environment in which girls and women are continually harassed by pimps and johns.<sup>71</sup>

Within the gendered institution of prostitution, race and class create a familiar hierarchy with indigenous women at its lowest point. Especially vulnerable to violence from wars or economic devastation, indigenous women are brutally exploited in prostitution—for example Mayan women in Mexico City, Hmong women in Minneapolis, Atayal girls in Taipei, Karen or Shan women in Bangkok, First Nations women in Vancouver.<sup>72</sup> Structural development programs run by the International Monetary Fund control developing economies, profoundly impacting women's lives. Poverty is one consequence of these IMF policies, which may also result in women's migration to cities for the purpose of economic survival, including prostitution.

There is a myth that class privilege protects some women in prostitution. Demystifying this, Giobbe explained what lies beneath the trappings of class in prostitution:

My experience in prostitution gives the lie to . . . common beliefs about the hierarchy of prostitution, the streets being the worst-case scenario and . . . [escort] service being the best. . . all I can say is,

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man whose job was to wipe ejaculate off Quek between johns. *Id.*

69. Telephone interview with Andrea Dworkin (June 17, 1997).

70. See CATHARINE A. MACKINNON & ANDREA DWORKIN, IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (1997) [hereinafter MACKINNON & DWORKIN, IN HARM'S WAY].

71. Vednita Nelson, *Prostitution: Where Racism and Sexism Intersect*, 1 MICH. J. GENDER & L. 81 (1993).

72. Because of their economic vulnerability and their lack of alternatives, prostitution more severely harms indigenous women. Melissa Farley, Preliminary Report on Prostitution in New Zealand (May 14, 2003) (unpublished manuscript, on file with author) (comparing Maori/Pacific Islander New Zealanders to European-origin New Zealanders in prostitution, with the former more likely to have been homeless and to have entered prostitution at a younger age, and quoting Mama Tere, an Auckland community activist who described New Zealand prostitution as an "apartheid system"); see also Libby W. Plumridge & Gillian Abel, *A "Segmented" Sex Industry in New Zealand*, 15 AUSTL. & N.Z. J. PUB. HEALTH 78, 78 (2001) (describing the differential impact prostitution has on Maori women in New Zealand).

whether you turn tricks in a car by the Holland tunnel or in the Plaza Hotel, you still have to take off your clothes, get on your knees or lie on your back, and let this stranger use you in any way he pleases.<sup>73</sup>

It is an error to assume that the privilege of so-called high-class call-girls protects them from the exploitation and violence that exists in all prostitution. In Chicago, for example, the same frequency of rape is reported by women in both escort and street prostitution.<sup>74</sup> Although some studies report greater violence in outdoor prostitution, the difference is trivial when contrasted with most peoples' assumptions of what constitutes reasonable physical and emotional risk.<sup>75</sup> For instance, while women prostituting on the street in Glasgow were almost twice as likely to experience violence than women prostituting indoors, forty-eight percent of the women prostituting *indoors* were subject to frequent and severe violence.<sup>76</sup> Among women prostituting in South Africa, while there was significantly more physical violence in street as compared to brothel prostitution, there was no difference in the women's emotional distress resulting from either street or brothel prostitution.<sup>77</sup>

It is also an error to assume that those in prostitution remain in one location. The location of prostitution is determined by wherever the greatest demand for it exists, by police surveillance and by arrests that deter prostitution. Women are moved to wherever pimps and traffickers can make the most money, for example near military bases,<sup>78</sup> near political or business conventions,<sup>79</sup> or to locations where sporting events take place.<sup>80</sup>

73. Giobbe, *The Vox Fights*, *supra* note 14, at 32.

74. JODY RAPHAEL & DEBORAH L. SHAPIRO, SISTERS SPEAK OUT: THE LIVES AND NEEDS OF PROSTITUTED WOMEN IN CHICAGO 5 (2002), available at [www.impactresearch.org/documents/sisterspeakout.pdf](http://www.impactresearch.org/documents/sisterspeakout.pdf).

75. Women in indoor prostitution (such as strip clubs, massage brothels and pomography) may have less control over the conditions of their lives and probably face greater risks of exploitation, enslavement, and physical harm than women prostituting on the street. See NORTHWEST RESOURCE ASSOCIATES, *supra* note 18.

76. Stephanie Church et al., *Violence by Clients Toward Female Prostitutes in Different Work Settings*, 322 BRIT. MED. J. 524, 524-25 (2001) (noting that women prostituting in the street more frequently report being slapped, punched, or kicked—while those indoors more frequently report attempted rape).

77. Melissa Farley et al., *Prostitution in Five Countries*, 8 FEMINISM & PSYCHOL. 405, 415 (1998). See also Ross, *supra* note 41, at 328-30 (noting that women who prostituted in strip clubs suffered significantly higher rates of dissociative and other psychiatric symptoms than women in street prostitution).

78. See Aida F. Santos, *Gathering the Dust: The Bases Issue in the Philippines*, 32, 40, in LET THE GOOD TIMES ROLL: PROSTITUTION AND THE US MILITARY IN ASIA (Sandra Sturdevant & Brenda Stolzfus eds., 1992). During World War II, for example, the Japanese Army seized as many as 200,000 Asian women and girls using deception and violence, pimping them into military brothels. Most of these 'comfort women' were Korean. See C. Sarah Soh, *Japan's Responsibility Toward Comfort Women Survivors* (Japan Policy Research Institute, Working Paper No. 77, 2001), available at <http://www.icasinc.org/lectures/soh3.html>; Deborah Zabarenko, *Ex-Slaves Sue Japan for Army Rapes, Torture—Former Comfort Women Testify in US*, TORONTO STAR, Sept. 21, 2000, at 1 (reporting on a class-action lawsuit filed by fifteen former comfort women in U.S. federal court); NORA OKJA KELLER, *COMFORT WOMAN* (1997) (a fictionalized account of one woman's life).

79. See Lisa Kramer, *Emotional Experiences of Performing Prostitution*, in PROSTITUTION,

3. In order to consider prostitution a job, and in order to keep the business of sexual exploitation running smoothly, *we can not know that prostitution, pornography and trafficking meet or exceed legal definitions of torture.*

Torture is:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as punishing him... or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>81</sup>

Specific acts commonly perpetrated against women in prostitution and pornography are the same as the acts defining what torture is: verbal sexual harassment, forced nudity, rape, sexual mocking, physical sexual harassment such as groping, and not permitting basic hygiene.<sup>82</sup> The psychological consequences of these acts are the same whether it is named state-sponsored torture or prostitution.<sup>83</sup>

Torture does not have to be perpetrated by state officials, and today there is an understanding that in some regions torture can and does occur at the hands of private individuals. Amnesty International "holds states accountable for all acts of torture of women, whatever the context in which they are committed

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TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 11, at 187, 191 (describing locations where 119 U.S. women prostituted). For a detailed refutation of the myth that indoor prostitution is safe for women and a summary of studies comparing different locations where prostitution occurs, see Farley, *supra* note 30, at 1099. See also Melissa Farley, *Prostitution Harms Women Even if Indoors: Reply to Weitzer*, 11 VIOLENCE AGAINST WOMEN 950, 955-960 (July 2005).

80. Germany's World Cup Games in 2006 led to predictions that 40,000 women would be trafficked from other countries in Europe to service sports fans in a country with legal prostitution. See Coalition Against Trafficking in Women, *Buying Sex is Not a Sport: No to Germany's Prostitution of Women in World Cup Games, 2006*, available at <http://catwpetition.ouvaton.org/php/index.php>.

81. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, Dec. 10, 1984.

82. Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Aug. 9, 1999, available at <http://www.unhcr.ch/pdf/81stprot.pdf> ("Sexual torture begins with forced nudity, which in many countries is a constant factor in torture situations. One is never so vulnerable as when one is naked and helpless. Nudity enhances the psychological terror of every aspect of torture, as there is always the background of potential abuse and rape or sodomy. Furthermore, verbal sexual threats, abuse and mocking are also part of sexual torture, as they enhance the humiliation and degrading aspects of it, all part and parcel of the procedure. Groping women is traumatic in all cases, and considered torture. There are some differences between sexual torture of men and sexual torture of women, but several issues apply to both.") [hereinafter Istanbul Protocol]. See also R.F. Mollica & Y. Caspi-Yavin, *Overview: The Assessment and Diagnosis of Torture Events and Symptoms*, in TORTURE AND ITS CONSEQUENCES 253 (Metin Basoglu ed., 1992).

83. See Finn Somnier et al., *Psycho-social Consequences of Torture*, in TORTURE AND ITS CONSEQUENCES, *supra* note 82, at 56.



and whoever is the perpetrator.”<sup>84</sup>

The existence of state-sponsored torture is decried by social critics on the Left, yet the identical treatment of women in prostitution is ignored by those same analysts. Many view torture by the United States of prisoners at Abu Ghraib with shock and horror, yet at the same time consider the identical acts perpetrated (and photographed) against prostituted women to be sexual entertainment.<sup>85</sup> Condemning the Bush administration’s tolerance for torture in the war on terror, one journalist noted the “gleeful sadism” of guards at Abu Ghraib.<sup>86</sup> Yet he and other political pundits maintain silence regarding the same gleeful sadism of men toward prostituted women at bachelor parties or strip clubs. Journalists and scholars fail to note the parallel between their descriptions of torture’s consequences for Abu Ghraib prisoners, on the one hand, and identical consequences for women in prostitution and pornography, on the other.

Despite its obvious similarity to state-sponsored torture, there is a great silence regarding the torture of women in prostitution during the making of pornography. Yet torture is commonplace in pornography.<sup>87</sup> A woman in Vancouver prostitution described a john’s purchase of her degradation, physical and sexual assault, and his videotape of that torture.<sup>88</sup>

Online pornography today welds men’s ejaculation to women’s degradation. A popular genre is *bukkake*, in which a group of men ejaculate on young women’s faces. The woman is usually extremely upset or crying, an emotional state that seems to sexually arouse both the men who are sexually abusing the woman, and the men who are purchasing those images of torture.<sup>89</sup> This spectacle of women’s torture and humiliation serves as a bonding ritual for the perpetrators just as the “carnavalesque rites” of pornographic torture at Abu Ghraib prison created bonds among the US soldiers who committed those cruelties.<sup>90</sup>

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84. AMNESTY INTERNATIONAL, *BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN* 4-5 (2001).

85. See ANDREA DWORKIN, *LETTERS FROM A WAR ZONE* 199 (1988).

86. See Richard Kim, *Pop Torture*, *NATION*, Dec. 26, 2005, at 37.

87. See, e.g., Gail Dines, *The White Man’s Burden: Gonzo-Pornography and the Construction of Black Masculinity*, 18 *YALE J.L. & FEMINISM* 283 (2006). Dines describes ass-to-mouth (ATM) pomography as a frequently-googled genre on the website of one of the most popular pornography actors, Max Hardcore. Dines points out that in ATM pomography, “the male performer anally penetrates a woman and then sticks his penis into her mouth, often joking about her having to eat shit. In this pomography the code of debasement is most stark. There is no apparent increase in male sexual pleasure by moving directly from the anus to the mouth outside of the humiliation that the woman must endure.” *Id.* at 286.

88. Jane Armstrong, *Torture Tapes Stun B.C. Investigators*, *GLOBE AND MAIL*, Jan. 19, 2004, at A1.

89. PAMELA PAUL, *PORNIFIED* 61 (2005); see also Robert Jensen, *You Are What You Eat: Robert Jensen Discusses the Pervasive Porn Industry and What It Says About You and Your Desires*, *CLAMOR*, Sept.–Oct. 2002, at 54 (describing *bukkake* and analyzing its effects on a male observer).

90. Joanna Bourke, *Torture as Pornography*, *LONDON GUARDIAN*, May 7, 2004, available at



Bourke described photographs of United States and German-sponsored torture as pornography:

[T]orture aims to undermine the way the victim relates to his or her own self, and thus threatens to dissolve the mainsprings of an individual's personality. . . . The sexual nature of these acts shows that the torturers realise the centrality of sexuality for their victims' identity. The perpetrators in these photographs aim to destroy their victim's sense of self by inflicting and recording extreme sexual humiliation.<sup>91</sup>

That description of torture applies equally to the prostitution and pornography that are everywhere on newsstands and on the world wide web. While she accurately describes what happens to people who are tortured by military regimes, Bourke fails to apply her truly insightful description of sexual torture to the women in video, internet, and magazine pornography who are similarly sexually humiliated. Only a handful of feminist analysts, beginning with Andrea Dworkin and Catharine MacKinnon,<sup>92</sup> analyze the horrific violence that women are subjected to in pornography that documents prostituted women's abuse: "Welcome to the Rape Camp,"<sup>93</sup> "Beaver Hunters,"<sup>94</sup> "Gag Factor,"<sup>95</sup> "A Cum Sucking Whore Named Kimberly,"<sup>96</sup> "65-Guy Cream Pie,"<sup>97</sup> "Black Poles in White Holes,"<sup>98</sup> and "Teen Fuck Holes."<sup>99</sup>

The sexual humiliation of having one's face smeared with semen is commonplace during rapes of children and adults, and in pornography, prostitution, and torture. But there are a multitude of techniques of humiliation, domination, and control that are less specifically sexual, and that are almost always used in conjunction with sexual humiliation.

Pimps and traffickers employ the three-pronged strategy of political torturers—debilitation, dread, and dependency. Like the state's torture experts, pimps and traffickers threaten to kill children and family members as a means of establishing control. Pimps' use of torture ensures that the prostituted woman will comply with any demands of johns or pimps.<sup>100</sup> Under conditions

<http://www.guardian.co.uk/women/story/0,3604,1211261,00.html>.

91. *Id.*

92. See DWORKIN, *LIFE AND DEATH*, *supra* note 16; DWORKIN, *MEN POSSESSING WOMEN*, *supra* note 15; ANDREA DWORKIN, *SCAPEGOAT: THE JEWS, ISRAEL, AND WOMEN'S LIBERATION* (2000); MACKINNON & DWORKIN, *supra* note 70; MACKINNON, *supra* note 3, at 1506–651; MacKinnon, *Prostitution and Civil Rights*, *supra* note 54.

93. D.M. Hughes, *Welcome to the Rape Camp: Sexual Exploitation and the Internet in Cambodia*, 6 J. SEXUAL AGGRESSION 29 (2000).

94. DWORKIN, *MEN POSSESSING WOMEN*, *supra* note 15, at 25.

95. Robert Jensen, *Cruel to Be Hard: Men and Pornography*, SEXUAL ASSAULT REPORT, Jan.–Feb. 2004, at 33, available at <http://uts.cc.utexas.edu/~rjensen/freelance/pornography&cruelty.htm>.

96. *Id.*

97. E-mail from Robert Jensen (Mar. 12, 2006).

98. Dines, *supra* note 87, at 285.

99. Jensen, *supra* note 95.

100. See, e.g., SCHWARTZ, *supra* note 38, at 320 (discussing torture and prostitution of children

of prostitution, autonomous self-regulation of any sort is considered insubordination and is actively suppressed by pimps.<sup>101</sup> Systematic methods of brainwashing, indoctrination and physical assaults (called "seasoning" by pimps), are used against women in prostitution. These techniques are aimed at eliminating any corner of mental space for her to exist in.<sup>102</sup>

One girl stated that when her pimp commanded "Down!", she was required to lay down on the floor without moving until he gave her permission to get up.<sup>103</sup> Each act of physical and psychological torture that he committed, each its own unique expression of dominance, was part of an interlocking system of control, degradation, and domination.<sup>104</sup>

The Stockholm syndrome is a psychological strategy for survival in captivity. In escapable situations, humans form bonds with their captors. The traumatic bonds established between women in prostitution and their pimp/captors is identical to those between battered women and their batterers.<sup>105</sup> In the absence of other emotional attachments, women appear to choose their relationships with pimps and may be psychologically at home with men who exercise coercive control over them.

In order for a woman to survive prostitution on a day-to-day basis, she must deny the extent of harm that pimps and johns are capable of inflicting. Since her survival may depend on her ability to predict others' behavior, she vigilantly attends to the pimp's needs and may ultimately identify with his worldview. This increases her chances for survival, as in the case of Patty Hearst who temporarily identified with her captors' ideology.<sup>106</sup>

The unpredictable and extreme violence in prostitution, like that of torture, is used for economic gain and sadistic pleasure. It also sends the message that the victim is utterly worthless. Experts on state-sponsored torture have explained that the specific goal of sexual torture is to make a captive believe

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with similar techniques and similar emotional consequences).

101. See Judith L. Herman, *Hidden in Plain Sight: Clinical Observations on Prostitution*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 11, at 4.

102. Describing her relationship with a pimp, one woman said that "[prostitution is] like a cult. He brainwashed me." Interview with anonymous prostituted woman, Aug. 6, 1997. Another woman explained that "[y]ou become what they say and do with you. It's internally damaging." Interview with anonymous prostituted woman, June 19, 1998. See also SCHWARTZ, *supra* note 38, at 314-19, 333-37 (confirming similarities between prostitution, trafficking, and political and religious cults such as the commonality in their methods of brainwashing and mind control, in the physiology of traumatic bonding, and in the manipulation of attachment by perpetrators in establishing power over the victim).

103. Interview with anonymous prostituted woman, in San Francisco, Cal. (May 8, 2004).

104. See KATE MILLETT, *THE POLITICS OF CRUELTY* 42 (1994) (discussing political torture with language that also applies to women in prostitution and noting that judicial torments are also methods of dominating victims).

105. DEE L.R. GRAHAM ET AL., *LOVING TO SURVIVE: SEXUAL TERROR, MEN'S VIOLENCE, AND WOMEN'S LIVES* 44 (1994) (describing behaviors which are typical of the Stockholm syndrome, such as extreme difficulty leaving one's captor and a long-term fear of retaliation).

106. PROSTITUTION OF SEXUALITY, *supra* note 3, at 250-75.

that she is a whore or an animal, rather than a human.<sup>107</sup> One person stated that the outcome of state-sponsored torture is that "they make a non-person out of you."<sup>108</sup> Similarly, Giobbe explained:

[T]he word 'prostitute' does not imply a 'deeper identity,' it is the absence of an identity: the theft and subsequent abandonment of self. What remains is essential to the 'job': the mouth, the genitals, anus, breasts . . . and the label.<sup>109</sup>

The psychological consequences of state-sponsored torture and those of prostitution include the same symptoms: depression, anxiety, posttraumatic stress disorder (PTSD), dissociative symptoms, somatic symptoms, suicide attempts, cognitive symptoms resulting from violence-related traumatic brain injury, and the existential despair that persists for years after prostitution or after torture.<sup>110</sup>

4. In order to consider prostitution a job, and in order to keep the business of sexual exploitation running smoothly *we can not know that pornography is action taken against real women, that it is advertising for prostitution, and that pornography is one way to traffic women.*

Pornography has been defined as the presentation of prostitution sex.<sup>111</sup> Pornography is a specific type of prostitution, in which prostitution occurs and, among other things, is documented. The women whose prostitution appears in pornography *are* prostituted women.

The sex industry is driven by pornography. Men learn how to use women by looking at and masturbating to pornography, developing a taste for prostitution. Pornographers are indistinguishable from other pimps.<sup>112</sup> Both exploit women and girls' economic and psychological vulnerabilities and

107. Inger Agger, *Sexual Torture of Political Prisoners*, 2 J. TRAUMATIC STRESS 305 (1989).

108. Mohammed Al-Sader, *Torture Survivors: A New Group of Patients*, Speech at World Congress on Violence and Human Coexistence (Aug. 20, 1997) (notes on file with author). See also ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 3 (1982) ("Whipping was not only a method of punishment. It was a conscious device to impress upon the slaves that they were slaves.") (quoting George P. Rawick).

109. Giobbe, *The Vox Fights*, *supra* note 14, at 35 (emphasis added).

110. See Stuart Turner, *Emotional Reactions to Torture and Organized State Violence*, 15 PTSD RESEARCH QUARTERLY 1 (2004). See generally AMNESTY INTERNATIONAL, *BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN* (2001) (addressing debt-bondage prostitution but not other types of prostitution that are assumed to be consensual but in which women are psychologically or socially coerced by factors such as poverty, childhood abuse, rape, war, or abandonment); Istanbul Protocol, *supra* note 82, at 66-70; Hans Petter Hougen, *Physical and Psychological Sequelae to Torture*, 39 FORENSIC SCI. INT'L 5 (1988); Derrick Silove, *The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma*, 187 J. NERVOUS & MENTAL DISEASE 200 (1999).

111. PROSTITUTION OF SEXUALITY, *supra* note 3, at 55.

112. See AKIYUKI NOZAKA, *THE PORNOGRAPHERS* (Michael Gallagher trans., 1968).

coerce them to get into and stay in the industry.<sup>113</sup> Both take pictures to advertise their “products,” suggest specific abuses for johns to perpetrate against women, and minimize the resulting harms.<sup>114</sup> Pornography is a documentary of specific women’s abuses in prostitution, and its consumers obtain pornography as a “document of humiliation.”<sup>115</sup> Yet in order to conceal the harms that are documented in the picture, the pornographer disconnects the picture from the person. The pornographer and his allies then name what is happening to her in the picture “speech” or “adult entertainment” rather than “torture” or “sexual abuse.”

Women have explained that they study pornography in order to learn how to perform prostitution: “I watch pornos and act like that in the room [with a john].”<sup>116</sup> Men show pornography to women to illustrate what they want them to do. Strip clubs show video pornography to promote lap dance and VIP-room prostitution. One pornographer advertised that he was in the business of “degrading whores for your viewing pleasure,” clearly eliminating any boundary that might be imagined to exist between pornography and prostitution.<sup>117</sup>

The filming of 251 men’s prostitution of Grace Quek (called Annabel Chong) was sold as “The World’s Biggest Gang Bang.”<sup>118</sup> After being edited down to four hours, the film became hardcore pornography.<sup>119</sup> The filming of johns assaulting Quek was stopped after ten hours because she was bleeding internally. For Quek, the film was not an idea, it was not a narrative, it was not a representation. Real johns perpetrated real sexual assaults on her resulting in real physical and psychological injuries.

Both survivors of prostitution and johns explain that pornography is prostitution with a camera. One john explained, “Yes, the woman in

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113. Pornography has been used as recruitment into childhood sexual assault as well as prostitution. See MACKINNON & DWORKIN, IN HARM’S WAY, *supra* note 70. Pornography that normalizes prostitution is used by pimps to teach girls what acts to perform in prostitution. Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women*, 10 SEX ROLES 857 (1984). Women in prostitution have described pornography’s role in submitting to the enactment of specific scenes for pimps or customers. *Id.* See also Melissa Farley & Howard Barkan, *Prostitution, Violence and Posttraumatic Stress Disorder*, 27 WOMEN & HEALTH 37 (1998).

114. See Donna Hughes, *Prostitution Online*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 11, at 115.

115. D.A. Clarke, *Prostitution for Everyone: Feminism, Globalization, and the ‘Sex’ Industry*, in NOT FOR SALE: FEMINISTS RESISTING PROSTITUTION AND PORNOGRAPHY 199 (Rebecca Whisnant & Christine Stark eds., 2004).

116. Teela Sanders, “It’s Just Acting”: Sex Workers’ Strategies for Capitalizing on Sexuality, 12 GENDER, WORK & ORG. 319, 330 (2005).

117. Robert Jensen, *The Paradox of Pornography*, OP ED NEWS, Feb. 1, 2006, at [http://www.opednews.com/articles/opedne\\_robert\\_j\\_060201\\_the\\_paradox\\_of\\_porno.htm](http://www.opednews.com/articles/opedne_robert_j_060201_the_paradox_of_porno.htm) (quoting Jeff Steward, owner of JM Productions, <http://www.jerkoffzone.com>).

118. Clark, *supra* note 68.

119. Robin Askew, *Life Thru a Lens*, SPIKE MAG., <http://www.spikemagazine.com/1000annabelchong.php> (last visited March 16, 2006) (interviewing the star of SEX: THE ANNABEL CHONG STORY).



pornography is a prostitute. They're prostituting before the cameras."<sup>120</sup> A number of courts have understood that making pornography is an act of prostitution.<sup>121</sup> Pimps make more money from johns when they advertise women in prostitution as "adult film stars" who are available as "escorts."<sup>122</sup> Benefiting from globalization, pornographers use women from Eastern Europe, where "they cost less and do more," explained one German producer.<sup>123</sup>

Prostitution is advertised online, where it is indistinguishable from pornography. The Internet has expanded the reach of traffickers and it has intensified the humiliation and violence of prostitution. Pornography is one specific means of trafficking women for the purpose of selling women into prostitution.<sup>124</sup> On pornography/prostitution websites, women are for rent and sale. They are moved across town, across the country, and from one country to another.

Craigslist is an Internet site where people can post at no cost what they want to buy and what they want to sell. A cell phone and an ad on Craigslist sets a teenager up in the business of being sexually exploited in exchange for housing, drugs, or cash. In March 2005, Craigslist averaged 25,000 new ads every 10 days for "erotic services" that are probably prostitution.

Internet prostitution and pornography offer the trick anonymity. There are increasing numbers of online trick communities supporting each others' predatory behaviors and exchanging information regarding where and how women can be bought.<sup>125</sup> As one young woman explained, "They can do more extreme things and keep a double life [on the Internet]. They can have a life with the wife and kids and have a fetish, porn thing where they are beating chicks on the side."<sup>126</sup> She did not say that the john was beating *images* of chicks. She said he was *beating chicks*. How is that possible in virtual reality, when he was at a computer and in an entirely different physical location than the women he was beating?

The web technology of live video chat permits johns to obtain prostitution online by interacting via telephone or keyboard, or by requesting specific sex acts that are then performed to his specifications. One company hired women

120. Melissa Farley, *Renting an Organ for Ten Minutes: What Tricks Tell us about Prostitution, Pornography, and Trafficking*, in *PORNOGRAPHY: DRIVING THE DEMAND FOR INTERNATIONAL SEX TRAFFICKING* (David Guinn ed., forthcoming 2006).

121. MACKINNON, *supra* note 3, at 1524.

122. Thomas Zambito, *Two Plead Guilty in \$13 Million Prosty Ring*, N.Y. DAILY NEWS, Jan. 6, 2006, at <http://www.nydailynews.com/front/story/380758p-323279c.html>.

123. *The Sex Industry: Giving the Customer What He Wants*, ECONOMIST, Feb. 14, 1998, at 21 (reporting that excruciating or humiliating acts purchased from women in economically devastated parts of Europe cost far less than pornographers paid to film the same acts a decade earlier).

124. See Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INTL. L. 993 (2005).

125. See Sven Axel Mansson, *Men's Practices in Prostitution and Their Implications for Social Work*, in *SOCIAL WORK IN CUBA AND SWEDEN* 267 (Sven Axel Mansson & Clotilde Proveyer eds., 2004).

126. Interview with anonymous, in San Francisco, Cal. (March 24, 2005).

to prostitute in warehouse cubicles where they were equipped with microphones to communicate with johns. The johns requested assurances from the women that the prostitution was performed in real time.<sup>127</sup>

Women in prostitution whose pimps or tricks made pornography of them displayed significantly more severe symptoms of post traumatic stress disorder than did women in prostitution who did not.<sup>128</sup> Even after women escaped prostitution, they continued to be traumatized by knowing that customers look at pornography made of them during their time in prostitution.<sup>129</sup>

5. In order to consider prostitution a job, and in order to keep the business of sexual exploitation running smoothly, *we can never talk about johns or tricks*

*A trick's perspective of prostitution:*

I was like a kid in the candy store. I mean, it was nothing for me to knock off four broads in an afternoon... I thought, *This is what men do.*<sup>130</sup>

*A prostituted woman's perspective:*

Every day I was witness to the worst of men. Their carelessness and grand entitlement. The way they can so profoundly disconnect from what it is they're having sex with... There was a system in place that was older and stronger than I could begin to imagine. Who was I? I was just a girl. What was I going to do about it. If I had any power I would make it so that nobody was ever bought or sold or rented.<sup>131</sup>

Even where prostitution is legal, a majority of tricks' behaviors are carefully concealed from public view. Tricks are most often average citizens rather than abnormally sadistic psychopaths. They are all ages and from all social classes. Most are married or partnered.<sup>132</sup>

When a john calls a phone number that he obtains online or via a free magazine for obtaining a prostitute, it is called escort prostitution. Indoor prostitution such as escort is advocated wherever there is a political movement promoting the decriminalization or legalization of prostitution; it is a way to protect the trick's anonymity. In indoor prostitution, the trick is much less likely to be arrested even where prostitution is illegal.<sup>133</sup>

Yet the social invisibility of indoor prostitution may actually increase its

127. Hughes, *supra* note 114, at 119.

128. Farley, *supra* note 120.

129. MACKINNON & DWORKIN, *IN HARM'S WAY*, *supra* note 70, at 351.

130. James Kaplan, *The Laughing Game*, *NEW YORKER*, Feb. 7, 2000, 52, 61-62 (emphasis added).

131. MICHELLE TEA & LAURENN MCCUBBIN, *RENT GIRL* 29 (2004).

132. Melissa Farley, *What Do We Know About Johns?*, *DEMAND DYNAMICS: THE FORCES OF DEMAND IN GLOBAL SEX TRAFFICKING* 27 (Morrison Torrey ed., 2004).

133. Jim Adams & Jason Riley, *After Spas' Boom, Enforcement Affects Illicit Sex Business*, *LOUISVILLE COURIER-JOURNAL*, July 11, 2004, at 1.

danger for women. Internationally trafficked women and children are almost always indoors. Sometimes neighbors may not even know that prostitution is occurring next door. Although the need for services remains the same regardless of the location where prostitution takes place, the invisibility of indoor prostitution makes it less likely that services to help women escape will be funded or that women will be able to access these services.

Paying for a woman in prostitution provides men with the power to turn women into what Davidson termed "the living embodiment of a masturbation fantasy."<sup>134</sup> As one man said about prostituted women, "I use them like I might use any other amenity, a restaurant, or a public convenience."<sup>135</sup> Interviews with men who buy women in prostitution have confirmed what survivors of prostitution have told us about prostitution and pornography. While feminists have spoken about prostitution as the buying and selling of women's bodies, one trick more specifically explained what he did in prostitution as "renting an organ for ten minutes."<sup>136</sup> In this definition, he removed her humanity. Women in prostitution became "something for him to empty himself into. . . a kind of human toilet."<sup>137</sup> Her self and those qualities that define her as an individual are removed in prostitution and she acts the part of the thing he wants her to be.<sup>138</sup> This understanding of the realities of prostitution on the part of both the john and the woman he buys are at odds with the notion of prostitution as skilled labor as some prostitution advocacy groups have characterized it.<sup>139</sup>

Many tricks have a nuanced awareness of exactly what being prostituted is like for the women. One trick explained that "[Prostitution] takes away a part of themselves that they can't get back. They can't look at themselves in the mirror." Others were aware of the extreme violence of pimps toward prostituted women and feared for their own safety.<sup>140</sup>

Mansson observed that the Swedish tricks he interviewed had greater problems than other men in maintaining relationships with women.<sup>141</sup> One man explained, "If you can't communicate with your partner, you can go to a

134. JULIA O'CONNELL DAVIDSON, PROSTITUTION, POWER, AND FREEDOM 209 (1998).

135. SEABROOK, *supra* note 63, at 193.

136. Interviews on file with the author and forthcoming in Farley, *supra* note 123.

137. HØIGÅRD & FINSTED, *supra* note 36, at 51.

138. DWORKIN, LIFE AND DEATH, *supra* note 16, at 139.

139. Valerie Jeness, *From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem*, 37 SOCIAL PROBLEMS 403 (1990) (referencing Margo St. James and Priscilla Alexander).

140. Farley, *supra* note 120 (describing the pimping relationship with quotations such as "He controls her by hitting her. And by playing mind games with her," "The pimp is the owner and the prostitute is the slave to make money for the pimp," and "Death is the end result of her relationship with a pimp").

141. Sven-Axel Mansson, *Men's Practices in Prostitution: The Case of Sweden*, in A MAN'S WORLD? CHANGING MEN'S PRACTICES IN A GLOBALIZED WORLD 135, 138 (Bob Pease & Keith Pringle eds., 2001).

prostitute.”<sup>142</sup> Many of the men expressed unveiled hostility toward women. “I think about getting even [during prostitution]—it’s like a kid’s game, you’re scoring points,” one man told us. Another said, “She gives up the right to say no.”<sup>143</sup> Another man told us that he clarifies the nature of his relationship to the women he buys: “I paid for this. You have no rights. You’re with me now.”<sup>144</sup> Tricks confirmed that the relationship in prostitution is one of dominance and subordination: “Prostitution says that women have less value than men.” Another explained,

Guys get off on controlling women, they use physical power to control women, really. If you look at it, it’s paid rape. You’re making them subservient during that time, so you’re the dominant person. She has to do what you want.<sup>145</sup>

Men’s ambivalence and shame about buying women in prostitution, and their desire not to be publicly known as tricks, may provide an opportunity for intervention and behavior change.

6. In order to normalize prostitution in everybody’s culture, *postmodern theory helps to keep the real harms of prostitution, pornography, and trafficking invisible.*

Some words hide the truth. Just as torture can be named enhanced interrogation, and logging of old-growth forests is named the Healthy Forest Initiative, words that lie about prostitution leave people confused about the nature of prostitution and trafficking. The following words contribute to the myth of the prostitution’s inevitability and to the belief that johns’ sexual predation is a logical consequence of “boys being boys.” Men who buy women in prostitution are called **interested parties** or **third parties**, rather than johns or tricks, which is what women call buyers. Pimps are described as **boyfriends** or **managers**.

There are other words that make the harm of prostitution invisible. Many terms in current usage camouflage the psychological, economic, and social coercion against women in prostitution: **voluntary prostitution** which implies that she consented when most frequently she had no other survival options; **forced trafficking** which implies that some women volunteer to be trafficked into prostitution; **sex work** which defines prostitution as a job rather than an act of violence against women. The term **migrant sex worker** blends prostitution and trafficking and implies that both are simply global labor practices. Other

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142. Farley, *supra* note 120.

143. *Id.*

144. *Id.*

145. *Id.*



words that make trafficked women invisible are **transnational migrant work** or **flexible labor**.

The expressions **socially disadvantaged women** (ostensibly used to avoid stigmatizing prostitutes) and **irregular migration** remove any hint of the sexual violence that is intrinsic to prostitution. The Chinese words **beautiful merchandise** sugar-coat the objectification of women in prostitution. A woman in Brazilian prostitution was described as an **erotic entrepreneur**.<sup>146</sup>

Sexual exploitation in strip club prostitution has been reframed as **sexual expression** and **freedom to express one's sensuality by dancing**. Brothels are referred to as **short-time hotels**, **massage parlors**, **saunas**, **health clubs**, **adult clubs**, or **sexual-encounter establishments**. Older men who buy teenagers for sex in Seoul call prostitution **compensated dating**. In Tokyo prostitution is described as **assisted intercourse**. In the United States, the expression 'ho promulgates the bigoted notion that all women, especially African American women, are natural-born whores.

Women in prostitution are described as **escorts**, **hostesses**, **strippers**, **dancers**, and **sex workers**. Sometimes these words are used by women in prostitution in order to retain some dignity. The term **sex worker** suggests that prostitution is a reasonable job for poor women, rather than a violation of their human rights. The words **sex worker** imply "order, hierarchy, and accountability. . . It says board of directors. . . and marketplace niche."<sup>147</sup> In that one word—work—we lose ground in the political struggle to understand prostitution as violence against women.<sup>148</sup>

Postmodern philosophy has contributed to the invisibility of the harms of prostitution/trafficking by mystifying prostitution/trafficking via a "politics of abdication and disengagement."<sup>149</sup> To postmodern Third Wavers, facts are unreliable. Incest and rape become "epistemological quandaries" to postmodernists.<sup>150</sup> The oppressive social forces that grind women down in prostitution—race and sex—are considered "unknowable."<sup>151</sup> Racism, sexism, and lethal poverty become representations of reality, rather than reality itself.

The assumption that material reality is mentally constructed and that

146. Larry Roter, *She Who Controls Her Body Can Upset Her Countrymen*, N.Y. TIMES, Apr. 27, 2006, at A4.

147. Jerry Carroll, *The Game of the Name*, SAN FRANCISCO EXAMINER, Sept. 11, 1994, at I.

148. For a blunt critique of the concept of prostitution as a form of labor, see Melissa Farley, *Unequal*, [http://www.prostitutionresearch.com/how\\_prostitution\\_works/000111.html](http://www.prostitutionresearch.com/how_prostitution_works/000111.html).

149. Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 711–12 (2000).

150. *Id.* at 703.

151. Celine Parreñas Shimizu, Remarks at the Yale Journal of Law and Feminism Symposium, Sex for Sale (Feb. 4, 2006). Noting the "paradox of pleasure and violence in racial subjection," Shimizu explores the rapes of slaves by their masters and recommends that we not prematurely dismiss "a telling of slavery from the point of view of slave sexual contentment." Celine Parreñas Shimizu, *Master-Slave Sex Acts: Mandingo and the Race/Sex Paradox*, WIDE ANGLE, Oct. 1999, at 42.

nothing is real means that the actual harms of prostitution cease to exist except in a woman's mind. Her life becomes simply a "narrative."<sup>152</sup> Postmodernists assume that women who have been prostituted, trafficked, or have had those experiences documented via pornography are narrating just one more version of reality. In postmodern reality, pimps' and pornographers' lies (prostitution is sexy and fun for everyone; prostitutes get rich and meet nice men) are just as valid as survivors' lived experiences of sexual exploitation and abuse. This presumed equivalence of validity reflects a postmodern "sexual politics of meaninglessness"<sup>153</sup> that has profoundly impacted women's lives because it makes men's violence against women invisible.

The disconnected verbosity of postmodern theorists on prostitution seems incomprehensible to those of us who know real women in prostitution. Under postmodern theory, the woman in prostitution is re-objectified as a "signifying system" or a "plane of consistency of desire." She is not understood as a human being whose dignity and personhood are removed by the john and whose body he sexually assaults for money. With what cruel disinterest does one write a book about prostitution that declares on page one that "the flesh-and-blood female body engaged in . . . sexual interaction in exchange for some kind of payment, has no inherent meaning?"<sup>154</sup> Another postmodern description of the "terrain" of escort prostitution fragments women's physical and psychological experience of prostitution into a "cyborg assemblage" that is sold as a commodity in prostitution.<sup>155</sup>

Postmodern ideology might be dismissed as elitist word-salad except that it has real effects on real women when its premises are accepted by public health advocates who work with prostituted women or by judges who interpret laws. In its celebration of fragmentation and multiplicity,<sup>156</sup> postmodernism denies the psychological fragmentation that is a direct result of prostitution, pornography, and trafficking.<sup>157</sup> The overwhelming experiences of rape and torture that occur in incest and prostitution are split off from the rest of the self. This traumatic dissociation is transformed into a "manufactured identity"<sup>158</sup> that is presumed to have been deliberately created by women in prostitution who are seen by postmodernists as "strategist[s]" full of "agency."<sup>159</sup>

152. MacKinnon, *supra* note 152, at 702.

153. JEFFREYS, *supra* note 15, at 201.

154. SHANNON BELL, *READING, WRITING AND REWRITING THE PROSTITUTE BODY 1* (1994).

155. Audrey Extavasia & Tessa Dora Addison, *Fucking (with Theory) for Money: Toward an Interrogation of Escort Prostitution*, *POSTMODERN CULTURE*, May 1992, <http://www3.iath.virginia.edu/pmc/text-only/issue.592/add-ext.592>.

156. Bell, *supra* note 154, at 4.

157. MacKinnon, *supra* note 149, at 707, makes the point that the fragmentation that is idealized by postmodernists is, in reality, psychological multiplicity caused by extreme—usually sexual—torture at a young age.

158. Sanders, *supra* note 116, 336.

159. *Id.*

Minimizing dissociation's origin in traumatic stress, Dutch prostitution researcher Vanwesenbeeck described a "dissociative proficiency" that made it possible for women to professionally perform the acts of prostitution.<sup>160</sup> Public health workers' lack of specialized training in recognizing or treating dissociation is partly a result of the postmodern failure to grasp the connection between deliberately-inflicted violence and dissociation.

Infused with postmodern ideology, advocates may blame people who are in fact victims of men's violence. To describe prostituting women as "risk takers" is to suggest that the women themselves provoke violence aimed at them in prostitution. One group of researchers assumed that "risk-taking" prostituted women willingly exposed themselves to harm, even though the "risk takers" had been battered and raped significantly more often than the non-risk takers.<sup>161</sup> The risk-taking behavior of prostituted women in this particular study was not understood as trauma-based repetition of childhood sexual abuse nor as having resulted from parental neglect.

Contrary to what is asserted by postmodernists, there is a *real* power imbalance in prostitution, where one person has the social, legal, and economic power to hire another person to act like a sexualized puppet. Prostitution always includes the dehumanization, objectification, and fetishization of women.<sup>162</sup> There is no mutuality of sexual pleasure or of any other kind of power in prostitution. In fact, women are non-persons in prostitution. As one of O'Connell Davidson's interviewees explained: the only "plausible line in the . . . film *Pretty Woman*. . . [is] when Richard Gere, playing a client, asks Julia Roberts, playing a prostitute, what her name is. She replies, 'Anything you want it to be.'"<sup>163</sup> Domination of one person by another is central to prostitution, including racist and sexist verbal abuse, deliberate humiliation and ridicule, sadistic physical and psychological tormenting of a vulnerable person, the conscious or unconscious degradation of another person, and frequently acts that are equivalent to torture.

Postmodern denial of the racism and violent sexism in prostitution is highlighted in reviews and commentaries about pornography made of Grace Quek.<sup>164</sup> A Chinese woman from Singapore, Quek was gang-raped prior to her entry into prostitution. She then moved to Los Angeles, where she entered the

160. VANWESENBEECK, *supra* note 5, at 107.

161. Ine Vanwesenbeeck et al., *Professional HIV Risk Taking, Levels of Victimization, and Well-Being in Female Prostitutes in The Netherlands*, 24 ARCHIVES SEXUAL BEH. 503 (1995).

162. CLAUDE JAGET, PROSTITUTES—OUR LIFE 88 (Anna Furse et al. trans., 1980) (discussing the pain of "being seen, looked at, and bought as an object"); see also GIOBBE, FACILITATOR'S GUIDE, *supra* note 10, at 35 ("To be a prostitute is to be an object in the marketplace."); HØIGARD & FINSTED, *supra* note 36, at 51 (offering many examples of the fetishization and objectification of women in prostitution).

163. DAVIDSON, *supra* note 134, at 109.

164. See, e.g., THE WORLD'S BIGGEST GANG BANG (Zane, 1995); SEX: THE ANNABEL CHONG STORY (Coffeeshouse Films, 2002).

sex industry, specializing in hard-core pornography where multiple men penetrated her. Quek has been dismissed by sex industry buffs as a “babbling idiot,”<sup>165</sup> a “multiple entity,” and a “freak-show,”<sup>166</sup> while the industry’s predators quickly moved to exploit her dissociative vulnerability. In *The World’s Greatest Gang Bang*, 251 men were filmed sexually assaulting Quek for ten nonstop hours. Her real consent for this was unclear from some of her comments in some interviews and from her face which was sometimes contorted in pain during the assaults. She was originally told that the men had been tested for HIV, and upon learning that not all johns had been tested, Quek commented, “sex is worth dying for.”<sup>167</sup> Observing the long-term effects of self-mutilation, one interviewer asked Quek about the scars on her arms. She responded, “I find pain a relief, you know?”<sup>168</sup>

One reviewer nonetheless viewed Quek as “the new feminist icon who provokes and is not ashamed . . . to be viewed as nothing more than an object.”<sup>169</sup> This postmodern perspective parallels the pornographers’ propaganda that their film was a subversive demonstration of Asian female sexual appetite. Yet Quek did not break a record for having orgasms; rather, she set a record for how many men could penetrate her.<sup>170</sup> This is the same sexual exploitation and abuse that is perpetrated against other women in pomography/prostitution.<sup>171</sup>

At one adult video event, Quek was surrounded by men with cameras who ordered her into different poses. She seemed “empty” to one observer who noted that she “c[ame] across like a puppet terrified of disappointing her commanders. There was no sign of the much-vaunted empowerment or control in her frantic displays, just someone that had sadly become less than human.”<sup>172</sup>

Postmodern thinking protects johns and maintains their social invisibility. The notion that all constructions of reality are equally valid colludes with, for example, rapists who deny perpetrating rape. How can we hold johns

165. Anthony Petkovitch, *Grace from Outer Space*, SPECTATOR, Apr. 26, 2000, <http://www.spectator.net/EDPAGES/annabelAP.html>.

166. Linda Ruth Williams, *Review of Sex: The Annabel Chong Story*, SIGHT AND SOUND, May 2000, <http://www.bfi.org.uk/sightandsound/review/493>.

167. Kimberly Chun, *Sex: The Annabel Chong Story from a Singapore Schoolgirl to the Nastiest Porn Star in the World*, ASIAN WEEK, May 4, 2000, [http://www.asianweek.com/2000\\_05\\_04/ae\\_annabelchong.html](http://www.asianweek.com/2000_05_04/ae_annabelchong.html).

168. Clark, *supra* note 68, at 13.

169. Gaby Bila-Gunther, *Review of Sex: The Annabel Chong Story*, SENSES OF CINEMA, July–Aug. 2000, <http://www.sensesofcinema.com/contents/00/8/sex.html>.

170. Linda Ruth Williams, *Review of Sex: The Annabel Chong Story*, SIGHT AND SOUND, May 2000, <http://www.bfi.org.uk/sightandsound/issue/200005>.

171. One particularly vicious pornographer sarcastically noted, “I simply must admire any woman who can take 250 loads on her back, ass, and tits; pounded from behind, from the side, and on top; a woman soaked, fatigued, and nearly broken.” Matt Cale, *Review of Sex: The Annabel Chong Story*, <http://ruthlessreviews.com/movies/s/sex.html> (last visited Mar. 16, 2006).

172. Dmetri Kakmi, *Review of Sex: The Annabel Chong Story*, SENSES OF CINEMA, Dec. 2000–Jan. 2001, <http://www.sensesofcinema.com/contents/00/11/annabel.html>.



accountable for acts of sexual abuse and paid rape, when postmodernists object to the idea of a “doer behind the deed”?<sup>173</sup> Why weren’t any of the men who gang raped Grace Quek charged with sexual assault? Postmodern ideologues are complicit with men who commit sexual violence against women, including johns, pimps and pornographers.

7. In order to view prostitution as a job, and in order to keep the business of sexual exploitation running smoothly, *we can not know that when prostitution is legalized or decriminalized, it gets worse. And we can not know that there are some excellent laws that are aimed squarely at abolishing the institution of prostitution while at the same time supporting the women in it to escape.*

The effects of legalized prostitution can be observed in Australia, where researchers have found that it produces a “prostitution culture”<sup>174</sup> with increased illegal as well as legal prostitution, increased presence of organized crime, increased demand for prostitution, increased child prostitution, and increased trafficking of women for the purpose of prostitution.<sup>175</sup> State-sponsored prostitution provides a legal welcome to pimps, traffickers, and johns.<sup>176</sup> But does it protect women?

Well-intentioned people are confused about how to address what they intuitively understand to be the intrinsic harms of prostitution and trafficking.<sup>177</sup> It is misleading when right-to-prostitution advocates and pimps reframe prostitution as a human rights issue. One organization even proposed that women’s civil rights would be violated if they were denied the “right to work” as a prostitute.<sup>178</sup> Laws against pimping or buying women are seen by sex workers’ rights groups as obstacles to conducting business.

Another source of confusion about legal prostitution is that sex industry

173. MacKinnon, *supra* note 149, 706 n.47 (quoting JUDITH BUTLER, GENDER TROUBLE 25 (1990)).

174. MARY SULLIVAN, WHAT HAPPENS WHEN PROSTITUTION BECOMES WORK? AN UPDATE ON LEGALISATION OF PROSTITUTION IN AUSTRALIA 23 (2005), available at <http://action.web.ca/home/catw/readingroom.shtml?x=84641>.

175. *Id.*

176. Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 11, at 315. See also SULLIVAN, *supra* note 174; ILVI JOE-CANNON, PRIMER ON THE MALE DEMAND FOR PROSTITUTION (2006), <http://action.web.ca/home/catw/readingroom.shtml?x=85687>.

177. Politicians speak about prostitution with inconsistent, sometimes wildly divergent statements. In New Zealand, for instance, Prime Minister Helen Clark argued that prostitution was “abhorrent,” but that its decriminalization would benefit women. Clark failed to note that in addition to decriminalizing solicitation offenses for women, across-the-board decriminalization of prostitution also decriminalizes the predatory behaviors of pimps, johns, and traffickers. See John Banks, *City Shoulders Load of Making Law Work*, NEW ZEALAND HERALD, Sept. 15, 2003, at 1.

178. VALERIE JENNESS, MAKING IT WORK: THE PROSTITUTES’ RIGHTS MOVEMENT IN PERSPECTIVE 5 (1993).

advocates appropriate the names of legitimate human rights or public health organizations. Although their names are similar, the Global Alliance Against Trafficking in Women (GAATW) promotes prostitution as sex work, while the Coalition Against Trafficking in Women (CATW) promotes the abolition of prostitution.<sup>179</sup>

Legal prostitution and decriminalized prostitution are both state-sanctioned prostitution, but there are differences between them. In legalized prostitution, the state assumes the role of pimp, collecting taxes and regulating the practice of prostitution. Decriminalized prostitution is a radical removal of any and all laws regarding prostitution (including laws against pimping, pandering, purchasing, and procuring) so that the buying and selling of people in prostitution is considered the legal equivalent of buying candy.

Although advocates allege that legalizing prostitution would remove its social stigma, in fact, women in legalized prostitution are still physically and socially rejected, whether they are in rural brothels ringed with razor wire or in urban brothels walled-off from the city.<sup>180</sup> Zoning of the location of legal or state-tolerated prostitution is a constant source of legal battles, since no one wants prostitution transactions taking place in his neighborhood.

Legalization is not only ineffective in removing the stigma of prostitution: it also fails to protect women from violence. Legal control of prostitution targets its "outward appearance rather than the conditions in which women find themselves. On the whole, governments are far more anxious about public order and public health than about abuse and violence."<sup>181</sup> Many women in

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179. Other organizations that accept or promote prostitution as a reasonable job for poor women include: World Health Organization (WHO); UN/AIDS; International Labor Organization (ILO); Amnesty International; Anti-Slavery International; Coalition Against Slavery and Trafficking (CAST), CARE International; and Medecins sans Frontieres. For a more extended list of such organizations, see Farley, *supra* note 30, at 1091-92.

180. Advocates for legalized or decriminalized prostitution argue that the primary harm of prostitution is social stigma rather than the physical and psychological violence described here. Yet there is no evidence that legalization mitigates the social stigma of prostitution. For example, Dutch women in legal prostitution have the opportunity to accrue pension funds. But they fail to take advantage of this option, fearing that the designation would pursue them for the rest of their lives. See Arjan Schippers, *Turning Prostitution into a Legal Business Has Met With Opposition from People in the Sex Industry Itself*, RADIO NETHERLANDS, <http://www.mw.nl/society/html/critics020102.html> (last visited Apr. 11, 2006); Suzanne Daley, *New Rights for Dutch Prostitutes, but No Gain*, N.Y. TIMES, Aug. 12, 2001, at 15.

181. MARJAN WIJERS & LIN LAP-CHEW, *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, in DOMESTIC LABOUR AND PROSTITUTION* 152 (Foundation Against Trafficking in Women, Utrecht, Neth., 1997). In order of frequency reported, manifestations of abusive conditions in prostitution include: psychological abuse, physical abuse, confinement, police harassment and arrest, sexual assault, no right to refuse a customer or a mandatory minimum number of customers per day, isolation, denial of days off, no right to refuse specific sexual acts, confiscation of identity papers and/or passport, imposition of twelve or more hours of work daily, no access to medical care, forced or dangerous abortions, threats of reprisals against family members for non-compliance, confiscation of personal belongings, denial of right to use condoms, withholding of pay, no proper sleeping accommodations, compulsory AIDS testing and no access to the results, inadequate food, and also forcible recruitment of sisters and friends into prostitution. *Id.* at 199.

prostitution tell us that legalized prostitution will not make them any safer than they were in illegal prostitution.<sup>182</sup> Thus legal brothels in the Netherlands may have as many as three panic buttons in each room.<sup>183</sup> Dutch, South African, and Australian pimps have commented on the extreme physical violence that johns inflict on women in prostitution,<sup>184</sup> and Australian women in prostitution are advised to take classes in hostage negotiation.<sup>185</sup> When rapes occur, however, women in legal strip clubs are told to keep silence or be fired.<sup>186</sup> Women in prostitution speak constantly of its violence.<sup>187</sup>

Although "health checks" of prostituted women occur in legal prostitution, the purpose of the screening is to provide the buyer with an HIV-free commodity. The health check is not aimed at protecting the woman in prostitution from HIV transmitted to her by johns. Under the guise of HIV prevention, and using the massive HIV prevention funding available worldwide, some advocacy groups have used HIV prevention funds to promote legalized or decriminalized prostitution. A 2005 crackdown on this misuse of funds has led to legal disputes.<sup>188</sup> Because sexual harassment and sexual violence are intrinsic to legal as well as illegal prostitution, and because rape is a primary means of transmission of HIV,<sup>189</sup> the threat of contracting HIV is not

182. Farley *supra* note 15, at 33; see also Roberto J. Valera, et. al, *Perceived Health Needs of Inner-City Street Prostitutes*, 25 AM. J. HEALTH BEHAV. 50, 54 (2001).

183. Interview with Jacob K. Jou, Yale University Computer Center, Yale University, in New Haven, Conn. (Feb. 4, 2006).

184. Sheila Jeffreys, *The Legalisation of Prostitution: A Failed Social Experiment*, WOMEN'S HEALTH WATCH, 1, 8 (Women's Health Action, Auckland, New Zealand, March/Apr., 2003) available at <http://www.womenshealth.org.nz> (discussing bouncers' failures to protect women from beatings in legal Australian brothels); SEX WORKER EDUCATION & ADVOCACY TASKFORCE, SAFETY TIPS FOR SEX WORKERS (1997) (on file with author) (recommending that those in prostitution check johns' rooms for knives, handcuffs or rope). Daley, *supra* note 180, at 15. (discussing a pimp who described a pillow in a brothel as a 'murder weapon.')

185. Mary Sullivan, *Can Prostitution Be Safe? Applying Occupational Health and Safety Codes to Australia's Legalized Brothel Prostitution*, in NOT FOR SALE 252 (Rebecca Whisnant & Christine Stark eds., 2004); see also SULLIVAN, *supra* note 174, at 21-22 (discussing risk management procedures and deescalation protocols).

186. Susan Sward, *Dancer Says Strip Club Patron Raped Her*, SAN FRANCISCO CHRONICLE, Feb. 10, 2000, at A19.

187. One woman explained that prostitution is "like domestic violence taken to the extreme," Diana Leone, *One in 100 children in Sex Trade, Study Says*, HONOLULU STAR-BULLETIN, Sept. 10, 2001, at A1, available at <http://starbulletin.com/2001/09/10/news/story1.htm>; A First Nations woman in Canada said, "what is rape for others, is normal for us." Farley et al., *supra* note 35, at 242; see also Susan Kay Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 1 (1994) (stating that it is impossible to protect women in prostitution who are raped approximately weekly).

188. For a detailed discussion of these issues, see Memorandum of Law for APNE AAP and Eighteen Other Organizations as Amicus Curiae, Alliance for Open Society Int'l, Inc., and Open Soc'y Inst. v. United States Agency for Int'l Dev., Civil Action No.05-CV-8209 (Dec. 9, 2005)

189. Press Release, Commission on the Status of Women, Remarks by Peter Piot, U.N. Doc. WOM/1104 (Mar. 3, 1999); Claudia Garcia-Moreno & Charlotte Watts, Press Release, *Gender Equality, Violence Against Women Present Continuing Challenges*, told to Third Committee, U.N. Doc. GA/SHC/3744 (Oct. 15, 2003). available at <http://www.un.org/News/Press/docs/2003/gashc3744.doc.htm>.



at all diminished under legal prostitution. Ultimately, the abolition of HIV and the abolition of prostitution both require the elimination of sex inequality.<sup>190</sup>

Systematically discriminating against women of all ages, all classes, and against ethnically subordinated groups, prostitution is not safer when it is legalized. Prostitution reinforces and promotes sex inequality. A Nevada legislator stated,

Condoning prostitution is the most demeaning and degrading thing the state can do to women. What... [Nevada] do[es] as a state is essentially put a U.S.-grade stamp on the butt of every prostitute. Instead, we should be turning them around by helping them get back into society.<sup>191</sup>

What is a better solution? In 1988, Andrea Dworkin suggested that prostitution should be decriminalized for the prostitute while at the same time criminalizing johns, pimps and traffickers.<sup>192</sup> Today such a law exists in Sweden. Recognizing that prostitution deserved abolition, the Swedish government criminalized the john's and pimp's and trafficker's buying of sex but not the prostituted person's selling of sex. The law made clear that "in the majority of cases... [the woman in prostitution] is a weaker partner who is exploited," and it allocated funding for social services to "motivate prostitutes to seek help to leave their way of life."<sup>193</sup> Two years after the law's passage, a government taskforce reported that there was a fifty-percent decrease in the number of women prostituting and a seventy-five percent decrease in the number men who bought sex. Trafficking of women into Sweden has also decreased.<sup>194</sup>

There are also progressive legal developments in Korea where buying and selling sex acts is criminalized. In 2004, following an educational campaign by women's and human rights groups, the Korean government enacted laws

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190. See Editorial, *The Feminization of AIDS*, N.Y. TIMES, Dec. 13, 2004, at A26; Maxine Frith, *India's Hidden AIDS Epidemic: Virus to Infect 25 Million by 2010*, THE INDEPENDENT (London), Nov. 19, 2003, at 13. Nonprostituted women are also at high risk for HIV because of the widespread tolerance of violence against women. In India, for example, there is no law against marital rape. *Id.* See also Kate Hendricks, Thailand's 100% Condom Use Policy: Success is in the Eye of the Beholder (Oct. 28, 2005) (unpublished manuscript, on file with first author); Sevgi O. Aral & Jonathan M. Mann, *Commercial Sex Work and STD: The Need for Policy Interventions to Change Societal Patterns*, 25 SEXUALLY TRANSMITTED DISEASES 455, 455-56 (1998)(discussing Centers for Disease Control recommendations that public health programs address the human rights violations of prostitution).

191. ALEXA ALBERT, BROTHEL: MUSTANG RANCH AND ITS WOMEN 178 (2001) (quoting William O'Donnell).

192. DWORKIN, *supra* note 84, at 133.

193. For information about the Swedish law regarding prostitution and trafficking, see Prostitutionresearch.com, Fact Sheet in Violence Against Women, <http://www.prostitutionresearch.com/swedish.html> (last visited Apr. 11, 2006).

194. Gunilla S. Ekberg, *The Swedish Law that Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN 1187 (2004), available at <http://www.prostitutionresearch.com/c-laws-about-prostitution.html>; see also Gunilla S. Ekberg, Prostitution and Trafficking: the Legal Situation in Sweden (Mar. 15, 2001) (unpublished manuscript, on file with author.)



authorizing seizure of assets obtained by trafficking in women, increased penalties for trafficking and prostitution, established supports and resources for prostituted/trafficked women, and provided funds for public education campaigns about prostitution.<sup>195</sup> The passage *and enforcement* of these laws has been credited with a thirty-seven percent reduction in the number of brothels in Korea, a thirty-to-forty percent decrease in the number of bars and clubs (which comprise eighty-percent of the sex industry in Korea), and a fifty-two percent decrease in the number of women prostituted in brothels.<sup>196</sup>

A Florida state law provides civil remedies for damages that johns and pimps inflict on prostituted women.<sup>197</sup> Women who are coerced into prostitution via exploitation of social and legal vulnerability can sue johns and pimps for damages. Coercion is defined as restraint of speech or communication with others; exploitation of a condition of developmental disability, cognitive limitation, affective disorder, or substance dependence; exploitation of prior victimization by sexual abuse; exploitation during the making of pornography; and exploitation of the human needs for food, shelter, safety, or affection.<sup>198</sup>

A new consciousness about the harms of prostitution in the United Kingdom is evident in political commentary suggesting that men should be charged with rape if they have sex with women who are intimidated into having sex with them, even if money is paid for that sex act.<sup>199</sup>

Two international agreements strongly oppose prostitution and trafficking. The United Nations 1949 Convention declares that trafficking and prostitution are incompatible with individual dignity and worth.<sup>200</sup> The Convention addresses the harms of prostitution to consenting adult women whether transported across national boundaries or not. Viewing trafficked women as

195. Farley & Seo, *supra* note 29, at 9-12.

196. *Id.* at 9 (discussing Gi Hwan Kim's legal proposals to prevent prostitution and sex tourism in Korea).

197. FLA. STAT. § 796.09 (2006); cf. MINN. STAT. § 611A.80 (1994); see also Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65 (1993) (discussing the Florida statute).

198. FLA. STAT. § 796.09(k)-(o) (2006); see Margaret Baldwin, *What Can Be Done to Interfere with and Ultimately Eliminate Demand?*, in DEMAND DYNAMICS 105 (Morrison Torrey ed., 2004) (discussing claims brought and won under FLA. STAT. § 796.09). In 2006, the Florida Council Against Sexual Violence, in collaboration with Florida Legal Services, the Jacksonville Women's Center, and Refuge House, is seeking federal funding to support civil legal claims that may be brought by prostituted women under section 796.09 of the Florida Code. Email from Margaret Baldwin (Mar. 17, 2006)(on file with author).

199. Denis MacShane, *Prosecute 'Massage Parlour' Rapists*, DAILY TELEGRAPH, Jan 3, 2006, at 14.

200. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271. See also Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 5, 1249 U.N.T.S. 13, 17, declaring in Article 6 that state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation or prostitution of women.

victims, not criminals, the 2000 Palermo Protocol makes consent irrelevant to whether or not trafficking has occurred and encourages states to develop legislative responses to men's demand for prostitution.<sup>201</sup> The Palermo Protocol establishes a method of international judicial cooperation that would permit prosecution of traffickers and organized criminals. It addresses a range of other forms of sexual exploitation including pornography.

A 2006 report by the United Nations Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, noted that prostitution as it is practiced in the world "usually satisfies the legal elements for the definition of trafficking"<sup>202</sup> and therefore, legalization of prostitution is "to be discouraged."<sup>203</sup> The Special Rapporteur observed that "the issue of demand is of crucial importance in addressing trafficking,"<sup>204</sup> noting, "[b]y engaging in the act of commercial sex, the prostitute-user is . . . directly inflicting an additional and substantial harm upon the trafficking victim, tantamount to rape, above and beyond the harmful means used by others to achieve her entry or maintenance in prostitution."<sup>205</sup>

#### CONCLUSION

Postmodern descriptions of prostituted women as sex workers promote an acceptance of conditions that in any other employment context would be correctly described as sexual harassment, sexual exploitation, or rape. Women's experiences of violence and their psychological response to it cannot be theorized away. Postmodern analyses of prostitution that consider it to be "just acting"<sup>206</sup> or that view women's traumatic dissociative responses as proof of "an exceptional control of the inner world" trivialize the existence of real violence against real women in prostitution.<sup>207</sup>

A false distinction between prostitution and trafficking has hindered efforts to abolish prostitution. The word trafficking has been used by sex industry promoters to separate 'innocent' victims of trafficking from women who

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201. See Janice G. Raymond, *The New U.N. Trafficking Protocol*, 25 *WOMEN'S STUD. INT'L F.* 491 (2002). The Protocol also closes some loopholes previously used to define prostitution and trafficking as labor. For example, the Protocol describes payment of money for prostitution as a means of coercing a person into being sexually used. *Id.* at 492.

202. United Nations, Commission on Human Rights, *Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, 9 U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006).

203. *Id.* at 17.

204. *Id.* at 7.

205. *Id.* at 12. The Special Rapporteur noted that "the terms 'sex work', 'sex worker' and 'client' wrongly suggest that prostitution, as currently practised, does not typically fall within the category of trafficking." *Id.* at 10.

206. Sanders, *supra* note 116, at 319.

207. MAGGIE O'NEILL, *PROSTITUTION AND FEMINISM* 89 (2001).

choose prostitution.<sup>208</sup> In reality, no such line exists. Understanding the real-world link between prostitution and trafficking is crucial to developing effective laws against trafficking. Since prostitution creates the demand for trafficking, the sex industry in its totality must be confronted. Unless existing prostitution laws are integrated into newer state antitrafficking laws, we won't be challenging sex trafficking as it operates in the world.<sup>209</sup>

A useful approach would be to compare the institution of prostitution to that of slavery.<sup>210</sup> Prostitution requires a sexualized identity just as slavery requires a racialized identity, and both institutions are fueled by racism and sexism. Slavery, like prostitution, is a relation of domination and subordination that involves "direct and insidious violence. . . namelessness and invisibility. . . endless personal violation, and. . . chronic dishonor."<sup>211</sup> Describing the parallel situation of Jamaicans under historical slavery and the situation of Jamaicans today who "earn their living by renting their genitals," a 2006 Kingston editorial criticized the legitimization of slavery-like conditions of those in prostitution by calling them 'sex workers.'<sup>212</sup>

Johns who buy women, groups promoting legalized prostitution, and governments that sanction or tolerate prostitution<sup>213</sup> form a powerful alliance that threaten all women. Legal and illegal (but tolerated) sex businesses are places where men can commit sexual harassment and sexual exploitation without fear, and where they are socialized to inflict those same acts on other women in their lives. When prostitution is tolerated or legalized by the state, sexual predation is normalized – acts ranging from "seemingly banal verbal humiliation (such as sexist and racist verbal abuse), to dominating and degrading behavior (pornography/prostitution in which a group of men ejaculate on a woman's face while she sobs), to lethal assault (snuff prostitution

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208. Dorchen A. Leidholdt, Coalition Against Trafficking in Women, Speech at University of North Carolina, Sexual Trafficking Conference: Breaking the Crisis of Silence (April 8, 2006)(also discussing the importance of developing strong state antitrafficking laws with comprehensive definitions of trafficking that include domestic as well as transnational trafficking, that address men's demand for prostitution as crucial to addressing sex trafficking, and that seek to prevent the recruitment of men to travel for the purpose of sexually exploiting women and children; also advocating state laws that clearly decriminalize the victims of prostitution, including prostituted children, and that provide funding for services for victims).

209. Neuwirth, *supra* note 56.

210. Melissa Farley, Prostitution, Slavery, and Complex PTSD (1997) (unpublished paper presented at International Society for Traumatic Stress Studies, Montreal, on file with author).

211. ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 12 (1982).

212. Anthony G. Gumbs, *Prostitution: A Return to Slavery*, JAMAICA GLEANER ONLINE, Apr. 24, 2006, available at <http://www.jamaicagleaner.com/gleaner/20060424/letters/letters1.html>

213. See, e.g., Marisa B. Ugarte et al., *Prostitution and Trafficking of Women and Children from Mexico to the United States*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 11, at 147 (describing zones of tolerance for prostitution near Mexico City). Hotel casinos in Las Vegas are another example of tolerance zones, where women are pimped to high rollers. Although prostitution is illegal in Las Vegas, police tend to ignore prostitution of adult women in casinos, and there are relatively few indoor arrests of johns. *Id.*

with actual murders filmed).<sup>214</sup>

Harm reduction models of intervention in prostitution/trafficking, while sometimes helpful, fail to address the roots of the problem.<sup>215</sup> If we are to prevent the harms of prostitution, and if its harms are intrinsic to prostitution, just as slavery's harms are intrinsic to that institution, then we must ultimately prevent the existence of prostitution. We must learn how it is that men make the choice to buy women in prostitution and how that behavior is reinforced in various cultures. This is a profoundly optimistic viewpoint, since it assumes that the even the most entrenched forms of male violence against women can be changed or eliminated. Our goal is to abolish the institution of prostitution while at the same time standing in solidarity with sisters who are currently prostituted.

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214. Farley, *supra* note 30, at 1116.

215. Harm reduction in prostitution/sex trafficking should include the same three components as harm reduction for the addictions. For example, 1) measures to reduce the harm of the addictions such as clean needles, and measures to reduce the harm of prostitution such as distribution of female condoms to reduce the incidence of cervical cancer; 2) measures to reduce the demand for drugs such as freely available methadone clinics, and measures to reduce men's demand for prostitution such as felony-level arrests of johns; 3) measures to reduce the supply of drugs, such as arrests of major drug dealers, and measures to reduce the numbers of women entering prostitution by providing stable housing or by arresting corrupt immigration officials in the case of trafficking. Harm reduction advocates often assume that women will inevitably remain in prostitution and focus only on number one above. We need to focus on harm *elimination* (as in numbers two and three) as well as harm reduction in prostitution/trafficking.



## APPENDIX A

**HELP WANTED: WOMEN AND GIRLS DO YOU WANT THIS JOB?**

Prostitution has been euphemized as an occupational alternative for women, as an answer to low-paying, low skilled, boring dead-end jobs, as a solution to the high unemployment rate of poor women, as a form of sexual liberation, and a career women freely choose.

- \*Are you tired of mindless, low skilled, low-paying jobs? Would you like a career with flexible hours? Working with people? Offering a professional service?
- \*No experience required. No high school diploma needed.
- \*No minimum age requirement. On-the-job training provided.
- \*Special opportunities for poor women—single mothers—women of color.

**Women and girls applying for this position will provide the following services:**

- \*Being penetrated orally, anally, and vaginally with penises, fingers, fist, and objects, including but not limited to, bottles, brushes, dildoes, guns and/or animals;
- \*Being bound and gagged, tied with ropes and/or chains, burned with cigarettes, or hung from beams or trees;
- \*Being photographed or filmed performing these acts.

**Workplace:**

Job-related activities will be performed in the following locations: in an apartment, a hotel, a "massage parlor," car, doorway, hallway, street, executive suite, fraternity house, convention, bar, public toilet, public park, alleyway, military base, on a stage, in a glass booth.

**Wages:**

- \*Wages will be negotiated at each and every transaction. Payment will be delivered when client determines when and if services have been rendered to his satisfaction.
- \*Corporate management fees range from 40-60% of wages; private manager reserves the right to impound all monies earned.

**Benefits:**

Benefits will be provided at the discretion of management.

**NO RESPONSIBILITY OR LEGAL REDRESS FOR THE FOLLOWING ON-THE JOB HAZARDS:**

- \*Nonpayment for services rendered;
- \*Sexually transmitted diseases or pregnancy;
- \*Injuries sustained through performance of services including but not limited to cuts, bruises, lacerations, internal hemorrhaging, broken bones, suffocation, mutilation, disfigurement, dismemberment, and death.

Note: Accusations of rape will be treated as a breach of contract by employee.

Name of applicant: \_\_\_\_\_

Signature of manager on behalf of applicant: \_\_\_\_\_

**EXHIBIT 5**  
**(Part 1 of 2)**

## COMMERCIAL SEX: BEYOND DECRIMINALIZATION

SYLVIA A. LAW\*

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Several magnificent NYU Law students helped with research and ideas: John Marshall Bellwoar, Joanne Armstrong Brandwood and Adam Wendell, NYU Law 2000, and Seth Nesin, NYU Law 2001. My assistant, Leslie Jenkins, provided excellent help. NYU Law School's Filomen D'Agostino and Max E. Greenberg Faculty Research Fund contributed financial support. Thanks to all.

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This Article argues that: 1) criminal sanctions against people who offer sex for money should be repealed, 2) legal remedies and programs to protect commercial sex workers from violence, rape, disease, exploitation, coercion and abuse should be enhanced and 3) whether or not commercial sex is prohibited by criminal law, government policy should promote decent working conditions for all workers and should not require people to engage in sex as a condition of subsistence. It further addresses how, as a practical matter, people who provide commercial sex can best be protected against exploitation, both physical and economic. This Article demonstrates that decriminalization of sexual services is a necessary first step toward creating more effective remedies against abuse, protecting vulnerable women and building a more humane society.

Part I introduces the law and contested facts. Part II describes and critiques the analyses of other scholars who have grappled with the subject of commercial sex, with a particular focus on debates among feminists. Part III describes a variety of contemporary alternatives to the criminal punishment of those who provide sex for money. Part IV argues that the criminal justice system should do more to protect women who sell sex for money from violence, rape, abuse and exploitation. Part V discusses the exchange of sex for money as a form of work.

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"Prostitution" is the word ordinarily used to describe the behaviors addressed in this Article.<sup>1</sup> This Article will avoid using the terms prostitute or prostitution, except when quoting from others or discussing criminal prosecutions.<sup>2</sup> The word "prostitution" both describes and condemns. The primary meaning of the word has a sexual connotation, historically describing women who offer sexual services on an indiscriminate basis, whether or not for money,<sup>3</sup> and more recently, the offer of sex for money. But a common secondary meaning of "prostitution" is any service to "an unworthy cause."<sup>4</sup> Because this Article explores whether the denunciation is warranted, it seems better to avoid words that assume the conclusion.<sup>5</sup> Further, the term "prostitute" conflates work and identity.<sup>6</sup> Women who sell sex for money typically have other identities, that is, daughter, mother, athlete, musician, et cetera. But, as John F. Decker, author of the preeminent study, *Prostitution: Regulation and Control* reminds us, "changing labels by itself will have little effect; what is more sorely needed is a change in attitude."<sup>7</sup>

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1. WEBSTER'S NEW WORLD DICTIONARY 1080 (3d College ed. 1994) defines prostitute as: "1 to sell the services of (oneself or another) for purposes of sexual intercourse 2 to sell (oneself, one's wit or moral integrity, etc.) for low or unworthy purposes." *Id.* An older definition of "prostitution" refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men." *United States v. Bitty*, 208 U.S. 393, 401 (1970). With the growing acceptance of noncommercial sex outside of marriage, the focus of moral condemnation shifted from promiscuity to commerce. See DAVID A.J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW* 94-95 (1982).

2. Many commercial sex workers prefer the term "whore." See Wendy McElroy, *Prostitutes, Anti-Pro Feminists and the Economic Associates of Whores*, in *PROSTITUTION: ON WHORES, BASTARDS, AND JOHNS* 333, 342 (James Elias, Veronica Elias & Vern L. Bulloch eds., 1998) [hereinafter *PROSTITUTION*].

3. MORRIS PLOSCOWE, *SEX AND THE LAW* 226 (rev. ed. 1962), defines prostitution as "the indiscriminate offer by a female of her body for the purpose of sexual intercourse or other lewdness." *Id.*

4. WEBSTER'S NEW WORLD DICTIONARY, *supra* note 1, at 1080. See also LOIS WINGERSON, *UNNATURAL SELECTION* 149 (1998) ("Scientists are the ultimate prostitutes," admitted French geneticist Jacques Cohen a few years ago. "We have to go wherever we can to get the money we need to put our ideas into effect.").

5. Similar issues arise in relation to the words used to describe children whose parents are not married to one another. "Illegitimate children" was the common historic description. But the name implies a substantive conclusion to a contested question. See HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 82 (1971).

6. People in high status jobs, such as judges or artists, often are proud to conflate work and identity. People in lower status jobs, such as sales clerks or housewives, often resist being defined solely by their work. See Kenneth Karst, *The Coming Crisis of Work in Constitutional Perspective*, 52 *CORNELL L. REV.* 523, 533 (1997).

7. JOHN F. DECKER, *PROSTITUTION: REGULATION AND CONTROL* 455 (1979).

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## I. INTRODUCTION

The exchange of sexual services for money is the only form of consensual adult sexual activity that is systematically subject to criminal sanctions in the United States at the end of the twentieth century.<sup>8</sup> The United States is unique among the nations of Western Europe and the British Commonwealth in imposing and enforcing criminal sanctions on people who offer sexual services for money.<sup>9</sup>

8. The American Law Institute does not define either adultery or fornication as a crime in its Model Penal Code, observing that such laws are widely disobeyed and rarely enforced. See MODEL PENAL CODE § 213 note on adultery and fornication (1980).

Only a few U.S. states prohibit fornication. See MITCH BERNARD, ELLEN LEVINE, STEPHEN PRESSER & MARIANNE STECHICH, *THE RIGHTS OF SINGLE PEOPLE* 13 (1985). Several states have held that fornication statutes are unconstitutional. See *Purvis v. State*, 377 So. 2d 674 (Fla. 1979); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *State v. Saunders*, 381 A.2d 333 (N.J. 1977). Where such laws exist, they are rarely enforced. See Note, *Fornication, Cohabitation and the Constitution*, 77 MICH. L. REV. 252, 270-71 (1978).

By the mid-1980s twenty states had repealed criminal sanctions against adultery. See BERNARD ET AL., *supra*, at 21. In 1987, the New Hampshire House of Representatives voted 277-57 to remove adultery from its criminal code after a man attempted to enforce it by filing a citizen's complaint against his wife's boss. Prior to this incident, the law had not been enforced for 60 years, even though from 1679 to 1973 the criminal code defined adultery as a serious offense punishable by whipping and display of the letters "AD" on the upper garments. See *New Hampshire Weighs End to Longtime Law on Adultery*, N.Y. TIMES, Feb. 15, 1987, §1, at 66.

In 1986 the Supreme Court, in a sharply divided decision, authorized states to impose criminal sanctions on sex between men or between women. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, 31 states do not prohibit consensual oral or anal sex; 13 states prohibit such acts between both different-sex and same-sex partners; and six states prohibit such sex only between same-sex partners. See LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., *SODOMY LAWS: STATE-BY-STATE STATUS REPORT* 1 (July 8, 1998). "Direct criminal enforcement of these laws against private activity between consenting adults is rare." *Id.* at 2. In 1998 the Georgia Supreme Court held that the Georgia state constitution protected a right to privacy broader than that embodied in the U.S. Constitution, and that the Georgia sodomy law violated the Georgia constitution to the extent that the statute criminalized the performance of private, unforced, non-commercial acts of sexual intimacy between consenting adults. See *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998).

In Great Britain, the courts have held that the common law prohibits consensual sado-masochistic activity. See *Regina v. Brown*, [1994] 1 App. Cas. 212 (appeal taken from Eng.). In the U.S., prosecutions for consensual sado-masochistic activity are rare. See William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 50 (1995). *Iowa v. Collier*, 372 N.W.2d 303 (1985), rejected a defendant's claim that consensual sado-masochistic action was immune from prosecution as assault under a statutory provision exempting "voluntary participants in a sport, social or other activity, not in itself criminal" and not reasonably likely to cause serious physical harm. *Id.* On the facts of the case, the evidence of consent was weak.

9. See ABRAHAM SION, *PROSTITUTION AND THE LAW* (1977). See also Ellen Pillard, *Rethinking Prostitution: A Case for Uniform Regulation*, 1 NEV. PUB. AFF. REV. 45, 45 (1991). Canada is perhaps closest to the United States. In 1985 a government commission recommended decriminalization of prostitution and related activities, as well as non-legal, social and economic responses to the social and economic inequality of women. See *PORNOGRAPHY AND PROSTITUTION IN CANADA: REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION* (1985) ("Fraiser Report"). While prostitution was decriminalized, the other recommendations were ignored. "The fact that prostitution per se

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The U.S. devotes substantial public resources to applying criminal sanctions to people who offer sex for money.<sup>10</sup> Enforcement of laws prohibiting commercial sex typically targets the person who offers sex for money, rather than those who promote such work or profit from it, or those who offer money for sex.<sup>11</sup> More particularly, the criminal law is enforced against street walkers, the poorest of the women who offer sex for money. In 1996, 99,000 people were arrested in the United States on prostitution and prostitution-related charges,<sup>12</sup> and in 1994, 12,243 people were arrested in New York state alone.<sup>13</sup> In 1985, police in the nation's sixteen largest cities made as many arrests for prostitution as for all violent crimes combined. And police in Boston, Cleveland and Houston arrested twice as many people for prostitution as they did for all homicides, rapes, robberies and assaults combined—and perpetrators evaded arrest for ninety percent of these violent crimes.<sup>14</sup> In nearly all prostitution prosecutions arrest occurs when a male undercover officer seeks out women he thinks are willing to offer sex for money. He either waits for them to offer to engage in sex in exchange for money, or, more often, solicits them himself.<sup>15</sup>

John Decker estimated that in 1974 between 230,000 and 350,000 U.S. women provided sex in exchange for money on a full-time basis, and far more did so on a part-time or occasional basis.<sup>16</sup> Others estimate that as many as 1,300,000 U.S. women do so.<sup>17</sup> An extensive study that used a va-

is not illegal in Canada is a limited reform when all the activities that make it possible are criminal." body Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75, 81 (1989).

10. See Julie Pearl, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS L.J. 769, 769-70 (1987).

11. See Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE J.L. & FEMINISM 329, 333 (1992). During the period of the study 163 female prostitutes were prosecuted, while only five men were arraigned for deriving support from the work of a prostitute, and only three for procuring/soliciting clients for a prostitute. Four of these eight cases were dismissed and one was on appeal at the time of the study. See *id.* The prosecution of customers and others who benefit from the sale of sex for money is discussed *infra* Part III.C.

12. See BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at 324 tbl. 4.1. From 1987 to 1996, the numbers of arrests for prostitution and related crimes fell from 85,588 to 76,754. See *id.* at 403 tbl.4.6.

13. See NEW YORK STATE DIV. OF CRIM. JUST. SERVS., 1993 CRIME AND JUSTICE ANNUAL REPORT 128 (1994).

14. See Pearl, *supra* note 10, at 769-70.

15. See Priscilla Alexander, *Bathhouses and Brothels: Symbolic Sites in Discourse and Practice*, 20 DANGEROUS BEDFELLOWS, POLICING PUBLIC SEX 229 (1996).

16. See DECKER, *supra* note 7, at 12-13. Decker's estimate is based on intensive analysis of a small, but apparently typical, Midwestern city, and extrapolated. Others estimate that as many as 500,000 U.S. women provide sex for money. See also HELEN REYNOLDS, *THE ECONOMICS OF PROSTITUTION* 5 (1986).

17. See DIANE FRENCH, *WORKING: MY LIFE AS A PROSTITUTE* 149 (1988).

riety of outreach methods to identify off-street commercial sex workers in Los Angeles found that 4,020 women in 1991 were involved in such work in that city.<sup>18</sup>

Another way to approach the question of the prevalence of relations that the parties regard as prostitution is by asking the customers. A 1992 survey reported that 8.6% of men aged eighteen to fifty-nine had ever paid for sex, but in the twelve months of the study only 0.4% responded that they had done so.<sup>19</sup> Decker speculates that in the 1960s and 1970s the number of young men who paid for sex declined, as social mores became more tolerant of extramarital sexuality, but that the number of older men seeking commercial sex may have increased during these decades.<sup>20</sup> In the mid-1990s, Lisa E. Sanchez did the most extensive research on commercial sex workers in a mid-size city since Decker's study in the 1970s.<sup>21</sup> Sanchez found dramatic increases in commercial sex during the period 1989 to 1996.<sup>22</sup> During a similar period, 1986 to 1995, Department of Justice data show that the number of arrests for prostitution dropped by eighteen percent, primarily because local police departments decided that arresting prostitutes served little useful purpose.<sup>23</sup> Justice Department figures show an increase in prostitution arrests from 1994 to 1996.<sup>24</sup> In short, even though it is impossible to obtain precise data, explicitly commercial sexual relations and prosecutions for prostitution are common.

Tracy M. Clements summarizes a common way of conceptualizing the diversity of the experience of women who work in commercial sex:

A somewhat static class system, mirroring the economic and racial stratification of the larger society, divides prostitutes into several categories.

18. See Janet Lever & David E. Kanouse, *Using Quantitative Methods to Study the Hidden World of Off-street Prostitution in Los Angeles County*, in PROSTITUTION *supra* note 2, at 396, 405. Of this 4,000 women, 1,825 were Asian, 1,750 were Hispanic immigrants, 320 were white, 90 were African-American and 35 were Hispanic non-immigrants. See *id.*

19. See EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY* 402, 435 (1994). A 1991 survey of males aged 20 to 39 reported that 6.7% had at some time paid for sex. See Daniel H. Klepinger, *Perceptions of AIDS Risk and Severity and Their Association with Risk Related Behavior Among U.S. Men*, 25 *FAM. PLAN. PERSP.* 74, 79 (1993).

20. See DECKER, *supra* note 7, at 18.

21. See Lisa E. Sanchez, *Boundaries of Legitimacy: Sex, Violence, Citizenship, and Community in a Local Sexual Economy*, 22 *L. & SOC. INQUIRY* 543 (1997).

22. In the Northwestern city she studied, Sanchez found that between 1989 and 1996, the number of all nude dance clubs increased from 10 to 100, as local taverns converted to strip clubs to compete for business with the larger clubs. See Sanchez, *supra* note 21, at 556.

23. See Julie Ball, *Women of Streets Scorned, Hardened Prostitutes Scared by Asheville Death*, *ASHEVILLE CITIZEN-TIMES* (N.C.), Aug. 17, 1997, at A1.

24. See BUREAU OF JUST. STAT., *supra* note 12.

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ries. Streetwalkers—those who openly solicit on the street—represent the lowest, most marginalized class of prostitutes. They are most likely to be controlled by pimps, and to be subjected to violence in their work.

Although streetwalkers are the most visible and familiar, they comprise only ten to twenty percent of all prostitutes. However, streetwalkers account for eighty-five to ninety percent of all prostitution arrests. This disparity in arrests has added significance when coupled with the fact that poor women and women of color are over represented among streetwalkers. Thus, fifty-five percent of all women arrested for prostitution, and eighty-five percent of those sentenced to jail, are women of color.<sup>25</sup>

The largest group of prostitutes, high-class “call girls” or “escorts,” falls at the other end of the social and economic spectrum. These women often come from more privileged backgrounds. They typically have a higher level of education, exercise a larger degree of control over their lives, and earn substantially more for their services than do streetwalkers.

Between these two classes lies a group of women who work in various off-street settings, including massage parlors, brothels, hotels and bars. While these women earn more and are less visible than streetwalkers, they work with less discretion and realize fewer profits than do call girls and escorts.<sup>26</sup>

Virtually all of the purchasers of commercial sex are men.<sup>27</sup> Significant numbers of men provide commercial sex to other men.<sup>28</sup> Men are rarely prosecuted for prostitution.<sup>29</sup> This Article focuses on the most com-

25. Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access to a Group of Women in Need*, 11 *BERKELEY WOMEN'S L.J.* 49, 52-53 (1996).

26. *See id.*

27. *See* DECKER, *supra* note 7, at 210. An in-depth study of male prostitution in England, which also examines prostitution in other countries, found no evidence of men who provide sexual services to women for money. *See* DONALD J. WEST, *MALE PROSTITUTION* at ix, xvi (1993). West acknowledges that such practices might exist, but he did not find it in the population he studied. A woman who has worked for ten years as a dominatrix, with hundreds, perhaps thousands, of clients, reports that the overwhelming majority of clients are men, a few are men who also bring women with them, and only a few were women seeking her services on their own. *See* Paul Theroux, *Nurse Wolf*, *NEW YORKER*, June 15, 1998, at 52. Marcia Neave, an Australian law professor and author of the major report on commercial sex in that country, *see infra* Part III.A, reports that in extensive interviews she met “a couple of men who did provide sexual services to women for money but these were only a very small proportion of the whole. However quite a number of men claimed to provide sexual services to heterosexual couples.” Letter from Professor Marcia Neave, Faculty of Law, Monash University, Australia to author (July 28, 1999) [hereinafter Neave Letter] (on file with author).

28. West reports a structure of the male prostitution enterprise similar to that of the women who provide sexual services to men described in note 27, *supra*. *See* WEST, *supra* note 27.

29. *See* DECKER, *supra* note 7, at 213; WEST, *supra* note 27, at 329-30. West observes that the absence of criminal restrictions, even if unenforced, has adverse consequences. *See id.* at 330.

mon form of commercial sex, that is, the sexual services that women provide to men.

Every state in the United States defines the actions of a person who offers or provides sex for money as a crime.<sup>30</sup> Every state also makes it a crime to knowingly, with the expectation of monetary or material gain, encourage or compel a person to sell sex for money.<sup>31</sup> Every state also makes it a crime to receive "something of value, not for legal consideration, knowing that it was earned through an act of prostitution."<sup>32</sup> Most states also impose criminal sanctions on the owners of property where commercial sex takes place, and on people who reside in such places.<sup>33</sup> In a few states, the *status* of being a prostitute is a crime.<sup>34</sup> Some states make it a crime to buy sex.<sup>35</sup>

## II. THE CRITIQUE AND DEFENSE OF THE CRIMINAL PROHIBITION OF COMMERCIAL SEX

This Part first considers arguments against criminalization of commercial sex from the perspective of moral philosophy, efficiency and economics, and discusses debates among feminists. It then presents the arguments in support of the criminalization of commercial sex. It concludes with a focused discussion of public health concerns, with a particular emphasis on HIV, and some speculation on the impact of decriminalization on the incidence of commercial sex.

### A. CRITIQUES OF CRIMINALIZATION

Classic liberal moral philosophers have long opposed criminalization of commercial sex.<sup>36</sup> David A.J. Richards articulates the argument based on the moral foundations of the concepts of individual rights and liberties:

To think of persons as possessing human rights is to commit oneself to two crucial normative assumptions: first, that persons have the capac-

30. See DECKER, *supra* note 7, at 81. In Nevada, criminal prohibition is the general rule, but some localities are authorized to allow such sales under defined circumstances. See discussion, *infra* Part III.B.

31. See *infra* Part III.D.

32. DECKER, *supra* note 7, at 84. See *infra* Part III.D.

33. See DECKER, *supra* note 7, at 84.

34. See *id.* at 82, 85.

35. See *infra* Part III.C.

36. See David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979). See also RICHARDS, *supra* note 1, at 84-156. Others have made similar arguments. See, e.g., Lars Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 ETHICS 335 (1980).

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ity to be autonomous, and second, that persons are entitled, as persons, to equal concern and respect in exercising that capacity. . . .

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[A]utonomy gives to persons the capacity to call their lives their own. The development of these capacities for separation and individuation is, from the earliest life of the infant, the central developmental task of becoming a person. . . .

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. . . Because autonomy is so fundamental to the concept of what it is to be a person and because all are equal in their possession of it, all persons are entitled to equal concern and respect, as persons.<sup>37</sup>

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Richards' vision of individual liberty is forcefully defended. He recognizes that realization of individual liberty demands state control of anti-social behavior. But, he argues, careful analysis does not support the assumption that the exchange of sex for money is anti-social. The notion that sex must be confined to procreation has been widely rejected.<sup>38</sup> He takes on the anti-commodification arguments presented by Marx and Freud, and more recently by Margaret Radin.<sup>39</sup> Commercial sex, he argues, is not the sale of a body or a body part, but rather the provision of a personal service.<sup>40</sup>

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Criminal punishment of commercial sex has also been challenged by economists. In 1968 Herbert Packer offered an efficiency based evaluation of criminal prohibitions against commercial sex that has since become classic:

There seems little reason to believe that the incidence of prostitution has been seriously reduced by criminal law enforcement . . . .

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The side effects on law enforcement are unfortunate. Police corruption is closely associated with this kind of vice control. . . .

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An equally disgusting kind of enforcement practice is the use of the police or police-employed decoy to detect solicitation. . . .

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What does society gain from this kind of law enforcement activity? If the effort is to stamp out prostitution, it is plainly doomed to failure. If it is to eradicate or curb the spread of venereal disease, that too is illusory . . . . To put it crudely, but accurately, the law is perverted . . . .

37. Richards, *supra* note 36, at 1224-25.

38. *See id.* at 1240.

39. *See infra* notes 69-81 and accompanying text.

40. *See Richards, supra* note 36, at 1257-58.

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It seems that prostitution, like obscenity, and like other sexual offenses, should be viewed as a nuisance offense whose gravamen is not the act itself, or even the accompanying commercial transaction, but rather its status as a public indecency.<sup>41</sup>

Over the years, many other economists and law and economics scholars have articulated this view.<sup>42</sup>

In the past quarter century, feminists have been the most influential voices in debates about commercial sex. Feminist analysis and action have had a dramatic impact on common cultural understandings, the law and social life. Two issues are central to feminist theory and action: work and sexuality.<sup>43</sup> The legal and social treatment of the exchange of sex for money lies squarely at the intersection of core feminist concerns with work and sexuality. Feminists are divided on factual questions about the situation of women who trade sex for money, and on matters of vision and principle. Despite these disagreements, all feminists agree on three points. First, they condemn the current legal policy enforcing criminal sanctions against women who offer sex in exchange for money.<sup>44</sup> Second, they agree

41. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 328-31 (1968).

42. See NORVAL MORRIS & GORDON HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 2-6 (1970); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 440 (4th ed. 1992); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 *ANNALS OF THE AM. ACAD. POL. & SOC. SCI.* 157 (1967); Eric Rasmusen, *Of Sex and Drugs, and Rock 'n Roll: Does Law and Economics Support Social Regulation?*, 21 *HARV. J.L. & PUB. POL'Y* 71 (1997). See also Kenneth Shuster, *On the "Oldest Profession": A Proposal in Favor of Legalized but Regulated Prostitution*, 5 *U. FLA. J.L. & PUB. POL'Y* 1 (1992).

43. Simone de Beauvoir's influential 1953 book, *The Second Sex*, described the erotic as an aspect of human liberty and insisted that sexual self-determination constitutes a fundamental part of women's liberation. SIMONE DE BEAUVOIR, *THE SECOND SEX* 567-68 (H. Parshley trans. & ed., 1968). By contrast, Betty Friedan contended that issues of sexuality were distractions from the core problems of meaningful work and political power. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 76-79 (1963).

44. See, e.g., DEBORAH L. RHODE, *JUSTICE AND GENDER* 400 n.78 (1989) (citing National Org. for Women, 1973 Conference Resolutions, reprinted in *CALIFORNIA NOW, WORKING PAPER ON PROSTITUTION* 16-17 (July 1983, unpublished)). In addition, the American Civil Liberties Union, some sections of the American Bar Association, and the National Council on Crime and Delinquency all oppose imposing criminal sanctions on people who offer sex for money. VALERIE JENNESS, *MAKING IT WORK: THE PROSTITUTES' RIGHTS MOVEMENT IN PERSPECTIVE* 32 (1993). For the views of leading feminists Catharine McKinnon, Margaret Radin, and Martha Chamallas, see *infra* text accompanying notes 64-88.

ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993) comes close to defending criminalization of commercial sex on grounds that it demeans women and involves a damaging commodification and market alienation of women's sexual capacity. But she concludes that her arguments "establish the legitimacy of a state interest in prohibiting prostitution, but not a conclusive case for prohibition," given the paucity of opportunities for working women. *Id.* at 150-58. Kathleen Barry initially defended criminal prosecution of women who sell sex, but subsequently repudiated that view, calling instead for prosecution of buyers. See KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 298 (1995). The National Coalition Against Sexual Assault (NCASA) called for decriminalization of

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that authentic consent is the sine qua non of legitimate sex, whether in commercial or non-commercial form.<sup>45</sup> Third, all feminists recognize that commercial sex workers are subject to economic coercion and are often victims of violence, and that too little is done to address these problems.<sup>46</sup>

Women who provide commercial sex, particularly streetwalkers, are subject to violence.<sup>47</sup> Many studies of women who work the street report that eighty percent have been physically assaulted during the course of their work.<sup>48</sup> Women who provide commercial sex are often the victims of rape.<sup>49</sup> They are murdered, perhaps at a rate forty times the national average.<sup>50</sup> Police systematically ignore commercial sex workers' complaints about violence and fail to investigate even murder.<sup>51</sup> Indeed, police officers rape and beat sex workers, and are rarely prosecuted for their wrongdoing.<sup>52</sup> Customers, pimps, police and other men inflict these harms on women.<sup>53</sup>

prostitution in 1981. In 1990, the group rescinded support for decriminalization and resolved to "endorse abolition of all laws penalizing women and children in prostitution used as sexual commodities, endorse enhanced penalties for trafficking, procuring, pimping, patronizing, promoting and profiting from prostitution, consistent with criminal sanctions for other forms of sexual assault, including child sexual abuse." Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65, 68 (1993).

45. See notes 291, 298 and accompanying text.

46. See *infra* Parts IV & V.

47. See Clements, *supra* note 26, at 58. A study of 130 street prostitutes in San Francisco found that 82% had been physically assaulted, 83% had been threatened with a weapon, 68% had been raped while working as prostitutes, and 84% reported current or past homelessness. See *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27 WOMEN & HEALTH 37, 37 (1998).

48. See Carla Marinucci, *School for Johns: \$500 Buys Clean Slate and Education for Men Caught Soliciting Sex*, S.F. EXAMINER, Apr. 16, 1995, at C1. See also Sanchez, *supra* note 21, for a carefully documented study demonstrating that violence is pervasive in the lives of all categories of women who sell sex for money.

49. See Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 201 (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1987).

50. A 1985 Canadian government report concluded that women and girls in prostitution suffer a mortality rate 40 times the national average. See Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 46, 87-90 (1992) (citing SPECIAL COMM. ON PORNOGRAPHY AND PROSTITUTION, PORNOGRAPHY & PROSTITUTION IN CANADA 350 (1985)).

51. See Sanchez, *supra* note 21, at 555, 558.

52. In one study, as many as 41% of the prostitutes surveyed reported being assaulted by police officers. See Mimi Silbert & Ayala Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. & BEHAV. 387 (1981); Nancy Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 L. & INEQ. 609, 618 (1984). See also ARLENE CARMEN & HOWARD MOODY, WORKING WOMEN 189 (1985) (noting that prostitutes "may be raped, beaten, and molested by other people—even the police—and have little recourse because of her 'label'").

53. See Erbe, *supra* note 52, at 609.

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Still there are substantial disagreements among feminists. As a matter of principle, some feminists see commercial sex as inconsistent with a vision of a just society and inherently damaging to women, while others see commercial sex as a legitimate choice for some women in some circumstances. Feminists also disagree about facts. "[W]e know very little about the reality of the lives of prostitutes. Whether prostitutes are more often sexual slaves than liberated women is not just a matter of perception, but depends on the facts of their daily existence."<sup>54</sup> In the absence of hard data, people rely on personal stories that carry divergent messages.<sup>55</sup> The experience of people who trade sex for money is diverse and highly contested.<sup>56</sup>

For example, feminists who believe that commercial sex is never a legitimate choice assert that "fourteen is the average age of a woman's entry into prostitution."<sup>57</sup> The evidence offered does not support this claim; most women begin such work as adults.<sup>58</sup> Some feminists look at these "facts" and conclude that no woman could ever authentically consent to engage in commercial sex, unless coerced by male supremacy<sup>59</sup> or desperate eco-

54. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 828 (1988).

55. An influential movement in legal scholarship relies on personal narrative to convey a richer concepts than can be captured in statistics or rules. See Harlon L. Dalton, *Storytelling on Its Own Terms*, in *LAW'S STORIES* 57 (Peter Brooks & Paul Gerwitz eds., 1996). But, there are many stories, with different messages. The process of evaluating their typicality and power is complex. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (expressing a skeptical view of the power of stories).

56. See RHODE, *supra* note 44, at 258-59; Chamallas, *supra* note 54.

57. Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 n.60 (1993). She provides no support for this factual assertion. Similarly, Neal Kumar Katyal asserts "[t]he average age of beginning prostitutes is fourteen years." Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE J.L. & FEMINISM 791, 794 (1993). He cites a brief by Margaret A. Baldwin. However, Baldwin, in a thoughtful article on the issue, does not make this claim. See Margaret A. Baldwin, *Pornography and the Traffic in Women: Brief on Behalf of Trudee Able-Peterson, et al., Amici Curiae in Support of Defendant and Intervenor-Defendants, Village Brooks v. City of Bellingham*, 1 YALE J.L. & FEMINISM 111, 123 (1989).

58. See *supra* note 12 and accompanying text. For example, FBI statistics for 1996 show that 48,591 women were arrested for prostitution and related offences. Of those, only 71 were under age 15, and only 507 were between the ages of 15-18. Teenagers represent a minuscule proportion of women arrested for prostitution. Perhaps teen prostitutes are better able to avoid arrest than their adult counterparts, but this seems unlikely.

59. WHISPER (Women Hurt in Systems of Prostitution Engaged in Revolt), a grass roots organization of former prostitutes, asserts that "[p]rostitution is founded on enforced sexual abuse under a system of male supremacy that is itself built along a continuum of coercion . . . . We, the women of WHISPER, reject the lie that women freely choose prostitution." JENNESS, *supra* note 44, at 77 (quoting Sarah Wynter, editor of the WHISPER newsletter). For a good description of WHISPER, see Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth"*, 4 COLUM. J. GENDER & L. 26, 47-53 (1994).

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nomic need.<sup>60</sup> Others, while recognizing the compelling necessity for bet-  
ter economic opportunities for women, and more effective protection  
against violence,<sup>61</sup> assert that commercial sex is sometimes an authentic  
choice. COYOTE, "the most visible organization in the contemporary  
campaign for prostitutes' rights,"<sup>62</sup> asserts that "most women who work as  
prostitutes have made a conscious decision to do so, having looked at a  
number of work alternatives. . . . [O]nly 15 percent of prostitutes are coer-  
ced by third parties."<sup>63</sup>

Disputes among feminists go beyond the facts. Some feminists chal-  
lenge the legitimacy of commercial sex within a larger vision of sexual re-  
lations. Catharine A. MacKinnon, Margaret Radin and Martha Chamallas,  
for example, reject the legitimacy of commercial sex for reasons that go  
beyond the facts of particular cases.

MacKinnon asserts that, in present conditions, consensual heterosex-  
ual relations are inherently oppressive to women: "[T]he wrong of rape has  
proved so difficult to define because the unquestionable starting point has  
been that rape is defined as distinct from intercourse, while for women it is  
difficult to distinguish the two under the conditions of male domi-  
nance. . . ."<sup>64</sup>

If all heterosexual intercourse is oppressive to women, commercial  
sex is obviously problematic. In relation to commercial sex, MacKinnon  
asserts that all commercial sex is forced, and hence per se illegitimate.<sup>65</sup>

60. The English Collective of Prostitutes asserts that poverty and lack of economic alternatives  
compel women to sell sex for money. "We want to make it clear that if there were no poor women,  
there would not be one woman on the game, not one." Fechner, *supra* note 59, at 42 (quoting Selma  
James, Speech Before the House of Commons on Behalf of the English Collective of Prostitutes (Mar.  
5, 1979) (the "game" is British slang for working in prostitution)). Bernard Shaw captured the impor-  
tance of economic motivation in his preface to *Mrs. Warren's Profession*. "[P]rostitution is caused, not  
by female depravity and male licentiousness, but simply by underpaying, undervaluing, and overwork-  
ing women. . . . If on the large scale we get what we call vice instead of what we call virtue it is simply  
because we are paying more for it." BERNARD SHAW, *Preface to BERNARD SHAW, MRS. WARREN'S*  
*PROFESSION*, in *PLAYS UNPLEASANT* 181 (Penguin Books ed. 1961) (1898).

61. *See infra* Part IV.

62. Joel Best, *Foreword to JENNESS, supra* note 44, at xiii. COYOTE (an acronym for Call Off  
Your Old Tired Ethics) was launched as a grass roots organization on Mother's Day 1973. *See id.* at  
42. Within a year of its formation, COYOTE claimed a membership of over 1,000, ten percent of  
whom were currently sex workers. *See id.* at 45. Similar organizations were created in many cities in  
the United States and Europe. *See id.* at 3. Jenness cautions that it is impossible to know whether  
claimed membership figures are accurate. *See id.* at 45.

63. *Id.* at 69.

64. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 175 (1989).

65. "[P]rostitution is not something a woman, absent force, would choose to do. . . . [M]ost if not  
all prostitution is ringed with force in the most conventional sense, from incest to kidnapping to forced



MacKinnon dismisses the reported experience of many women who provide sex for money. She argues:

To be a prostitute is to be a legal nonperson in the ways that matter. What for Blackstone and others was the legal nonpersonhood of wives, is extended for prostitutes from one man to all men as a class. *Anyone can do anything to you and nothing legal will be done about it.*<sup>66</sup>

MacKinnon is correct in asserting that commercial sex workers are often denied effective legal response to acts of violence, rape, coercion and fraud.<sup>67</sup> But, the failure to provide effective legal remedies for abuses is not inherent in either commercial sex or marriage. Nonetheless, MacKinnon opposes laws that impose criminal sanctions on women who offer sex for money.<sup>68</sup>

Professor Margaret Jane Radin addresses the large question of whether there are or should be some things in the human experience which are "outside the market place but not outside the realm of social intercourse."<sup>69</sup> She challenges the economics paradigm that assumes that everything that people value is (or should be) ownable and salable,<sup>70</sup> observing that many important interests are commonly regarded as inalienable in market transactions; for example, voting rights and duties to serve in the military or on a jury.<sup>71</sup> Radin argues that the assumption of total commodification cheapens human experience.<sup>72</sup>

Like all feminists, Radin opposes criminalization of commercial sex.<sup>73</sup> On the other hand, she expresses deep discomfort with it.

If the social regime permits buying and selling of sexual[ity,] . . . thereby treating [it] as [a] fungible market commodit[y] given the . . . capitalistic understanding of monetary exchange, there is a threat to the personhood of women, who are the "owners" of these "commodities." The threat to personhood from commodification arises because essential attributes are treated as severable fungible objects, and this denies the integrity and

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drugging to assault to criminal law." MacKinnon, *supra* note 57, at 25-27. She also acknowledges that "Sex-based poverty, both prior to and during prostitution, enforces it." *Id.* at 26.

66. MacKinnon, *supra* note 57, at 15 (emphasis added).

67. *See infra* Part IV.

68. *See* MacKinnon, *supra* note 57, at 20.

69. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853 (1987) [hereinafter Radin (1987)]. *See also* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1991) [hereinafter Radin (1991)]; MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996).

70. *See* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 34 (4th ed. 1992).

71. *See* RADIN, *supra* note 69, at 18-29. *See also* Radin (1987), *supra* note 69, at 1909-14.

72. *See* Radin (1987), *supra* note 69, at 1872.

73. *See* RADIN, *supra* note 69, at 132.

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uniqueness of the self. But if the social regime prohibits this kind of commodification, it denies women the choice to market their sexual . . . services, and given the current feminization of poverty and lack of avenues for free choice for women, this also poses a threat to the personhood of women. The threat from enforced noncommodification arises because narrowing women's choices is a threat to liberation, and because their choices to market sexual . . . services, even if nonideal, may represent the best alternatives available to those who would choose them.

Thus the double bind: both commodification and noncommodification may be harmful.<sup>74</sup>

While Radin's arguments against the market commodification of babies and body parts are powerful,<sup>75</sup> her criticism of commercial sex is less persuasive. First, the sale of body parts is prohibited by law only insofar as it poses much greater material physical danger to the seller than the sale of sex.<sup>76</sup> Second, the transfers of both body parts and babies are subjected to systemic legal and professional control. The risks of a black market in body parts are slim because the buyer must use a regulated professional and health care facility to get the part installed. Similarly, even though baby sales are routinely arranged in the grey market, parental rights can only be established in court.<sup>77</sup> By contrast, prohibitions against commercial sex are notoriously difficult to enforce.

74. Radin (1991), *supra* note 69, at 1699-1700.

75. See Radin (1987), *supra* note 69, at 1925-33 (baby selling and surrogacy) & 1855 (sales of human organs).

76. The U.S. now permits the sale of blood, semen, ova, hair and tissue. See Gerald Dworkin, *Markets and Morals: The Case for Organ Sales*, 60 MOUNT SINAI J. MED. 66, 66 (1993). Other organs—heart, livers, or lungs—are essential to life and U.S. law prohibits people from selling them or giving them away. Because humans have two kidneys and two corneas, a person could sell or give one away and continue to live. For most people, donating a kidney is a positive experience, but for some it causes long term distress. See Eric M. Johnson, J. Kyle Anderson, Cheryl Jacobs, Gina Suh, Abhinav Humar, Benjamin D. Suhr, Stephen R. Kerr & Arthur J. Matas, *Long-Term Follow-Up of Living Kidney Donors: Quality of Life After Donation*, 67 TRANSPLANTATION 717, 717 (1999). In 1999 medical science began to develop the ability to transfer half of a liver. The procedure requires major surgery and poses substantial risks to the donor. See Denise Grady, *Live Donors Revolutionize Liver Care*, N.Y. TIMES, Aug. 2, 1999, at A1.

77. See MARTHA A. FIELD, SURROGATE MOTHERHOOD 84-96 (1988). Like Radin, Field opposes commodification of childbirth. Indeed she seems more willing than Radin to use the criminal law to prohibit commodification. See *id.* at 10 ("I would not oppose federal legislation prohibiting surrogacy."). But protection of the individual mother is at the heart of Field's concern, whereas Radin appears to be more concerned with the effects on people who are not directly involved in selling sex. See *id.* at 97-109.

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It is not obvious that in commercial sex "essential attributes are treated as severable fungible objects, and this denies the integrity and uniqueness of the self."<sup>78</sup> As Professor Martha Nussbaum observes:

All of us, with the exception of the independently wealthy and the unemployed, take money for the use of our body. Professors, factory workers, lawyers, opera singers, prostitutes, doctors, legislators—we all do things with parts of our bodies for which we receive a wage in return. Some people get good wages, and some do not; some have a relatively high degree of control over their working conditions, and some have little control; some have many employment options, and some have very few. And some are socially stigmatized, and some are not.<sup>79</sup>

Radin's intuition that sex, as opposed to the physical and intellectual labor that are the bread and butter of the world of work, is more "an essential attribute that defines individual integrity and uniqueness" than mental capacity or physical labor seems right. Part V, *infra*, embraces Radin's claim that sex is different in arguing that people should never be compelled to engage in sexual relations, even in a culture that otherwise requires people to work. But, the question why sex is different from other forms of labor is difficult.

Radin argues that legitimization of commercial sex might have a "domino effect" that would "unleash market forces onto the shaping of our discourse regarding sexuality and hence onto our very conception of sexuality and our sexual feelings."<sup>80</sup> Thus she urges that, if sale is legalized, advertising should be banned to avoid "extensive permeation of our discourse by commodification-talk [that] would alter sexuality in a way that we are unwilling to countenance."<sup>81</sup> Images and reality of degradation of women, violence, and exploitative sexuality are pervasive in U.S. culture. But it is difficult to see commercial sex as the main culprit. Despite the fact that the U.S. is expensively committed to the prosecution of commercial sex,<sup>82</sup> the commodified discourse that Radin fears is pervasive in the magazines at the supermarket check-out line, on commercial airlines, in network television, and, in more explicit forms, on cable TV, the Internet

78. Radin (1991), *supra* note 69, at 1699-1700.

79. Martha C. Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 J. LEGAL STUD. 693, 693-94 (1998).

80. RADIN, *supra* note 69, at 132-33.

81. Radin (1987), *supra* note 69, at 1925. She says, "If sex were openly commodified . . . , its commodification would be reflected in everyone's discourse about sex, and in particular about women's sexuality. New terms would emerge for particular gradations of sexual market value." RADIN, *supra* note 69, at 133.

82. See *supra* note 10 and accompanying text.

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ated and at newsstands. Indeed these pedestrian forms of sexual commodifica-  
ness tion may be more pernicious than commercial sex simply because they are  
so ordinary. It is not clear that legalization of commercial sex would lead  
to an increase in sex commodification talk, even if advertising were not  
banned.<sup>83</sup>

Assuming that Radin is correct that it would be disturbing and socially  
coercive if commercial sex were offered more openly and pervasively,  
time, place, and manner restrictions would provide a more focused way of  
addressing these problems. Further, the "domino effect" argument implic-  
itly suggests that the exploitation of mostly poor women that results from  
the criminalization of commercial sex is counter-balanced by benefits to  
people whose sexual and economic lives are closer to the visionary ideal  
she articulates.<sup>84</sup>

Professor Martha Chamallas raises concerns about the legalization of  
commercial sex from a perspective that is similar to Radin's. It is premised  
on visionary feminist moral concepts about sexual relations in a good life  
and a good society. Chamallas argues:

[M]oral sex is coming to be identified with sexual conduct in which  
both parties have as their objective only sexual pleasure or emotional in-  
timacy, whether or not tied to procreation. Good sex, in the egalitarian  
view, is noninstrumental conduct. Sex used for more external purposes,  
such as financial gain, prestige, or power, is regarded as exploitative and

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83. Today, even though commercial sex is illegal, it is extensively advertised through a range of  
publications catering to people with different interests. See, e.g., Theroux, *supra* note 27. The indi-  
vidualized, personal nature of the service suggests that this pattern would continue and that billboards  
and ads on prime time television would be highly unlikely. On the other hand, some products that are  
now legal are not advertised in mainstream media. For example, the media and industry have agreed to  
ban ads for hard liquor from television. See Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77  
IOWA L. REV. 909, 921 (1992). For another example, television and most magazines do not accept ad-  
vertising for condoms, even though they are legal, and the absence of open talk about contraception  
may contribute to the high U.S. rates of unintended pregnancy and sexually transmitted diseases, espe-  
cially among young people. See Jeannie I. Rosoff, *Not Just Teenagers*, 20 FAM. PLAN. PERSP. 52, 52  
(1988) (stating that use of condoms is more common in countries in which they are advertised in main-  
stream media).

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84. Margaret Baldwin offers a sharp critique of Radin's analysis:  
In [Radin's] view, women in prostitution thus confront a profound double-bind, for they are  
placed at serious risk by engaging in prostitution, while materially powerless to leave it. She  
argues that neither "pro-commodification" legal philosophies, nor "anti-commodification"  
positions adequately address this difficulty. The former ignores the violence; the latter, the  
need. Ultimately, however, Professor Radin counsels us to ignore both, so long as the "cul-  
tural discourse" of the problem of sexual commodification remains confined to prostitution.  
Concluding that ideology is unlikely to "trickle up" over its present discursive sea wall and  
contagiously threaten the comfort of other women, Professor Radin leaves prostitutes to fend  
as best they can, with all sympathy and good wishes for the future.  
Baldwin, *supra* note 50, at 59-60.

immoral, regardless of whether the parties have exchanged voluntarily in the encounter.<sup>85</sup>

Chamallas thus argues that *any* exchange of sex for money should be regarded as illegitimate.<sup>86</sup> Rejecting the possibility of defining all exchanges of sex for money as rape, Chamallas sees prostitution as morally suspect.<sup>87</sup> Nonetheless, she sharply condemns the criminal prosecution of those who offer sex for money.<sup>88</sup>

Other feminists have a very different vision of sexuality and commercial sex. They see the freedom to explore sexuality and to recognize women as sexual agents as a central tenant and energizing, organizing principle of the women's liberation movement of the late twentieth century.<sup>89</sup> Personal, communal and political efforts to understand and affirm women's sexuality have transformed understandings of homosexuality and heterosexuality.<sup>90</sup> Since the 1970s, feminists, and millions of women who do not self-identify as feminists, have explored whether to seek traditional female values of commitment, monogamy, and marriage, or to try a traditional male norm of sexuality that embraces adventure, anonymity, diversity and a separation of sex from commitment; never before have women been so

85. Chamallas, *supra* note 54, at 784.

86. *See id.* at 820-24.

87. *See id.* at 827-28.

88. *See id.* at 828-30.

89. A core element of the women's liberation movement of the early 1970s was an affirmation of women's sexuality, the legitimacy of a variety of sexual experiences and an effort to disentangle authentic passion from cultural construction. *See generally* CAROL S. VANCE, PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (1984); POWERS OF DESIRE: THE POLITICS OF SEXUALITY (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983). One aspect of this was a feminist campaign to decriminalize sex. *See, e.g., In re Dora P.*, 400 N.Y.S.2d 455 (Fam. Ct. 1977) (a feminist analysis holding that prohibition of commercial sex is unconstitutional, even as applied to a minor), *rev'd*, 418 N.Y.S.2d 597 (App. Div. 1979). *See also supra* note 44 and accompanying text (discussing National Organization for Women and ACLU); DE BEAUVOIR, *supra* note 43, at 555-57. For example, in a satirical novel about the early stages of the women's movement, Alix Kates Shulman has one of her characters demand of her lovers cunnilingus and "three hours minimum" for sex. ALIX KATES SHULMAN, BURNING QUESTIONS 356 (1978).

90. *See* POWERS OF DESIRE, *supra* note 89, at 29-35. The work also describes the initial homophobia of the heterosexual woman's rights movement, and the successful lesbian challenge to it. Although the challenge did not end homophobia in the women's movement it did reduce it to a whisper; moreover, it changed the balance of sexual power radically not only between straight women and lesbians but between straight feminists and straight men. Sexual pleasure no longer depended so entirely on being acceptable to men. Even women who had not the slightest inclination to cross the threshold of taboo reaped some benefits in their heterosexual negotiations from the general acknowledgment that lesbianism was now within the realm of the imaginable.

*Id.* at 34.

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uppity or the meaning of gender been so challenged.<sup>91</sup> As a person who catches most of the movies at the mall and reads *People Magazine*, it strikes me that the new ideas of female sexuality have caught on, not simply among doctrinaire feminists or cutting-edge post-modernist Gen-Xers, but in the mainstream culture of the American heartland. While strip clubs and exotic dancing raise serious questions for feminists, in 1997 Americans spent "more money at strip clubs than at Broadway, off-Broadway, regional, and nonprofit theaters; at the opera, ballet, and jazz and classical music performances—combined."<sup>92</sup>

The late Professor Mary Jo Frug argued that commercial sex is useful in combating the maternalization of the female body. She wrote:

Sex workers themselves . . . want legal support for sex that is severed from its reproduction function and from romance, affection, and long-term relationships. Because "legal" sexual autonomy is conventionally extended to women only by rules that locate sexuality in marriage or by rules that allow women decisional autonomy regarding reproductive issues, arguments in support of law reforms that would legalize sex work conflict with the language of the maternalized female body. The arguments that sex workers are making to assimilate their work into the wage market appeal to a sexualized femininity that is something other than a choice between criminalized and maternalized sex or a choice between terrorized and maternalized sex. This appeal to a fresh image of the female body is based on a reorganization of the [terrorized, the maternalized, and the sexualized] images of femininity . . . Its originality suggests, to me, resistance to the dominant images.<sup>93</sup>

Some of the women who sell sex for money are vivid examples of female sexual agency, and hence most threatening to traditional notions of female sexuality. Many organizations of sex workers defend the legitimacy of commercial sex.<sup>94</sup> The manifesto of the International Committee on Prostitutes' Rights, for example, states that it "affirms the right of all women to determine their own sexual behavior, including commercial exchange, without stigmatization or punishment."<sup>95</sup>

91. See *id.* at 21-36; Gail Pheterson, *Not Repeating History*, in *A VINDICATION OF THE RIGHTS OF WHORES 3* (Gail Pheterson ed., 1989).

92. See Eric Schlosser, *The Business of Pornography: Who's Making the Money?*, *U.S. NEWS & WORLD REP.*, Feb. 10, 1997, at 44.

93. Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 *HARV. L. REV.* 1045, 1058-59 (1992).

94. These organizations include COYOTE, the National Task Force on Prostitution (NTFP), and the International Committee for Prostitutes' Rights (ICPR). See JENNESS, *supra* note 44, at 66-67.

95. *International Committee for Prostitutes' Rights World Charter and World Whores' Congress Statements*, in *SEX WORK* 305, *supra* note 49, at 310.



Thus feminists agree that it does not make sense to define the women who sell sex as criminals; there is an urgent need to provide more effective remedies to protect women who sell sex from violence, rape and coercion; and authentic consent is key. Nonetheless there are real differences among feminists. Some favor vigorous prosecution of customers and other people who share the earnings of commercial sex workers while others oppose such laws. The dispute is empirical. What strategies are most likely to be effective in protecting women from violence and coercion? Those questions are explored in Parts III and IV *infra*. More fundamentally, feminists disagree about whether a woman can ever authentically consent to commercial sex, and whether it would exist in a just society.

#### B. TRADITIONAL MORAL DEFENSE OF CRIMINAL PROHIBITION

The core moral argument for the criminal prohibition of prostitution rests on a vision of women, their sexuality, and the role of marriage. In 1908 the U.S. Supreme Court offered this description of commercial sex workers:

The lives and example of such persons are in hostility to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."<sup>96</sup>

Laws prohibiting contraception, abortion, fornication and commercial sex were premised upon, and reinforced, a gender-based double standard which assumed

that woman are delicate, that voluntary sexual intercourse may harm them in certain circumstances and that they may be seriously injured by words as well as deeds. The statutes also suggest that, despite the generally delicate nature of most women, there exists a class of women who are not delicate or who are not worthy of protection.<sup>97</sup>

Beginning in the 1950s and accelerating in the 1960s and 1970s, diverse groups of people challenged laws and social mores that restricted consensual sexual activities. Through the 1940s and 1950s, doctors and leaders of the Republican Party challenged laws restricting access to birth

96. *United States v. Bitty*, 208 U.S. 393, 401 (1908) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)) (construing an act of Congress prohibiting the importation of any woman or girl for the purposes of prostitution).

97. KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, *SEX-BASED DISCRIMINATION* 892 (1st ed. 1974).

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control.<sup>98</sup> Also in the 1950s, heterosexual men, exemplified by Hugh Hefner and his Playboy philosophy, challenged then contemporary sexual mores.<sup>99</sup> In the late 1960s, the emerging feminist movement made access to abortion a central issue.<sup>100</sup> In the 1980s, some U.S. states softened or abandoned enforcement of rules against abortion, contraception and homosexuality, and others repealed the rules.<sup>101</sup> The Supreme Court held that the individual right to use contraception or to have an abortion is an aspect of constitutionally protected liberty that states may not deny.<sup>102</sup> Since the 1970s, most states have abandoned all efforts to enforce criminal prohibitions against private, adult, consensual relations,<sup>103</sup> except for commercial sex.

However, traditional conservative moral ideas about families and gender roles are alive and strong in contemporary U.S. society. This vision animated the defense of Georgia's criminal penalty against homosexual conduct, accepted by the Supreme Court in *Bowers v. Hardwick*.<sup>104</sup> Concerned Women for America and the Rutherford Institute were the only groups supporting Georgia in its Supreme Court argument defending the constitutionality of criminal sanctions against private, adult, consensual homosexual activity, while several civil rights organizations, religious groups, states, and medical and professional organizations challenged the criminal law.<sup>105</sup> The Rutherford Institute asserted that if private, consen-

98. See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 79-130 (1994).

99. See BARBARA EHRENREICH, THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT 42-51 (1983) (describing the influence of the pill and men's resistance to married monogamy).

100. See generally KRISTEN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

101. See GARROW, *supra* note 98, at 196-269, 355-88 (discussing the inception of the right to contraception and state court reforms preceding *Roe v. Wade*); LUKER, *supra* note 100, at 92-125 (discussing the mobilization of the pro-choice movement); JOHN D'EMILIO & ESTELLE FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 318-25 (1988) (discussing the gay liberation movement).

102. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming a woman's right to abortion but giving states more freedom to promote other interests, including protection of the fetus); *Roe v. Wade*, 410 U.S. 113 (1973) (determining the constitution protects women's liberty to choose abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding single people have a constitutionally protected right to use contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding married people have a constitutionally protected right to use contraception).

103. See *supra* note 8 and accompanying text.

104. 478 U.S. 186 (1986).

105. See Amici Curiae Brief of the Rutherford Institute, and the Rutherford Institutes of Alabama, Connecticut, Delaware, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia in support of the Petitioner, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) [hereinafter Rutherford Brief]; Brief Amicus Curiae of Concerned Women for America, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-

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sual homosexual activity is decriminalized, "[T]he very foundations of this society will be shaken. . . . [O]ur institutions are built on a foundation which is incompatible with such practices, i.e., monogamous marriage and the family unit."<sup>106</sup> Preservation of gender distinctions and privileging of the heterosexual, monogamous family is defended by conservative intellectuals.<sup>107</sup> The conservative ideology reflects not simply an idea of a good life for the individual, but also a vision of stable families and, still more grandly, a productive economic, intellectual and political society.<sup>108</sup> Conservative ideology cannot adopt an attitude of tolerance toward people who find sexual satisfaction outside of traditional forms, because this ideology sees the monogamous patriarchal family as both "natural" and, at the same time, vulnerable.<sup>109</sup> The traditional family must be privileged if people are to be motivated to accept its demands and strictures.<sup>110</sup> In the 1990s, the Rutherford Institute and Concerned Women for America have been active in seeking laws that restrict access to abortion and contraception and that limit the liberty of gay people. They have also actively opposed judicial nominees who do not share these views. These groups have not been active in defending the status quo that imposes criminal penalties on women who offer sex for money.<sup>111</sup> This silence from the Right probably reflects the fact that groups opposing criminal sanctions for women who offer commercial sex have not put the issue on the political or constitutional agenda.<sup>112</sup>

140). See also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

106. Rutherford Brief, *supra* note 105. The State of Georgia offered a similar argument. Petitioner's Brief at 37-38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

107. See GEORGE GILDER, *SEXUAL SUICIDE* 35 (1973); GEORGE GILDER, *WEALTH AND POVERTY* 136 (1979) (asserting that male dominance, monogamy, and heterosexuality are essential to family stability). See also ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 355, 363 (1986) (claiming society has a strong interest in limiting sex to the heterosexual, monogamous, patriarchal family).

108. See Thomas Grey, *Eros, Civilization and the Burger Court*, 43 L. & CONTEMP. PROBS. 83, 88, 92-93 (1980).

109. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 542-44 (1983).

110. See POWERS OF DESIRE, *supra* note 89, at 10.

111. While Concerned Women for America disseminates policy papers encouraging sexual abstinence, advocating school prayer and a balanced budget, opposing abortion, contraception and the United Nations, there is no policy paper or statement on prostitution. See Concerned Women for America (visited Dec. 10, 1999) <<http://www.cwfa.org>>.

112. For example, even though the ACLU opposes criminal sanctions for women who sell sex, see *supra* note 44, they have not sought change through litigation or legislation since the 1970s. See Letter from Janet Linde, ACLU Archivist to author (July 6, 1998) (on file with author). Similarly, while NOW opposes criminal sanctions, it has not been active on the issue. See Electronic Mail Letter from Martha Davis, Legal Director, NOW LDEF to author (July 8, 1998) (on file with author).

Many people view that the patriarchal family form of sexual, individual liberty law has largely force the constitutional. The criticised on gender and women, with gender equality.

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Many people in the United States, probably most, do not share the view that the patriarchal, monogamous, heterosexual family is the only legitimate family. The conservative claim that there is only one acceptable form of sexual, affectionate, family relations imposes enormous cost on individual liberty and happiness. Except in relation to commercial sex, the law has largely rejected the idea that criminal sanctions may be used to enforce the conservative vision of patriarchal, monogamous family relations.<sup>113</sup> The conservative vision of appropriate sexual relations is premised on gender differentiated concepts of the interests and capacities of men and women, which are inconsistent with contemporary commitments to gender equality.<sup>114</sup>

Even though the conservative vision of family values has been largely rejected in relation to birth control, abortion, premarital sex, and homosexuality, criminal prohibitions against commercial sex, and vigorous efforts to enforce them, have persisted to the end of the twentieth century. The 1970s saw an energetic feminist effort to decriminalize prostitution.<sup>115</sup> But, unlike the partially successful campaigns to decriminalize other forms of consensual sex, and access to contraception and abortion, the movement to decriminalize commercial sex has all but disappeared.<sup>116</sup>

### C. PUBLIC HEALTH CONCERNS

One important reason for the continued criminalization of commercial sex is the identification of HIV in 1981 and the knowledge that the exchange of bodily fluids during sex is one of the principle means by which the virus is transmitted.<sup>117</sup> Commercial sex workers have traditionally been viewed as a source of disease,<sup>118</sup> and the rapid spread of AIDS in the mid-1980s solidified that view.

A California court expressed the traditional view in rejecting an equal protection challenge to a sentence of six months to five years, for a single conviction for solicitation of prostitution, even though the customer was not prosecuted:

113. See *supra* note 8 and accompanying text.

114. See generally Law, *supra* note 105.

115. See *supra* notes 43-44.

116. People writing about commercial sex in the 1980s and 1990s often observe that the subject receives little attention. See, e.g., Baldwin, *supra* note 50, at 78 ("Domestic legal reform activity on prostitution is nearly nonexistent, both in feminist legislative projects and feminist legal scholarship.").

117. See McElroy, *supra* note 2, at 335.

118. See generally ALLAN M. BRANDT, NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880 (1985). See also D'EMILIO & FREEDMAN, *supra* note 101.

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[Fallen women] present a greater single element of economic, social, moral, and hygienic loss than is the case with any other single criminal class . . . and occup[y] a relation to society very analogous to that of the chronic typhoid carrier—a sort of clearing house for the very worst forms of disease.<sup>119</sup>

The facts do not support the assumption that commercial sex workers are primary transmitters of venereal disease, including HIV. The Centers for Disease Control reports that as of 1998, 570,425 adult and adolescent men had contracted AIDS in the United States.<sup>120</sup> Of this group, only four percent had contracted AIDS through heterosexual contact.<sup>121</sup> Of that four percent, more than half contracted AIDS through sex with an injecting drug user, a hemophiliac, or a transfusion recipient. Thus, two percent of men with AIDS contracted it as a result of sex with a woman without an identified risk factor.<sup>122</sup> The CDC does not distinguish commercial sex workers from other women. It seems likely that non-commercial sex is more common than commercial sex. Thus the two percent of men who contract HIV through heterosexual contact probably contract it from wives and lovers, rather than from commercial sex workers.

Women are much more likely to contract HIV through heterosexual sex than men. The CDC reports that thirty-nine percent of women and four percent of men contract HIV through heterosexual contact.<sup>123</sup> Just over half of those women contracted AIDS from men with identified risk factors, but 20,821 women contracted AIDS as a result of heterosexual sex with a man with no identified risk factor.<sup>124</sup> Again, the CDC figures do not distinguish between commercial sex and other sexual relations.<sup>125</sup>

The overall prevalence of HIV in female commercial sex workers “rarely exceeds a rate of 5%” in Europe and North America.<sup>126</sup> In Sub-

119. *Ex parte Carey*, 207 P. 271, 274 (Cal. Ct. App. 1922).

120. See CENTERS FOR DISEASE CONTROL, 10 HIV/AIDS SURVEILLANCE REPORT I, 14 tbl.5 (Dec. 1998).

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. The CDC also gathers information about people with HIV infection who have not yet developed AIDS. As of 1998, the proportion of HIV cases attributable to heterosexual contact was similar to the proportion of cases of developed AIDS. *See id.* at 15 tbl.6. Six percent of men with HIV acquired it through heterosexual contact, and 40% of those cases involve contact with people with known risk factors. Forty percent of women acquire HIV through heterosexual contact and over half of those cases involve sex with a man with a known risk factor.

126. Avril Taylor, Martin Frischer, Neil McKeganey, David Goldberg, Stephen Green & Stephen Platt, *HIV Risk Behaviors Among Female Prostitute Drug Injectors in Glasgow*, 88 ADDICTION 1561,

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Saharan Africa and in many countries of Asia, infection rates among commercial sex workers are much higher.<sup>127</sup> More than half of the women selling sex at a truck stop in the midlands of South Africa were HIV positive in 1996.<sup>128</sup> The HIV seroprevalence rate among commercial sex workers in Cambodia in 1997 was 43.9%.<sup>129</sup> A study in Northern Thailand showed that brothel-based commercial sex workers were more than twenty times more likely to be infected with HIV than commercial sex workers in bars or massage parlors.<sup>130</sup> But HIV is not prevalent among commercial sex workers in all developing countries. Only 0.1% of women sex workers arrested in Mexico City in 1992 were HIV positive.<sup>131</sup> The same rates were reported in Bolivia in 1995, and safe sex education dramatically reduced the incidence of other sexually transmitted diseases between 1992 and 1995.<sup>132</sup>

Overall rates of HIV infection mask differences between commercial sex workers who are intravenous drug users and those who are not, and differences between street workers and sex workers in other settings. For example, in Italy and Spain respectively, sex workers who did not use intravenous drugs had HIV infection rates of 1.6% and 3.4%, while for sex workers who used intravenous drugs the rates were 36% and 51.7%.<sup>133</sup> A study in Glasgow, Scotland, in 1990, reported HIV infection rates in com-

1561 (1993). See also Carole A Campbell, *Prostitution, AIDS, and Preventive Health Behavior*, 32 SOC. SCI. MED. 1367, 1367 (1991).

127. See Maria J. Wawer, *Origins and Working Conditions of Female Sex Workers in Urban Thailand: Consequences of Social Context for HIV Transmission*, 42 SOC. SCI. MED. 453 (1996).

128. See Gita Ramje, Salim S. Abdool Karim & Adriaan W. Sturtn, *Sexually Transmitted Infections Among Sex Workers in KwaZulu-Natal, South Africa*, 25 SEXUALLY TRANSMITTED DISEASES 346, 346 (1998).

129. This article, originally published in Japanese, is by authors from the Department of Public Health, Yokohama City University School of Medicine. See K. Ohsige, S. Morio, S. Mizushima, K. Kitamura, K. Tajima, A. Ito, A. Suyama, S. Usuku, T. Phalla, H.B. Leng, H. Sopheab, B. Eab & K. Soda, [*Epidemiological Study on HIV/AIDS in Cambodia; Seroprevalence of HIV/STD Among Commercial Sex Workers*], 46 NIPPON KOSHU EISEI ZASSHI 61, 61-70 (1999), available in LEXIS, Medline.

130. See The HIV/AIDS Collaboration, Nonthaburi, Thailand, *HIV-1 Seroconversion in a Prospective Study of Female Sex Workers in Northern Thailand: Continued High Incidence Among Brothel-Based Women*, 12 AIDS 1889, 1889-98 (1998).

131. See L. Juarez-Figueroa, F. Uribe-Salas, C. Conde-Glez, M. Hernandez-Avila, M. Olamendi-Portugal, P. Uribe-Zuniga & E. Calderon, *Low Prevalence of Hepatitis B Markers Among Mexican Female Sex Workers*, 74 SEXUALLY TRANSMITTED INFECTIONS 448, 448 (1998).

132. See Centers for Disease Control, *Decline in Sexually Transmitted Disease Prevalence in Female Bolivia Sex Workers: Impact of an HIV Prevention Project*, 12 AIDS 1899 (1998).

133. See Umberto Tirelli, Giovanni Rezza, Massimo Giullani, Federico Caprilli, Giulio Gentili, Adriano Lazzarin, Alberto Saracco & Renato De Mercato, *HIV Seroprevalence Among 304 Female Prostitutes From Four Italian Towns*, 3 AIDS 547 (1989) (citing Umberto Tirelli, *HIV Prevalence and Risk Factors in Spanish Prostitutes*, Abstract POC489, 8th Int'l AIDS Conf., Amsterdam, 1992). See also Taylor et al., *supra* note 126, at n.4.



mercial sex workers of 3% to 5% among intravenous drug users and zero among non-drug using sex workers.<sup>134</sup> A study of London female sex workers, conducted from 1986 to 1988, found an HIV positive rate of 0.6%.<sup>135</sup> In Los Angeles, from 1991 to 1995, researchers tested for HIV from urine samples from people arrested in Los Angeles County.<sup>136</sup> The researchers found that six percent of arrested commercial sex workers were HIV positive.<sup>137</sup> Since the early 1990s, Memphis, Tennessee, has required that women charged with prostitution be tested for HIV and other venereal diseases; between 1992 and 1997, an average of 5.2% of arrested women tested positive for HIV.<sup>138</sup>

A review of the literature of HIV infection and commercial sex conveys two messages. First, a small proportion of commercial sex workers in developed countries or Latin America are HIV positive. Second, there is little research and information because studies are mostly foreign, small and old. The Los Angeles study of arrestees is the largest U.S. study I have been able to find. The Los Angeles researchers acknowledge that "who gets arrested among these groups is not a random process." Arrests are likely to over-represent people "who are most actively involved in criminal behavior, least competent in their criminal activities, and more likely to have been the subject of previous arrest and/or incarceration."<sup>139</sup> While the U.S. devotes substantial resources to enforcing criminal prohibitions against commercial sex,<sup>140</sup> and substantial resources to studying HIV, we spend virtually no public or private money investigating the relationships between commercial sex and communicable disease.

The CDC has performed a tremendously useful public function by advising hospitals, other health care organizations, and the people who provide care, on how to grapple with the risks posed by HIV positive health

134. See Neil McKeganey, Marina Barnard, Alastair Leyland, Isobel Coote & Edward Folett, *Female Streetworking Prostitution and HIV Infection in Glasgow*, 305 BRIT. MED. J. 801, 802 (1992).

135. See Helen Ward, Sophie Day, Jane Mezzonc, Lucinda Dunlop, Catrina Donegan, Sara Farrar, Luke Whittaker, John R.W. Harris & David L. Miller, *Prostitution and Risk of HIV: Male Partners of Female Prostitutes in London*, 307 BRIT. MED. J. 359, 359 (1993).

136. Ninety-four percent of arrested people consented to the anonymous testing. See Catherine L. Carpenter, Douglas Longshore, Kiku Annon, Jeffrey J. Annon & M. Douglas Anglin, *Prevalence of HIV-1 Among Recent Arrestees in Los Angeles County, California: Serial Cross-Sectional Study, 1991 to 1995*, 21 J. AIDS 172, 172-73 (1999).

137. See *id.* at 172. Over the years of the study, the HIV prevalence among sex workers varied: 1991: 5.0%; 1992: 6.0%; 1993: 4.4%; 1994: 7.7%; 1995: 5.8%. See *id.* at 174.

138. See Sumner J. Glassco, *Prostitution in Memphis—Past, Present, and Future*, 91 J. TENN. MED. 355, 356 (1998).

139. Carpenter et al., *supra* note 136, at 176.

140. See Pearl, *supra* note 10.

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care workers.<sup>141</sup> The CDC has done nothing comparable in relation to commercial sex workers. Perhaps the sophisticated CDC researchers have concluded that there is so little reason to believe that commercial sex is a major source of HIV infection that there is no justification to use their limited resources to address the issues. That might make sense from an epidemiologic perspective. But, given the amount of public resources devoted to the prosecution of commercial sex, driven in significant part by fear of HIV transmission, the CDC should do more to investigate the links between commercial sex and HIV.

Even when a sex worker is infected with HIV, it is difficult for her to transmit the disease to a man through sexual intercourse.<sup>142</sup> Transmission by vaginal fluid has not been observed.<sup>143</sup> The difficulty of transmitting HIV from women to men through intercourse is confirmed by a study of the Health Department of New York City, which has a large proportion of persons with HIV. The study revealed that only seven percent of AIDS

141. The CDC does not recommend regular mandatory testing of health care workers for either hepatitis or HIV. The CDC suggests that most health care workers do not need to know their HIV status, or to inform their patients that they are HIV positive, if they practice recommended universal precautions. See 40 MORBIDITY & MORTALITY WKLY REP., RR-8 (1991). Testing costs time and money. False negatives that result from technological limitations on the test, and delays between contracting the diseases and testing positive, can give people a false sense of security. Thus, in the context of hospital patients and workers, the CDC encourages the use of "universal precautions." Every patient and every worker should assume that everyone else is infected with HIV and/or hepatitis and take precautions against it. See *id.*

The CDC also recognizes that there are a small number of extremely high risk procedures—or orthopedic surgery by a doctor infected with HIV—in which the generally effective universal precautions may be insufficient, and the patient is entitled to information, if the doctor knows that he or she is HIV positive. The CDC recommends that health care workers who perform "exposure prone invasive procedures" should know whether they are infected with HIV or hepatitis and "should not perform exposure-prone procedures unless they have sought counsel from an expert review panel and been advised under what circumstances, if any, they may continue to perform these procedures. Such circumstances would include notifying prospective patients of the [health care worker's] seropositivity before they undergo exposure-prone invasive procedures." *Id.* "Exposure-prone procedures" are defined as "digital palpitation of a needle tip in a body cavity or the simultaneous presence of the health care worker's fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomical site." *Id.*

142. See Merle A. Sande, *Transmission of AIDS: The Case Against Casual Contagion*, 314 NEW ENG. J. MED. 380, 381 (1986); Nancy S. Padian, Stephen C. Shiboski, Sarah O. Glass & Eric Vittinghoff, *Heterosexual Transmission of Human Immunodeficiency Virus (HIV) in Northern California: Results from a Ten-year Study*, 146 AM. J. EPIDEMIOLOGY 350, 350 (1997) (male-to-female transmission is approximately eight times more efficient than female-to-male transmission).

143. See Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1130 (1987). During intercourse there is generally no passage of the female's bodily fluids into the male's bloodstream. See Mary E. Guinan & Ann Hardy, *Epidemiology of AIDS in Women in the United States*, 257 JAMA 2039 (1987); John Decker, *Prostitution as a Public Health Issue*, in AIDS AND THE LAW 82 (Harlan Dalton ed., 1987).



cases in New York City involve heterosexual partners of individuals infected with the virus. It also underscores the difficulty of transmitting the virus from a woman to a man through sexual intercourse. "Of 634 heterosexual contact cases reported in the city through late 1989, 627 were women who acquired the virus from men and only 7 were men, all of whom had sexual contact with female intravenous drug users."<sup>144</sup>

Beyond the fact that it is difficult for women to transmit HIV to men, there is substantial evidence that women who work in commercial sex are far more likely than other people to use condoms and engage in safer sex practices that prevent the transmission of disease.<sup>145</sup> Indeed, women who consistently use condoms with their customers often do not do so in their non-commercial sexual relationships.<sup>146</sup> Further, most commercial sex interactions involve oral, rather than vaginal, sex.<sup>147</sup> There is virtually no risk of transmitting HIV from a woman to a man through unprotected oral sex,<sup>148</sup> though many commercial sex workers nonetheless insist on the use of a condoms even for oral sex.<sup>149</sup> Careful studies reveal *no* association

144. Philip J. Hiltz, *Spread of AIDS by Heterosexuals Remains Slow*, N.Y. TIMES, May 1, 1990, at C1.

145. See Centers for Disease Control, *Antibody to Human Immunodeficiency Virus in Female Prostitutes*, 257 JAMA 2011, 2012 (1987); Decker, *supra* note 143, at 84. Taylor reports that 98% of drug injecting commercial sex workers in Glasgow always used condoms in commercial sex, but only 9% used them with steady partners and 22% did so with casual non-commercial partners. See Taylor et al., *supra* note 126, at 1563. A London study of men who had sexual relations with female sex workers reports that 82% always used a condom in commercial relationships, while only 18% of the non-paying partners of sex workers did so. See Sophie Day, Helen Ward & Louise Perrotta, *Prostitution and Risk of HIV: Male Partners of Female Prostitutes*, 307 BRIT. MED. J. 359, 359 (1993). A study of drug addicted women in Harlem found that 41.5% reported that they had always used condoms during vaginal sex with paying partners during the previous month, while only 17.2% reported that they always used condoms with non-paying partners. See Nabila El-Bassel, Robert F. Schilling, Kathleen L. Irwin, Sairus Faruque, Louisa Gilbert, Jennifer Von Burgen, Yolanda Serrano, & Brain R. Edlin, *Sex Trading and Psychological Distress Among Women Recruited from the Streets of Harlem*, 87 AM. J. OF PUB. HEALTH 66, 68 (1997).

146. See Lori E. Dorfman, Pamela A. Derish & Judith B. Cohen, *Hey Girlfriend: An Evaluation of AIDS Prevention Among Women in the Sex Industry*, HEALTH EDUC. Q., Spring 1992, at 25, 35; Day et al., *supra* note 145, at 358.

147. Three quarters of patrons seek oral sex. See Decker, *supra* note 143, at 84; CHARLES WINICK & PAUL M. KINSIE, *THE LIVELY COMMERCE* 207 (1971).

148. See Martin Schechter, *Can HIV-III Be Transmitted Orally?*, LANCET, Feb. 15, 1986, at 379; David Lyman, *Minimal Risks of Transmission of AIDS-Associated Retrovirus Infections by Oral-Genital Contact*, 255 JAMA 1703 (1986); Alan R. Lifson, *Do Alternate Modes for Transmission of Human Immunodeficiency Virus Exist?*, 259 JAMA 1353, 1354 (1988).

149. See Lisa Jean Moore, *The Variability of Safer Sex Messages: What Do the Centers for Disease Control, Sex Manuals, and Sex Workers Do When They Produce Safer Sex?*, in PROSTITUTION, *supra* note 2, at 435, 453 (providing a detailed description and critique of these various sources of information). The commercial sex workers active in the California Prevention Education Project stay abreast of the information developed by the CDC, and consult with CDC researchers about the safety of

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between a history of sex with women in commercial sex and positive HIV status.<sup>150</sup>

Even though commercial sex workers are not a particular source of contagion, they are themselves at risk of contracting the virus. They confront a far greater risk of contracting HIV from their male customers than the customers face of contracting the virus from them.<sup>151</sup> Commercial sex workers also risk HIV through the injection of drugs.<sup>152</sup>

Commercial sex workers have been targeted for special measures ostensibly designed to prevent the spread of HIV. These include laws that require testing for women convicted of prostitution,<sup>153</sup> and laws that make it a more serious crime for an HIV positive person to engage in prostitution.<sup>154</sup> People who know that they are HIV positive and engage in risky

particular unusual practices. See *id.* at 450. These sex workers have different assessments of risk. For example, some insist on the use of a condom for oral sex, while others believe that unprotected oral sex poses no risk. See *id.* at 453. Some insist on gloves, others do not. See *id.* at 454-56. The commercial sex workers appreciate that safer sex is not solely a matter of knowledge and technique. "Sex workers, whether based on capitalistic business sense or political and moral conviction, share an ideology of sex as positive, consensual, recreational activity. Crudely stated, the more successful they are popularizing and eroticizing safer sex, the easier and more lucrative their jobs will be." *Id.* at 436. Most important, these women see themselves as professional sex educators, helping their client/students to become both safer and more erotic. See *id.* at 450-58.

150. See Thomas C. Quinn, David Glasser, Robert O. Cannon, Diane L. Matuszak, Richard W. Denning, Richard L. Kline, Carl H. Campbell, Ebenezer Israel, Anthony S. Fauci & Edward W. Hook III, *Human Immunodeficiency Virus Infection Among Patients Attending Clinics for Sexually Transmitted Diseases*, 318 N. ENG. J. MED. 197, 199 (1988). This study questioned 2,700 men with sexually transmitted diseases. If transmission of HIV from women in commercial sex to customers were even minimally efficient, we would expect to see the disease in a large number of white, heterosexual men. These AIDS cases do not exist. New York City arrests 20,000 street prostitutes a year and each of these workers has an average of 1,500 clients a year. See NATIONAL TASK FORCE ON PROSTITUTION, SUMMARY OF DATA ON PROSTITUTES AND AIDS 2 (1987). If even one in 500 sexual encounters transmitted HIV from an infected woman to an uninfected customer, one analysis estimates that we should expect that at least 30,000 men, primarily white, middle-class, middle-aged, married men, would have been diagnosed with AIDS by 1989. See J. COHEN, AIDS RESEARCH AND INTERVENTION ISSUES FOR FEMALE SEX WORKERS 8 (1989). Yet, as noted, in the 1980s only seven men acquired HIV from women, all of whom were intravenous drug users. See Hilts, *supra* note 144.

151. See *supra* notes 145-46 and accompanying text. See generally Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of a Disease and Its Legal Regulation*, 3 TEX. J. WOMEN & L. 7, 39 (1994); Clements, *supra* note 26, at 62-63.

152. See Centers for Disease Control, *Antibody to Human Immunodeficiency Virus in Female Prostitutes*, 36 MORBIDITY & MORTALITY WKLY. REP. 157, 157 (1987).

153. See, e.g., *People v. Adams*, 597 N.E.2d 574 (Ill. 1992); *Love v. Superior Ct.*, 276 Cal. Rptr. 660 (Cal. App. 1990) (both approving mandatory testing laws for women convicted of prostitution).

154. See, e.g., CAL. PENAL CODE § 647f (West 1999) (felony to solicit or engage in prostitution after one previous conviction, but only after having tested and been informed of positive HIV results); COLO. REV. STAT. § 18-7-201.7 (1997) (same); FLA. STAT. ANN. § 796.08 (West 1992) (any person who commits or procures another to commit prostitution in a manner likely to transmit HIV, after knowledge of a positive HIV test, is guilty of a misdemeanor); KY. REV. STAT. ANN. § 529.090 (Mi-

sexual behavior without informing their sex partners are now subject to criminal and civil sanction, without any special new law for HIV.<sup>155</sup> Laws specifically targeted at commercial sex workers cannot be defended from a public health prospective.<sup>156</sup>

Commercial sex workers are concerned about sexually transmitted diseases, particularly HIV, but resist laws that wrongly blame them for sexually transmitted diseases.<sup>157</sup> In the late 1980s, COYOTE shifted its focus from seeking legalization of commercial sex to providing safe sex education programs for commercial sex workers and their customers.<sup>158</sup> At the request of the California Department of Health, COYOTE submitted a proposal for funding to do AIDS prevention work.<sup>159</sup> This work has been effective and led the San Francisco District Attorney to announce that commercial sex should be treated as a public health issue, rather than a crime.<sup>160</sup>

### III. ALTERNATIVES TO CRIMINAL PUNISHMENT OF PEOPLE WHO SELL SEX FOR MONEY

This Part examines the experience of developed states and nations that do not define commercial sex as a crime, but nonetheless seek to regulate it.<sup>161</sup> As in the United States, in many countries, including the Nether-

chie 1991) (same); NEV. REV. STAT. ANN. § 201.358 (Michie 1997) (any prostitute, licensed or not, who practices with knowledge of positive HIV test result is guilty of a felony).

155. Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139 (1988) provide a careful analysis of the ways in which traditional criminal and tort remedies could be brought to bear against people who intentionally or recklessly expose others to HIV, as well as the strengths and weaknesses of laws targeted specifically to punish those who wrongfully infect others with HIV. The authors conclude that criminal and civil remedies are unlikely to slow the spread of HIV. "Medical research and public education must be the first lines of defense against AIDS." *Id.* at 196.

156. A thoughtful opinion by the New Jersey Supreme Court approves mandatory HIV testing for sex offenders, at the request of the victim, where there is probable cause to believe that there was transmission of bodily fluids, and where the test results may not be used in a criminal prosecution. *See New Jersey ex rel J.G.*, 701 A.2d 1260 (N.J. 1997). Mandatory testing of women charged with prostitution is not so carefully tailored to serve defined purposes. *See supra* note 153 and accompanying text.

157. *See JENNESS, supra* note 44, at 92-96.

158. *See id.* at 99-103.

159. *See id.*

160. *See Jane Meredith Adams, Uneasily, Some Consider Legalizing Oldest Trade*, CHI. TRIB., Jan 11, 1994, § 1, at 6; Kenneth B. Noble, *Fighting Crime, Gently*, N.Y. TIMES, Jan 18, 1996, at A14.

161. Calls for "regulation" are typically vague. Margaret Radin, for example, argues that the sale of sex should be decriminalized on an individual level, but that advertising and pimping should be more firmly regulated to protect women. *See Radin (1987), supra* note 69, at 1924. She does not explain how this would work in practice. Similarly, Carlin Meyer asserts that decriminalization could offer wage, hour, health, child labor, social security, and pension benefits to prostitutes. *See Carlin Meyer,*

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lands,<sup>162</sup> Japan,<sup>163</sup> and Australia,<sup>164</sup> commercial sex is regulated at the state or local level. Regulation serves diverse, sometimes conflicting, goals including: avoiding public nuisance, protecting buyers, protecting public health, and, to a lesser extent, protecting sellers. Regulation takes many forms, including: licensing of individual workers; control of public solicitation; regulation of the places in which commercial sex is practiced; and restrictions on those who benefit from the earnings of commercial sex workers. Traditional regulation also underscores social disapproval of commercial sex. This Part describes the regulatory programs adopted in Western European countries and then discusses, in greater detail, the regulatory regimes in three jurisdictions that have decriminalized commercial sex: Nevada since 1971; Hawaii during World War II, and Australia. These traditional regulatory programs are designed to protect customers, and public sensibility, with little concern for the well being of people who sell sex for money. Indeed, traditional regulatory approaches inflict serious harm on commercial sex workers and do little to protect buyers or the general public. In short, regulation is simply a gentler alternative to the criminal law's expression of condemnation of women who sell sex for money. Parts IV and V explore regulatory alternatives that could protect sex workers and also meet other public concerns.

Feminist discussions of proposals to repeal criminal sanctions against people who sell sex for money often distinguish between "legalization" and "decriminalization." Wendy McElroy, for example, says:

"Legalization" refers to some form of state-controlled prostitution, for example, the creation of red-light districts. . . . Decriminalization is the opposite of legalization. It refers to the elimination of all laws against prostitution, including laws against those who associate with whores: i.e. madams, pimps, and johns. With startling consistency, the prostitutes' rights movement calls for the decriminalization of all aspects of prostitution.<sup>165</sup>

*Decriminalizing Prostitution: Liberation or Dehumanization?*, 1 CARDOZO WOMEN'S L.J. 105, 106 (1993). COYOTE argues that prostitution should be decriminalized and "the businesses which surround prostitution [should be] subject to general civil, business, and professional codes. The problems involved in forced prostitution, such as fraud and collusion, would be covered by existing penal code provisions." JENNESS, *supra* note 44, at 69 (citing COYOTE documents). It is not clear what this means.

162. See DECKER, *supra* note 7, at 127-30.

163. See Andrew D. Morrison, Note, *Teen Prostitution in Japan: Regulation of Telephone Clubs*, 31 VAND. J. TRANSNAT'L L. 457, 487-88 (1998).

164. See Marcia Neave, *Prostitution Laws in Australia—Past History and Current Trends*, in SEX WORK AND SEX WORKERS IN AUSTRALIA 67-99 (Roberta Perkins, Garrett Prestage, Rachel Sharp & Frances Lovejoy eds., 1994).

165. McElroy, *supra* note 2, at 337.



The meaning of the distinction is unclear. Every business, profession and most human activities in a complex world are regulated in one way or another. Probably what feminist authors such as McElroy seek to convey is to reject existing models of legalized, regulated commercial sex. While feminists reject the imposition of criminal sanctions on women who offer sex for money,<sup>166</sup> they disagree about whether and how commercial sex should be regulated. Should criminal sanctions be applied to men who buy or to people who benefit from the earnings of women who sell sex for money?

#### A. OTHER COUNTRIES

Japan, Europe, and British Commonwealth countries reject criminal prosecution of those who offer sex for money, and take a variety of approaches to issues ancillary to commercial sex that are perceived as problematic: public solicitation, promotion of commercial sex, public health problems, and exploitation of people involved in commercial sex.<sup>167</sup>

*Great Britain.* Some countries focus on the problem of public solicitation. For example, in Great Britain, the sale of sex for money has never been a crime. Until the 1950s offenses ancillary to such transactions were not subject to criminal sanction and open trade in sex for money flourished.<sup>168</sup> The 1954 Wolffenden Report, which is popularly known for its argument that the criminal law should not punish prostitution or homosexuality, recommended harsher criminal sanctions against the "public nuisance" aspects of prostitution.<sup>169</sup> Parliament increased penalties on public solicitation for commercial sex.<sup>170</sup> In response to the criminal prohibition

166. See *supra* notes 44, 68, 73, 88 and accompanying text.

167. See DECKER, *supra* note 7, at 115-44.

168. See *id.* at 115-16. In 1864, Parliament enacted a law requiring medical inspection of prostitutes in specific military depots. The law precipitated the first "explicitly feminist moral crusade against male vice." Judith R. Walkowitz, *Male Vice and Female Virtue*, in POWERS OF DESIRE, *supra* note 89, at 419, 421. The feminists, led by Josephine Butler of the Ladies National Association, denounced the mandatory examinations as

a blatant example of class and sex discrimination . . . [that] only deprived poor women of their constitutional rights and forced them to submit to a degrading internal examination . . . [and] officially sanctioned a double standard of sexual morality, which justified male sexual access to a class of "fallen" women yet penalized women for engaging in the same vice as men.

*Id.* (footnote omitted). See also JUDITH R. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS AND THE STATE (1980).

169. See REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (THE WOLFFENDEN REPORT) 142-43, 151 (Am. ed. 1963).

170. The Street Offences Act of 1959 provided that "[i]t shall be an offense for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution." Street Offences Act, 1959, 7 & 8 Eliz. 2, ch. 57, §1, sched. 1 (Eng.).

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against public solicitation, people offering sex for money used ads and agents to offer their services. Decker observes that "the visible aspects of prostitution have been suppressed"; "prostitution still flourishes"; and this approach "appears to raise problems for not only the prostitute but also the public at large."<sup>171</sup>

*Canada.* In 1972, Canada followed the British model, eliminating prohibitions on commercial sex and enacting a ban on solicitation for the purposes of prostitution.<sup>172</sup> A Royal Commission on the Status of Women recommended that vagrancy and solicitation statutes be repealed because arrests for public solicitation were "futile and stigmatizing."<sup>173</sup>

*France.* France targets prohibitions against procuring, pandering and pimping, as well as keeping, or assisting one in keeping a house of prostitution.<sup>174</sup> Until the early 1960s brothels were licensed and women who worked in them were required to undergo periodic medical exams.<sup>175</sup> With the closing of the brothels, venereal diseases, public solicitation, and police corruption all increased and women were more dependent upon pimps.<sup>176</sup>

171. DECKER, *supra* note 7, at 120.

172. See MARTIN'S ANNUAL CRIMINAL CODE: 1973, § 195.1 (1973). In the 1990s, erotic dancing that had traditionally operated under rules prohibiting touching began to create an expectation that dancers would touch and allow touching in increasingly intrusive ways. As expectations changed, women who preferred dancing under the "no touch" rules found that they were under great pressure to allow unwanted touching. See Jacqueline Lewis, *Lap Dancing: Personal and Legal Implications for Exotic Dancers*, in PROSTITUTION, *supra* note 2, at 376, 379-80. In 1996, a trial court dismissed charges of allowing indecent performances brought against the owner and manager of a Toronto strip club. The court found that lap dancing that included extensive physical touching did not violate community standards of decency. See *Regina v. Mara*, No. C18057, 1996 Ont. C.A. LEXIS 32 (Feb. 9, 1996). The decision escalated expectations of what erotic dancers would do. Lewis reports that these changes were profoundly disturbing to many dancers. Lewis, *supra*, at 381-85. The Canadian Supreme Court reversed, holding that public lap dancing that involves sexual touching is indecent and "exceeded the standard of tolerance in contemporary Canadian society." *Regina v. Mara*, No. 25159, 1997 Can. Sup. Ct. LEXIS 41 (June 26, 1997). The Court found that such activity "is harmful to society in many ways: it degrades and dehumanizes women; it desensitized sexuality and is incompatible with the dignity and equality of each human being; and it predisposes persons to act in an antisocial manner." *Id.* at 13. Because the decision is ambiguous as to whether it applies only to public lap dancing, or also to that taking place in private rooms, some clubs have responded by increasing opportunities and pressures for private lap dancing. See Lewis, *supra*, at 384. Prosecutions, mostly against women, have increased and many clubs have closed. See *id.* at 385-86. Most of the women whom Lewis interviewed preferred the prior system that allowed erotic dancing and enforced a "no touch" rule. Many are critical, however, of the stringent criminal enforcement of the "no touch" rule because it deprives them of the ability to make a living as an exotic dancer and leads many to turn to prostitution to support themselves and their families. See *id.* at 387-88.

173. REPORT OF THE ROYAL COMMISSION OF THE STATUS OF WOMEN IN CANADA 370-71 (1970) (discussing DECKER, *supra* note 7, at 123-24).

174. See DECKER, *supra* note 7, at 125.

175. See HARRY BENJAMIN & R.E.L. MASTERS, PROSTITUTION AND MORALITY 426 (1964).

176. See DECKER, *supra* note 7, at 126-27.



These consequences led councilperson Marthe Richard, a feminist who had sponsored the legislation to close the brothels, to seek to reinstitute legal houses of commercial sex.<sup>177</sup> Strong penalties against pimping, procuring and brothels were never vigorously enforced and commercial sex has always been common.<sup>178</sup>

*Sweden.* Sweden does not prohibit consensual sexual relations between adults, even when money is exchanged.<sup>179</sup> It does impose criminal sanctions on actions judged to be abusive of public good or exploitative of those who engage in commercial sex.<sup>180</sup> There is little commercial sex in Sweden.<sup>181</sup> However, it is not clear whether the absence of commercial sex is attributable to the lack of criminal prohibition against it, to the general open acceptance of sexuality, or to something else.<sup>182</sup>

*Japan.* Japan has a long history of toleration of commercial sex, based in part on a strong version of a sexual double standard that endures at the end of the twentieth century.<sup>183</sup> In 1956, in response to persistent demands from the United States, and lobbying from some local women, Japan adopted a Prostitution Prevention Law.<sup>184</sup> The law is aimed primarily at third parties who benefit from commercial sex, though it also provides for mandatory training for women who offer sex for money.<sup>185</sup> But the police do not enforce the law. Japanese law enforcement officials have effectively decriminalized commercial sex, with no change in the law.<sup>186</sup>

177. *See id.* at 127.

178. *See id.* at 125-27.

179. *See* NEIL ELLIOT, *SENSUALITY IN SCANDINAVIA* 255 (1970).

180. A person who, in a public place, "offends morality and decency" or "disturbs the peace" may be subject to criminal punishment. 17 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE PENAL CODE OF SWEDEN ch. 16, § 11 (offends morality or decency), § 16 (disturbs the peace) (1972). While living off the earnings of a person engaged in commercial sex is not illegal, "if a person habitually or for personal gain encourages or exploits another person's immoral mode of life, or if a person entices someone under twenty-one years of age to enter such a life," such a person is guilty of "procuring." *Id.* ch. 6, § 16. Or, "[if] a person in order to gain particular profit encourages temporary sexual relations between others" the person is guilty of "promoting immorality." *Id.* Finally, "seduction of youth" under age 18 is defined as a crime. *Id.* § 8.

181. *See* ELLIOT, *supra* note 179, at 255; DECKER, *supra* note 7, at 130.

182. Richard Posner observes that the low incidence of prostitution in Sweden, where it is not illegal, is likely attributable to the fact that "women's opportunities in the job market are probably better there than in any other country." POSNER, *supra* note 70, at 43. *See also* Neave Letter, *supra* note 27.

183. *See* Morrison, *supra* note 163, at 473-74.

184. *See id.* at 466-71.

185. *See id.* at 483-84.

186. *See* Minoru Yokoyama, *Analysis of Prostitution in Japan*, 19 INT'L J. COMP. & APPLIED CRIM. JUST. 47 (1995). Official studies estimate that 300,000 women work in commercial sex in Japan and the work is stratified as it is in the United States. *See* Morrison, *supra* note 163, at 474-77.

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The 1980s and 1990s saw a new form of commercial sex in Japan: the telephone club. Men and women arrange "compensated dates" by phone.<sup>187</sup> Four percent of high school girls report that they participate in compensated dates, facilitated by the telephone club arrangement.<sup>188</sup> A 1996 federal law regulates telephone clubs, requires them to register, and prohibits them from making their services available to people under the age of eighteen.<sup>189</sup> Andrew D. Morrison's study of the telephone club law finds it just as ineffectual as the 1956 law against prostitution.<sup>190</sup> Morrison documents that high school girls participate in compensated dates because they want money to buy clothes and other consumer goods.<sup>191</sup>

*Australia.* Since the 1970s, most Australian states have repealed laws that make commercial sex a crime and have adopted a variety of measures that regulate the sex industry through controls imposed on brothel and escort agency operators, rather than on sex workers.<sup>192</sup> Prostitute collectives exist in all Australian States and law reform bodies and legislators seek their views.<sup>193</sup> Australian states have followed a variety of approaches and their experience provides a source of insight about alternative models for reform.

A 1985 *Report of the Inquiry of the Victorian Government* provides a useful summary of what has been learned from the Australian experience.<sup>194</sup> In addition to examining the diverse experiences of various Australian states, the inquiry commission consulted with prostitute collectives, organized extensive surveys, and conducted in depth, structured interviews with 115 commercial sex workers.<sup>195</sup> The Inquiry's recommendations fell into five categories. First, it "recommended repeal of specific offences for most prostitution-related activities, including the use of premises for habitual prostitution, . . . the ownership, management or use of brothels, living on the earnings of prostitution and procuring of adult prostitutes."<sup>196</sup> The prohibition on the use of premises for prostitution had been applied to women who used their own homes for commercial sex. The Victoria In-

187. Morrison, *supra* note 163, at 478.

188. *See id.* at 479 (citing YUKIKO TANAKA, CONTEMPORARY PORTRAITS OF JAPANESE WOMEN 90 (1995)).

189. *See id.* at 488-92.

190. *See id.* at 492-94.

191. *See id.* at 480-81.

192. *See Neave, supra* note 164, at 92.

193. *See id.*

194. *See id.* at 82.

195. *See id.* at 83.

196. *Id.*

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quiry declined to condemn brothels because it found that women are often less vulnerable to violence or exploitation in such organized settings, than when working on the street or through an escort service.<sup>197</sup> It declined to condemn "living on the earnings of prostitution" because such laws have been applied to punish the children, spouses, and friends of women who work in commercial sex.

Second, the Inquiry recommended that laws against public solicitation and loitering be retained, but that localities retain the power to "opt out" and designate particular areas as available for street solicitation.<sup>198</sup> Experience suggests that if brothels are closed street prostitution and escort services become more popular. Thus, as a practical matter, the question is whether we prefer street prostitution and escort services to brothels. Street prostitution raises the most serious risks of violence, sexually transmitted disease, and offence to community sensibility and public life. Thus, the Inquiry recommended that prohibitions on street solicitation be retained, but within a context that allowed alternative means of negotiating commercial sex relations.<sup>199</sup>

Third, the Inquiry supported the application of planning laws to brothels employing two or more people. The limitation to larger brothels was "intended to give sex workers the freedom to choose between working in a larger brothel and being self-employed."<sup>200</sup> Zoning concerns have been a matter of serious conflict in the Australian states that have decriminalized commercial sex. On the one hand, local planning groups want to control the nature of their neighborhoods and communities. On the other hand, many communities seek to exclude all forms of group homes that are regarded as undesirable, whether it is homes for the retarded, students, addicts or brothels.<sup>201</sup> In addition, there is a long standing dispute among urban planners whether sexually oriented entertainments and book stores should be confined to a "red light" district, or dispersed throughout a

197. "Because [escort agency prostitution] makes prostitution less visible it is seen by the majority of the community as less problematical than other forms of prostitution, but women working as escorts run a high risk of death and physical injury." *Id.* at 93.

198. *See id.* at 83.

199. In Victoria, the Inquiry estimated that between 3,000 and 4,000 women, men and transsexuals worked in commercial sex on a regular basis. Only 150 of these people worked on the street, and the vast majority were women. Virtually all law enforcement activity is targeted at street activity. *See id.* at 82.

200. *Id.* at 83. Neave, who was Chair of the Inquiry Commission, states that "[w]ith hindsight the recommendation applying to premises used by only [two people] seems too restrictive." *Id.*

201. *See generally* Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 *STAN. L. REV.* 767 (1969).

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city.<sup>202</sup> Relying on the experiences of Australian states in dealing with the zoning issue, the Inquiry recommended that local authorities be given authority to apply traditional zoning concerns.<sup>203</sup> In short, local authorities were empowered to exercise control over legitimate zoning concerns, but not to exercise a per se moral veto against brothels that did not raise problems traditionally addressed by the zoning laws.<sup>204</sup>

Fourth, the Inquiry rejected the view that sex workers should be registered.<sup>205</sup> Licensing "would legitimize prostitution and stigmatize prostitutes, making it difficult for them to move out of prostitution."<sup>206</sup> Generally licensing commercial sex workers, as it has been practiced, diminishes, rather than enhances, the worker's control over her working conditions.<sup>207</sup> Finally, the Victoria Inquiry "proposed introduction of new offences relating to prostitution of minors and assault or intimidation of adult prostitutes[.]"<sup>208</sup> including provision of services to teens who would otherwise be homeless. These problems are probably the most serious issues raised by commercial sex, and are addressed more fully in Part IV *infra*.

## B. UNUSUAL STATES

*Nevada.* In 1971, Nevada state law regulating gambling houses and dance halls was amended to provide that, "[i]n a county whose population is 250,000 or more, the license board shall not grant any license to a petitioner for the purpose of operating a house of ill fame or repute or any other business employing any person for the purpose of prostitution."<sup>209</sup> The Nevada Supreme Court held that this language implicitly allowed counties with smaller populations to license brothels.<sup>210</sup> Prostitution remains illegal

202. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (approving a zoning ordinance designed to prevent the concentration of adult movie theaters in a single neighborhood); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (approving a zoning ordinance requiring such concentration). See also Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1208-14 (1996) (describing the formalized toleration of prostitution in legal red light districts in U.S. cities at the turn of the twentieth century).

203. See Neave, *supra* note 164, at 83.

204. See *id.*

205. See *id.* at 84.

206. *Id.*

207. See Rachael West, *U.S. PROstitutes Collectives*, in SEX WORK 279, *supra* note 49.

208. Neave, *supra* note 164, at 83.

209. NEV. REV. STAT. ANN. § 244.345 (Michie 1995). The population limit was subsequently increased to 400,000. Nevada imposes criminal penalties on street prostitution, pimping and pandering, and the location of brothels near schools and churches. NEV. REV. STAT. §§ 1.030, 1911, 244.345 (1913). See generally Pillard, *supra* note 9.

210. See *Nye County v. Plankington*, 587 P.2d 421 (Nev. 1978).



in Nevada outside of the licensed brothels in the less populated counties.<sup>211</sup> Of the less populous counties, four counties prohibit prostitution, six ban it in the unincorporated areas of the county, and seven permit it throughout the county.<sup>212</sup> In 1999 nearly a thousand women worked in thirty-three licensed brothels in Nevada.<sup>213</sup> Illegal commercial sex, "street prostitution, escort service sex work and call girl services flourish" in Reno and Las Vegas, where commercial sex is illegal.<sup>214</sup> Business in the legal brothels seems to be on the decline.<sup>215</sup>

State law requires that women who provide commercial sexual services register with the police, be fingerprinted, photographed, and submit to weekly health exams for sexually transmitted diseases, and monthly exams for HIV.<sup>216</sup> Counties regulate where brothels may be located and impose signage requirements. In addition, county police authorities have large discretion to define the terms on which commercial sex is permitted. "[C]ounty sheriffs enforce a variety of local customs such as prostitutes may not have their children live in the community in which they work, they cannot drive a car in the city limits, and they must be off the streets by 5 p.m."<sup>217</sup> Brothel owners impose additional requirements on the women.

In most brothels the women live on the premises during the three week period they are working and are on call for twelve to fourteen hours a day.<sup>218</sup> Brothel owners charge women for their rooms, between \$14 and \$40 a day in 1999. Some brothel owners also charge for food, though oth-

211. See NEV. REV. STAT. ANN. § 201.354 (Michie 1995).

212. See Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 88 (1998).

213. See Paul Pringle, *Brothels Thrive in Nevada Despite Push for Family-Oriented Tourism*, DALLAS MORNING NEWS, May 28, 1999, at A41. The biggest brothels employ as many as 50 women, while others are much smaller. See *id.* The most successful brothels are located close to Las Vegas, Reno, or Lake Tahoe, or along interstate highways. See Bingham, *supra* note 212, at 86.

214. Pillard, *supra* note 9, at 46. "[T]he number of women working in legal brothels is fairly small in comparison to the total numbers of prostitutes statewide." *Id.* After a crackdown on street solicitation in 1982, in 1984 an estimated 2,000 to 2,500 beeper-carrying women served men in the hotels in Las Vegas alone. By contrast, about 900 women worked full-time in the legal brothels. See Timothy Appleby, *Booming Las Vegas Wrestling With a Split Personality*, HOUS. CHRON., Aug. 28, 1994, at A12.

215. The City Clerk of Ely reports that in the 1950s and 1960s the three brothels in that city employed eight to twelve women each, but in 1997 each employed only two women. See Bingham, *supra* note 212, at 86 n.109.

216. See Pillard, *supra* note 9, at 46-47; Bingham, *supra* note 212, at 90.

217. Pillard, *supra* note 9, at 47. See also Bingham, *supra* note 212, at 89.

218. See Bingham, *supra* note 212, at 94.

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ers do not.<sup>219</sup> The brothel owner takes fifty percent of gross earnings, in addition to the charges for room and board. But even after this cut, women in smaller brothels net \$500 to \$1500 a week, while those in larger establishments earn more.<sup>220</sup> Brothel owners typically regard women as independent contractors and do not provide them with health insurance, workers' compensation, unemployment insurance, vacation pay, or retirement benefits.<sup>221</sup>

Licensed sex workers have very low rates of venereal disease infections.<sup>222</sup> Since 1986, no licensed brothel worker has tested positive for HIV.<sup>223</sup> "[T]he operation of regulated brothels has eliminated any violence in the houses themselves."<sup>224</sup> Brothel owners help the women in insisting on cleanliness and safe sex.<sup>225</sup> Finally, Nevada's legalization program provides significant financial benefits to state and federal governments in taxes on earnings, and to brothel owners, who customarily collect fifty to sixty percent of the worker's earnings.<sup>226</sup>

The women who work in the Nevada brothels offer mixed evaluation of their experience. Virtually all report that they do the work only because they need money and do not see alternative ways of making it.<sup>227</sup> Many resent the extensive, and seemingly arbitrary restrictions on their liberty.<sup>228</sup> The owner's share of fifty percent, plus rent and other expenses, seems ex-

219. See Pringle, *supra* note 213. In some houses women pay for other services such as laundry, weekly venereal disease check, tips for house employees and maid services. See Bingham, *supra* note 212, at 94.

220. See Pringle, *supra* note 213. Pillard estimates that in the late 1980s, the average brothel worker brought in \$100,000 a year; \$60,000 of that goes to the brothel owner and \$40,000 to the woman. See Pillard, *supra* note 9, at 47. In 1999, full-time workers at the Mustang Ranch netted \$50,000 a year, after paying the ranch and taxes. See Evelyn Nieves, *Shutdown Looming at Nevada's Oldest Bordello*, N.Y. TIMES, July 19, 1999, at A10. Another report says that workers in the legal brothels typically net about \$75,000 a year and pay taxes, while the illegal sex workers in Las Vegas earn an average of \$2,000 to \$3,000 a week tax-free. See Appleby, *supra* note 214.

221. See Bingham, *supra* note 212, at 93. The legal question whether this relationship is appropriately regarded as one of an independent contractor or an employee is complex. See discussion *infra* Part V.B.

222. See Pillard, *supra* note 9, at 47.

223. See Pringle, *supra* note 213.

224. Pillard, *supra* note 9, at 47.

225. See Pringle, *supra* note 213.

226. Legal brothels generate an annual \$200 million of taxable income. See Appleby, *supra* note 214. The Mustang Ranch is the third largest employer in Storey County, after the Kan Kan factory and the school district. See Nieves, *supra* note 220. It pays the county \$500,000 a year in taxes, one-eighth of the county's \$4 million budget. In 1997 Lyon county collected \$200,000 from brothels in fees, in addition to personal, property and business taxes. See Jennifer Coleman, *Bordellos of Nevada Have Friend in Lobbyist*, SAN DIEGO UNION-TRIB., June 25, 1999, at A3.

227. See, e.g., Pringle, *supra* note 213.

228. See Bingham, *supra* note 212, at 93.

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cessive. It is not clear what useful purpose is served by police registration, and it imposes enormous costs on women. According to Ellen Pillard:

Regulation which requires the identification of women in prostitution and periodic health exams has led to the stigmatization of these women. . . . These practices make it difficult for prostitutes to maintain a "normal" life outside their work and compound the problems they have when they want to stop work as a prostitute.<sup>229</sup>

On a more positive note, some women consider themselves professionals and assert that they are treated with respect by the customers and brothel owners.<sup>230</sup> Perhaps the most significant fact about legalized commercial sex in Nevada is that a thousand women choose to do it. Far more women work in the illegal free market in Nevada, with fewer restrictions and no requirement to share income with a brothel keeper.<sup>231</sup> The fact that one thousand Nevada women choose to work in the brothels speaks volumes about the poor economic opportunities available to women, and about the dangers involved in illegal sex work.

In short, the Nevada system is not a feminist model of legalized commercial sex. It serves the interests of men, of brothel keepers and of tax collectors. But it does so while imposing heavy, and seemingly unjustified burdens on working women.

*Hawaii.* Beth Bailey and David Farber provide a richly detailed picture of regulated commercial sex in Hawaii during World War II.<sup>232</sup> From the early 1930s until 1941, the regulation of commercial sex in Hawaii followed a model similar to that in Nevada today. Local police authorities, led by Police Chief William Gabrielson, allowed brothels that provided the police a hefty monthly payoff of \$30 per woman,<sup>233</sup> and enforced rigid constraints on the women who worked in the brothels.<sup>234</sup> In the pre-War years most women

found their lives in Paradise a boring, degrading routine ruled by often brutal masters. A few months was all they could take. Some probably

229. Pillard, *supra* note 9, at 46.

230. See, e.g., Pringle, *supra* note 213.

231. See *infra* note 235.

232. See generally BETH BAILEY & DAVID FARBER, *THE FIRST STRANGE PLACE: AN ALCHEMY OF RACE AND SEX IN WORLD WAR II HAWAII* (1992).

233. See *id.* at 112.

234. Sex workers were recruited from the mainland, registered and finger printed by the police, and instructed in the vice squad rules. A sex worker could not visit Waikiki Beach, bars, or better class cafes. She could not own property or an automobile, or have a "boyfriend." She could not leave the brothel after 10:30 p.m., attend dances, ride in the front seat of a taxi or with a man in the back. She could not phone the mainland or wire money there. See *id.* at 109.

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236. *Id.* at

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**EXHIBIT 5**  
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earned what money they needed in those few months and left the trade. Others were ordered by the vice squad to return to the West Coast.<sup>235</sup>

In 1939, with the influx of military personnel and war workers, that pattern began to change. A key agent of change was one sex worker, Jean O'Hara. She had come to Hawaii in 1938, after a life in commercial sex in Chicago and San Francisco. When she refused to abide by the curfew and other restrictive rules, the vice police beat and arrested her. She sued them for \$100,000 in damages. The police dropped their charges, and she dropped hers. The police regulation of sex workers "while not revoked at this time, suddenly could not be enforced with the same enthusiasm."<sup>236</sup>

After the attack on Pearl Harbor, on December 7, 1941, the brothels, like most businesses in Hawaii, shut down for several weeks. "[T]he women of the houses, who were far closer to the injured sailors and enlisted men than most of the islands' residents, hurried to help."<sup>237</sup> Madams turned brothels over to the military to provide living space for the wounded. The women quietly moved into houses around Honolulu.

As the number of U.S. servicemen and war workers in Hawaii grew, so too did the demand for commercial sex. The Islands were placed under federal martial law. Frank Steer, the Army major who headed the Military Police, did not share the retributive attitude of the local vice police.<sup>238</sup> Major Steer's tolerance of the commercial sex workers was directly contrary to explicit federal Congressional policy.<sup>239</sup> Soon after the brothels reopened after Pearl Harbor, the madams gathered and agreed to raise their price, for a three-minute session, from \$3 to \$5.<sup>240</sup>

In the months after Pearl Harbor, local Police Chief Gabrielson sought to reassert authority over the women who had moved into private homes around Honolulu. When the local police sought to evict and arrest them, the women sought help from the military authorities. When the military authorities offered them moral, but not practical, support against the local

235. *Id.*

236. *Id.* at 116.

237. *Id.* at 117.

238. *See id.*

239. In July 1941, in preparation for an expanded armed forces, President Roosevelt signed the May Act providing that where local officials were unwilling or unable to eliminate prostitution, federal officials were authorized to assume authority to do so. Between 1941 and 1945, federal military authorities closed 700 vice districts located near U.S. military installations. *See id.* at 98-99. The military authorities in Hawaii decided to ignore the May Act. United States military authorities have often condoned, or facilitated, commercial sex opportunities for fighting men. *See* CYNTHIA ENLOE, DOES KHAKI BECOME YOU? 32-45 (1988).

240. *See* BAILEY & FARBER, *supra* note 232, at 116-17.

police, the women went on strike. For three weeks they picketed outside police headquarters.<sup>241</sup> The commercial sex workers agreed to Major Steer's demand that they keep their prices at \$3. "But they were damned if they were going to allow the police to bully them and force them to miss the good living that their profits could afford. . . . They struggled not for better pay but better treatment, for full rights of citizenship."<sup>242</sup>

The military asserted its authority and reached a compromise that allowed the women "to live outside the brothels and appear in public so long as they kept their business to the brothels and behaved in an orderly fashion both inside the district and out."<sup>243</sup> The women cheered the decision and the local authorities accepted it, knowing that they had little choice.

Legalized commercial sex in Hawaii from 1941 to 1944 presents a complex picture. Hotel Street, where the brothels were located, offered bars, pin ball, penny arcades, tattoo parlors, photos with Hula girls, shoe shines, popcorn, postcards, and keepsakes. People stood in line for everything. In 1942, 250,000 men a month stood in line for hours and "paid three dollars for three minutes of the only intimacy most were going to find in Honolulu."<sup>244</sup> "[S]ome of the young men going up the steps to the brothels would die, never having had any other woman than the three-dollar whore they had bought while drunk in broad daylight in Honolulu."<sup>245</sup> "Most of the time, the overwhelming experience of Hotel Street was one of boredom and disappointment. The men were looking for intensity or contact with another human being. By and large, they found neither."<sup>246</sup> Immediately following their visit to the brothel, men went to military prophylaxis stations next door and again they stood in line.<sup>247</sup>

In 1944, as the military threat to Hawaii ended, civilian authorities reasserted control, first forcing women back into the brothels, and then closing them all together.<sup>248</sup> The military authorities did not resist, in part because penicillin had just become available to treat the venereal diseases servicemen picked up as a result of a less controlled form of sex-for-money.<sup>249</sup>

241. *See id.* at 123.  
 242. *Id.* at 123.  
 243. *Id.* at 124.  
 244. *Id.* at 95.  
 245. *Id.* at 97.  
 246. *Id.* at 97-98.  
 247. *See id.* at 106.  
 248. *See id.* at 129-30.  
 249. *See id.* at 130.

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What does this fascinating story tell us about commercial sex in the U.S. today? One obvious response is that the situation in war time Hawaii was so foreign and unusual that nothing useful can be learned from this experience; the U.S. has often tolerated or even sponsored commercial sexual services for military men in time of war.<sup>250</sup> Nonetheless, the Hawaii experience may offer some general insight. The concentrated brothel structure of commercial sex in Hawaii—with services confined to brothels and the brothels confined to a particular area—was a source of both oppression and opportunity for the women who worked there. Concentrated organization enabled the madams and the authorities to keep prices low, when the market would have allowed the women to charge more, and to impose restrictive conditions on the women who worked in the brothels. On the other hand, the concentrated structure facilitated measures to protect women and men from violence and sexually transmitted disease, and provided women the opportunity to organize collectively to negotiate with those in control to obtain better working conditions, if not better pay.

### C. PUNISHING THE BUYERS

Many feminists who reject the imposition of criminal penalties on women who offer sex for money suggest that a better alternative would be to punish those who offer to buy.<sup>251</sup> Most U.S. states impose more serious penalties on people who sell sex than on those who buy. A few jurisdictions impose no criminal sanctions on the men who buy.<sup>252</sup> More commonly, states following the Model Penal Code<sup>253</sup> classify prostitution as a misdemeanor, but patronizing a prostitute as merely an infraction.<sup>254</sup> In some states the formal law now treats buyers and sellers equally.<sup>255</sup>

250. See generally ENLOE, *supra* note 239.

251. See, e.g., Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11 (1999); Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE I.L. & FEMINISM 329 (1992); Baldwin, *supra* note 44.

252. See, e.g., *Plas v. State*, 598 P.2d 966 (Alaska 1979) (female only prostitution statute unconstitutional, but sex bias can be severed from statute; prosecution of female prostitute stands); *State v. George*, 602 A.2d 953 (Vt. 1991) (rejecting an equal protection challenge to a statute providing that "a person shall not procure or solicit or offer to procure or solicit a female person for the purpose of prostitution"). See also Lefler, *supra* note 251, at 17 n.47.

253. MODEL PENAL CODE § 251.2 (1980). The American Law Institute explains that harsher penalties for buyers are unrealistic since prosecutors, judges, and juries would disregard such laws due to "the common perception of extra-marital intercourse as a widespread practice." *Id.* at cmt. 6.

254. See Lefler, *supra* note 251, at 18 nn.56-61.

255. See, e.g., MASS GEN. LAWS ANN. ch. 272, § 53A (West 1997); Lefler, *supra* note 251, at 18-19 nn.62-63.

Even where formal legal rules apply equally to buyers and sellers, law enforcement resources, including undercover agents, are typically directed to prosecuting the women who sell, rather than the men who buy.<sup>256</sup> After Massachusetts amended its law in 1983 to make buyers and sellers equally guilty, 263 women, and not a single man, were arraigned on charges of prostitution in Boston in 1990.<sup>257</sup> A common explanation for the disparity is that police use male decoys who pose as potential customers, and not female officers posing as sex workers.<sup>258</sup> Some sex workers have challenged these patterns of discriminatory law enforcement practice as a violation of constitutional gender equality norms. But even where the facts establish dramatically different enforcement efforts that target the women who sell, and ignore the men who buy, courts have refused to find an equal protection violation.<sup>259</sup> General standards of gender equality under the

256. In San Francisco in 1977, 2,938 people were arrested for prostitution and only 325 were arrested as customers. See Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 435 (1998). In Massachusetts, from 1988 to 1993, 30% of women in county jails were incarcerated on charges of prostitution, while those charges applied to only two percent of men. See *id.* at 436.

1996 FBI statistics are not illuminating. They report the following numbers of arrests for "Prostitution and Commercialized Vice." This category includes: prostitution; keeping a bawdy house, disorderly house, or house of ill fame; pandering, procuring, transporting or detaining women for immoral purposes; or any attempt to commit any of the above offenses. The FBI statistics do not differentiate between sex workers, male or female, customers, or pimps. Here are the numbers, for what they are worth:

Total arrests in 1996:	81,036
Arrests under 15:	140
Arrests 15-18:	2,397
Male arrests:	31,217
Arrests under 18:	504
Female arrests:	46,954
Arrests under 18:	550

BUREAU OF JUST. STAT., *supra* note 12, at 326-27 tbl.4.6, 334-35 tbl.4.7, 337 tbl.4.9.

257. See Kandel, *supra* note 251, at 334-35.

258. See *id.* at 335.

259. See *People v. Superior Ct.*, 562 P.2d 1315 (Cal. 1977); *State v. Tookes*, 699 P.2d 983 (Haw. 1985); *Young v. State*, 446 N.E.2d 624 (Ind. Ct. App. 1983); *People v. Burton*, 432 N.Y.S.2d 312 (City Ct. 1980) (all accepting factual allegations that enforcement efforts are targeted at women who sell rather than men who buy, but rejecting equal protection claims of discriminatory law enforcement). But see *Commonwealth v. An Unnamed Defendant*, 492 N.E.2d 1184 (Mass. App. Ct. 1986), in which the court reversed a woman's conviction finding that discriminatory patterns of law enforcement were based on gender. See also *In re P.*, 400 N.Y.S.2d 455 (Fam. Ct. 1977), *rev'd on other grounds*, *In re Dora P.*, 418 N.Y.S.2d 547 (App. Div. 1979). In 1976, of the 2,944 female prostitutes arrested, only 60 of their male patrons were charged with a violation. This data supports the conclusion that those assigned the task of enforcing the law harbor the attitude that women who supply sex are immoral whereas the men who demand their services are considered blameless. *Id.* at 460. See generally Lefler, *supra* note 251, at 23-26 nn.97-128.

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U.S. constitution make it exceedingly difficult to establish a claim based on discriminatory patterns or effects.<sup>260</sup>

In the 1990s, a growing number of communities have sought to apply a new range of sanctions to punish men who buy sex, including: public-ity,<sup>261</sup> impounding autos,<sup>262</sup> revoking drivers licenses,<sup>263</sup> and requiring customers to attend school.<sup>264</sup> The difficulty with these new penalties is that they can do both too much and too little. Some localities impose sanctions on the basis of arrest, rather than conviction,<sup>265</sup> raising serious problems of due process and fundamental fairness.<sup>266</sup> However, when customers are actively prosecuted, they are rarely convicted. When confronted with the threat of a penalty more serious than a fine—loss of a car or drivers license, or publication of a photo—defendants resist, delay, and plead to

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260. Under the federal Equal Protection Clause, discriminatory effects do not matter unless there is evidence of a discriminatory purpose or intent:

"Discriminatory purpose," however, implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," and not merely "in spite of" its adverse affect upon an identifiable group.

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (citations omitted).

261. See Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1526 (1996). This was the approach followed in the Soviet Union, which published the names of the "Buyers of the Bodies of Women" on workplace bulletin boards. LEO KANOWITZ, *WOMEN AND THE LAW* 17-18 (1989).

262. See Baldwin, *supra* note 44, at 75; Anthony Cardinal, *Prostitutes' Clients Take an Impounding in Vice Crackdown*, BUFFALO NEWS, Jan. 25, 1994, at 1; Kevin Fagan, *Oakland to Seize Cars in Drug, Prostitution Cases*, S.F. CHRON., Sept. 22, 1997, at A15; Charlie Goodyear, *Police in Contra Costa Back Proposed Law to Deter Prostitution: County Ordinance That Would Force Customers to Forfeit Their Cars*, S.F. CHRON., Oct. 13, 1988, at A18; Yumi L. Wilson, *Oakland to Begin Seizing Johns' Cars: New State Prostitution Law Will Focus on Men Who Pay for Sex*, S.F. CHRON., Dec. 27, 1993, at A1.

263. Minnesota provides that a notation will be placed on the license of a patron of a prostitute who uses a vehicle in committing the offense. See MINN. STAT. ANN. § 609.324 (West 1994). See Ev-  
elina Giobbe & Sue Gibel, *Impressions of a Public Policy Initiative*, 16 HAMLINE J. PUB. L. & POL'Y 1, 23 (1994).

264. See Rebecca Bragg, *Penitent Johns See Other Side at 'School': Information Blitz Leaves Many Shaken up Over Prostitution*, TORONTO STAR, Mar. 23, 1997, at A6; Janice L. Habuda & Henry L. Davis, *City Tries New Approach to Old Problem*, BUFFALO NEWS, Oct. 27, 1996, at A1; Gromet Jeffers, Jr., *The Class No One Wants to Repeat: Those Arrested for Solicitation Sent to John School to Learn Lesson*, KAN. CITY STAR, Aug. 31, 1997, at B1; John Lyons, *S.F. Class Teaches Prostitute Clients the Price of Vice*, SACRAMENTO BEE, Oct. 9, 1997, at A4 (men pay \$500 fine and attend a one day seminar).

265. See Tustin Amole, *Proposal to Repeal Prostitution-Soliciting Law to Go Forward Without Support*, ROCKY MOUNTAIN NEWS (Denver), Aug. 5, 1998, at A28 (popular support for a policy allowing publication of photos upon arrest and before conviction); Chet Barfield, *Dear John: If You're Caught Your Photo Might be Published*, SAN DIEGO UNION-TRIB., Nov. 5, 1994, at B2.

266. See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); Henry Paul Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977).



a lesser offense to avoid the sanction.<sup>267</sup> Some communities deal with this problem by impounding the car upon arrest and imposing substantial sanctions, even when the criminal charge is dismissed.<sup>268</sup> In some cases the car seized is the defendant's family's only means of transportation.<sup>269</sup>

Perceived excesses in the application of punishment to arrestees, and in the application of sanctions that seem disproportionate to the offense, led some to reject these new forms of sanctions as arbitrary and unfair.<sup>270</sup> In 1999, Congress considered limiting the power of local authorities to seize property in drug cases, recognizing that the financial incentives created by the forfeiture law may have become too strong in some communities.<sup>271</sup> While some of the defendants in these new sanctions cases raise legitimate claims of fairness and proportion, Professor Margaret Baldwin observes that police agencies, and the public at large, are reluctant to expose customers to embarrassment because they are "mostly white, married men with at least a little disposable income. Real people, that is."<sup>272</sup>

Women who work in commercial sex generally oppose these new programs to impose more effective punishment on their clients. According to Wendy McElroy:

The force of such laws will not determine, and historically never has determined, how many women will turn to the streets. But prostitute activists argue, the laws will discourage a certain class of men from seeking out streetwalkers. Men who are married, with respectable careers and a reputation to protect, will not risk being publicly exposed as a john. On the other hand, men who are criminally inclined toward pros-

267. For example, in Oakland in 1992 and 1993, 95% of defendants pled guilty to the lesser crime of disturbing the peace when confronted with the possibility that they would lose their car. See Wilson, *supra* note 262, at A1. See also Lefler, *supra* note 251, at 27-32 nn.131-75.

268. In Inkster, Michigan, the average cost to a man accused of soliciting from an automobile is \$2,225, even when the charges are dismissed. The charges include: court costs (\$500), vehicle recovery (\$650), towing (\$75), legal bills (\$1,000). "Inkster collects as much as \$320,000 a year from a prostitution sting operation that critics say is little more than a fund-raising drive run by the police." Norman Sinclair, *Inkster Profits in Sex Sting: City Makes Thousands From Prostitution Operation; Accused Men Claim Entrapment*, DETROIT NEWS, Oct. 29, 1998, at A1.

269. See *id.* See also Lefler, *supra* note 251, at 28 n.140 (observing that California law does not allow the seizure of cars if the vehicle is the only means of transportation for the family of the accused, but that this "limits the law's applicability and effectiveness," since at the moment of seizure it is difficult to know the impact on the defendant's family).

270. See Editorial, *City Council's Bad Idea*, SACRAMENTO BEE, Jan. 22, 1999, at B6 ("To use this Draconian and constitutionally suspect police tactic in misdemeanor prostitution and drug cases is both wrong and unjust."); Sinclair, *supra* note 268.

271. See Gary Fields, *Senate Hearing Takes Up Debate over Police Seizures of Property*, USA TODAY, July 21, 1999, at A6; Carl Rowan, Editorial, *Stop Unconstitutional Seizures*, DENVER POST, July 27, 1999, at B7.

272. Baldwin, *supra* note 44, at 74.

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titutes will not be discouraged by the prospect of a police fine. Thus, police/feminist policy keeps peaceful johns off the streets and leaves women to compete more vigorously for johns and screen less rigorously those who approach them.<sup>273</sup>

The pattern in which women who sell are prosecuted and men who buy are not is egregiously wrong, both from a feminist point of view and in terms of more general egalitarian, democratic values. Should feminists then welcome this new effort to impose effective sanctions on men? It seems unlikely that these new enforcement mechanisms will end commercial sex and likely that they will impose costs and burdens on women who sell sex for money. On the other hand, enforcement efforts targeted at men may focus public attention on a gender discriminatory law enforcement pattern that has too long been ignored. Because the men who are the targets of this new enforcement effort are better able to command public sympathy, enforcement of sanctions against men who buy may lead people to question the wisdom of the criminalization of commercial sex. In the short run, imposing new sanctions on the customers seems to harm rather than provide concrete help to women who work in commercial sex. But as a strategic move, it might help them, as well as the general cause of gender equality.

#### D. PUNISHING THIRD PARTIES WHO PROMOTE AND PROFIT FROM COMMERCIAL SEX

A second common feminist proposal is to enhance and strengthen enforcement of criminal penalties against third parties who promote and profit from commercial sex.<sup>274</sup> The laws prohibiting pimping or pandering are broadly drawn. Pimping laws make it a crime for anyone to benefit economically from the earnings of one engaged in commercial sex.<sup>275</sup> Pandering, which is criminal in many states, is equally broad.<sup>276</sup> Prosecutions for pimping or pandering are rare, particularly relative to prosecutions of women who sell sex, or even of men who buy.<sup>277</sup> Perhaps this is be-

273. McElroy, *supra* note 2, at 338.

274. See, e.g., Chamallas, *supra* note 54, at 831 ("I discern a trend here to regard economic pressure as an unacceptable inducement to sex and to create a range of legal sanctions to discourage economically coerced encounters, even if such sex is not subject to direct criminal sanctions."); Radin (1987), *supra* note 69, at 1924.

275. See David Vestal, *Pandering; Procuring; Pimping; Promoting Prostitution*, 63-C AM. JUR. 2D §§ 17-23, 17-24 (1964).

276. See *id.*

277. There is virtually no data, but the empirical and legal literature of commercial sex reveals almost no evidence of prosecution for pimping or pandering. FBI statistics, see *supra* note 12, do not

cause it is more difficult to prove offenses under these laws than it is to prove buying or selling, or perhaps it is because pimping and pandering are less common.

The behaviors and relationships criminalized by these laws are common in the U.S. today and vary from the reprehensible to the laudable. Laura Sanchez, in her magnificent study of commercial sex workers in a Midwestern city, describes many examples of troubling relations that violate these criminal law norms. One man "frequently lured girls as young as 13 or 14 off the South Evergreen strip by offering them money or promising to take them 'to party' at his house," persuading them to have sex with others, and then paying them much less than promised.<sup>278</sup> Sanchez recounts the story of a girl, Meagan, "compelled into street prostitution by pimps":<sup>279</sup>

At age 12, Meagan had run away from home and was "hanging out downtown" when she met a guy who later became her boyfriend: "Here was this older guy telling me he loved me, and that made me feel secure. I finally realized he was a pimp after about one month. People told me." Meagan then went on to detail how her "boyfriend" eventually convinced her to start turning dates:

Meagan: Darryl needed some money and asked if I would work, and I said no. Finally I said I'd try it once, so his brother's girlfriend took me out. I didn't know how much money to charge, so I came back with too little money, and he beat me up severely.

L.S.: How much did you get?

Meagan: Ninety dollars. I didn't want to leave him and the security I had. But he changed. He became highly controlling. I couldn't talk to anyone, especially black men. The beatings still occurred; he would get mad for no reason. I had to go to the hospital twice. I was 14 by that time.<sup>280</sup>

Meagan's story suggests that Darryl is guilty of both pimping and pandering, as are his brother and his brother's girlfriend. While we know little about Darryl, on Meagan's report he is a serious criminal wrongdoer. But what is it about Darryl's conduct that warrants criminal condemnation?

distinguish these offenses from other sex vice crimes. The Westlaw Synopsis of criminal appellate cases lists virtually all the convictions that are appealed. A July 26, 1999 search revealed only 305 cases in the U.S. since 1980 which mention pimping, pandering, or promoting prostitution. While most criminal convictions are never appealed, the number suggests that prosecutions are few.

278. Sanchez, *supra* note 21, at 565-66.

279. *Id.* at 561.

280. *Id.* at 561-62.

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Is it that he took Meagan in and made her feel secure? Had sex with her, at age twelve? Asked her to help with their mutual expenses? Asked her to have sex with someone else for money? Beat her when she did not bring home enough money? The criminal law gives pretty clear answers to some of these questions. Sex with a twelve-year-old is statutory rape.<sup>281</sup> Beating her is assault and battery. But it is difficult to see the evil in "taking her in and making her feel secure" or in asking her to help with common expenses, even though legal wage earning opportunities for twelve-year-olds are limited. Would criminal prosecution of Darryl as a pimp add anything to prosecution for assault and statutory rape? Would prosecution as a pimp add anything to the protection of Meagan? Most important, why did Meagan leave home and why did Darryl look like the best option available to her? Most of the heart wrenching stories that Sanchez tells of young women's entry into commercial sex involve naive girls and women making bad choices, without the help of a pimp or a panderer.<sup>282</sup>

For some women, the laws against pimping represent a serious burden on personal family relations. When women who work in commercial sex have voice in the development of public policy they reject laws making it a crime to live "off the earnings of prostitution."<sup>283</sup> Many women work precisely to support their children, parents or friends. Other women who sell sex for money prefer to have a third person mediate the transaction. That mediation can be benevolently protective or exploitative. Laws against pimping do not distinguish among the worker's child, mom, protective

281. See *infra* Part IV.A.

282. See Sanchez, *supra* note 21, at 560-61 (recounting that Helen and Mary, age 17 and 18, agree to sex to get rent money). See also *id.* at 561 (indicating that Cory, age 14 ran away, moved in with Mike, became addicted to speed, and began trading sex for money when he threw her out).

283. Carol Leigh, *A First Hand Look at the San Francisco Task Force Report on Prostitution*, 10 HASTINGS WOMEN'S L.J. 59, n.34 (1999). The 1996 San Francisco Task Force on Prostitution recommended that laws against pimping be repealed.

There was testimony from prostitutes . . . that laws against the "living off the earnings of prostitution" are often used against families of prostitutes and against prostitutes working together in various business arrangements. These laws inhibit organization for self-protection and criminalize consensual person relationships, and numerous other aspects of prostitutes' lives. Legal Recommendation IV, Task Force Report, Appendix D.

*Id.* (citations omitted). In addition, the Task Force found that

[a]lthough pimping and pandering laws are ineffective and rarely used against those who exploit and abuse prostitutes, these charges are brought against prostitutes working together. Women working in hotels are harassed by security guards. Landlords often refuse to rent to sex workers or overcharge for substandard accommodations. Sex workers who are found out may be evicted and end up working in the streets.

*Id.* at n.67. Similarly, the 1985 Australian Report of the Inquiry into Prostitution found that the laws against pimping and pandering, while rarely enforced, were damaging to women and recommended that they be repealed. See Neave, *supra* note 164, at 84.

madam or an exploitative sex slaver. Anyone who derives financial benefit from a commercial sex worker is a criminal. This is odd. Providing economic support to children, parents, family and friends is generally regarded as a social good and is a significant motivation for work. So, too, independent contractors often appreciate the value of having someone to recruit and screen customers and mediate transactions. Those people, head hunters, stock brokers, real estate agents, get paid for their services.

The obvious response is that a pimp is not a mom, a child, a protective madam, or a good stock broker or real estate agent. The pimp recruits vulnerable young girls, sells them, enslaves them, and profits from them. That behavior is reprehensible and deserves punishment. But, if we are serious about criminal penalty we need to define the crime with precision. A crime that sweeps in the mom or kid who benefits from the wages of a sex worker is not likely to focus on exploitation and is not likely to be enforced.

Empirical studies suggest that in the 1990s women were less likely to have a relationship with a pimp. At one end of the spectrum of commercial sex work, higher class, educated, women who work in private settings are able to negotiate their own transactions and use referral services only if they provide value for money. At the other end of the spectrum, Jody Miller's study of street prostitutes who regularly exchange sex for drugs found that "crack had altered traditional pimp/prostitute relationships, lessening the role of pimps on the street as a result of prostitutes' overriding concern with 'chasing the crack.'"<sup>284</sup> Pimps are less interested in working with drug addicted women, and the women are unwilling to give a pimp money that could otherwise be used to buy drugs.

#### IV. EFFECTIVE LEGAL REMEDIES TO PROTECT COMMERCIAL SEX WORKERS FROM VIOLENCE, COERCION AND ABUSE

Commercial sex workers are vulnerable to violence, rape and murder, and often the police do not take their complaints seriously.<sup>285</sup> Further, the law of statutory rape makes it a crime to engage in sex with a person under the age of consent.<sup>286</sup> Since the 1980s there have been dramatic changes in the legal and social understanding of violence against women in the United States. These new understandings, laws, practices and services have not been extended to commercial sex workers. This Part argues that existing

284. Jody Miller, *Gender and Power on the Streets: Street Prostitution in the Era of Crack Cocaine*, 426 J. CONT. ETHNOGRAPHY 427, 438 (1995).

285. See *supra* Part II.A.

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state criminal laws against rape, statutory rape, and domestic violence should be mobilized to address the serious problems of the exploitation of young women and violence against many commercial sex workers.<sup>287</sup> The 1994 federal Violence Against Women Act provides additional remedies.<sup>288</sup> Nonetheless, the protection of existing criminal laws has been systematically denied to women who sell sex for money, including teen girls. Applying existing laws to protect women who sell sex for money requires focused attention and rethinking of basic assumptions.

### A. STATUTORY RAPE

One argument against abolishing criminal prohibitions against buying and selling sex, as well as prohibitions against pimping and pandering, is that such a change would send a message to young girls that commercial sex is a legitimate life choice.<sup>289</sup> While feminists and other observers disagree about the extent to which young girls engage in commercial sex,<sup>290</sup> whatever the proportion of teen sex workers, it is disturbing that *any* young girls sell sex for money, whether they are coerced, forced, or voluntarily choose to engage in such conduct.

It is difficult to define the age at which young people are capable of engaging in adult activities. Some large, well-coordinated ten-year-olds may be better drivers than many adults. Some young teens may be capable of authentic choice in relation to sex. Nonetheless, as a society, we have established arbitrary presumptive rules. Kids cannot drive until they are sixteen or seventeen. In relation to sex, the law of statutory rape defines

287. Many people concerned about the protection of women who work in commercial sex have advocated creation of a new tort law "which would establish a cause of action for compensatory and punitive damages for women who had been coerced into prostitution." Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 *TEMPLE POL. & CIV. RTS. L. REV.* 459, 470 (1999). See also Baldwin, *supra* note 44, at 92; Giobbe & Gibel, *supra* note 263, at 10.

I am skeptical that creation of the described civil cause of action would be helpful. To the extent that a woman is "coerced into prostitution" by an individual responsible actor with money to pay a judgment, existing laws against fraud, false imprisonment, misrepresentation, or breach of contract provide remedies. However, women who sell sex for money are not likely to have access to lawyers to help them pursue private causes of action and defendants are likely to be judgement proof. Coercion, abuse, and rape of women is a public, as well as a private offense and should be prosecuted effectively, independent of the woman's ability to find a lawyer to take her private claim and a defendant able to pay.

288. See *infra* Part IV.C.

289. Personal conversation with Professor Malina Coleman, University of Akron (Jan. 29, 1999).

290. See *supra* notes 57-58 and accompanying text; VANCE, *supra* note 89, at 131, 217, 350. Also FBI data, as poor as it is, suggests that a small proportion of sex workers are teenagers. See *supra* note 256.



the social norm of the age at which unmarried young people are presumptively unable to consent to sex.<sup>291</sup> People disagree about the age at which most young people develop the capacity to consent to sex in an informed and authentic manner.<sup>292</sup> These differences are reflected in the variety of approaches that states take in defining statutory rape.<sup>293</sup>

Despite the laws against statutory rape, sex is common among U.S. teens.<sup>294</sup> Nonetheless, statutory rape is rarely prosecuted.<sup>295</sup> A handful of reported cases confirm that statutory rape prosecutions could be pursued

291. The age of consent ranges from 14 to 18, most states set it as 15 or 16 and differentiate based on the disparity in age between the older and younger person. See RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICAN SEX LAWS 44-64 (1996). State law also defines the age at which young people can marry, with or without parental consent. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 208-09 (1998).

292. Some feminists are skeptical whether adult women, much less teenage girls, are capable of authentic consent to sex in a culture of patriarchy. See *supra* notes 59-60 and accompanying text. Others respect the experience of teenage girls who perceive themselves capable of sexual judgment and consent. See *supra* notes 61-63 and accompanying text. Historically, the crime of statutory rape could only be committed by a man against a woman and the central purpose of the law was to protect the woman's chastity. Statutory rape laws were

initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State's protection. In contrast, young men were assumed to be capable of making such decisions for themselves.

*Michael M. v. Superior Ct.*, 450 U.S. 464, 494-96 (1981) (Brennan, J., dissenting). In the 1970s, most jurisdictions made the statutes gender neutral. See *id.* at 492. In 1996, California rewrote its statutory rape law, making it gender neutral, providing greater penalties for perpetrators who are over 18-years-old, or more than three years older than a minor. See Teenage Pregnancy Prevention Act of 1995, Cal. Legis. Serv. 789 (West 1996) (codified as amended at CAL. PENAL CODE § 261.5).

In *Michael M.*, Justice Brennan, dissenting, expressed the view that minors, as well as adults, enjoy a constitutionally protected right to privacy that places some limit on the state's authority "to make consensual sexual intercourse among minors a criminal act." *Michael M.*, 450 U.S. at 491 n.5. Justice Stevens, also dissenting, disagreed, saying, "I would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse." *Id.* at 497.

293. See WEISBERG & APPLETON, *supra* note 291. In 1285, the age of consent under English law was 12 years old. In 1576, it was reduced to ten and that was the age adopted by most of the original States of the U.S. In the 1890s the age of consent was advanced to 16 in many jurisdictions, and to 18 in the 1910s. See *Michael M.*, 450 U.S. at 496 n.9 (Brennan, J., dissenting); Jane E. Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth Century America, 9 YALE J.L. & HUMAN. 1 (1997) (describing 19th century feminist effort to raise the age of consent under statutory rape laws).

294. The U.S. has the highest rates of unintended teen pregnancy of any developed nation in the world. Elise F. Jones, Jacqueline D. Forrest, Stanley K. Henshaw, Jane Silverman & Aida Torres, *Unintended Pregnancy, Contraceptive Practice and Family Planning Services in Developed Countries*, 20 FAM. PLAN. PERSP. 53, 55 (1988).

295. Data before the Supreme Court in *Michael M.* revealed that between 1975 and 1978, an average of 61 juvenile males and 352 adult males were prosecuted for statutory rape each year in California. In 1976, 50,000 California girls between the ages of 13 and 17 became pregnant. *Michael M.*, 450 U.S. at 494 n.8 (Brennan, J., dissenting).

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successfully against men who buy sex from young girls.<sup>296</sup> Statutory rape prosecutions of men who have sex with girls who are under the state-defined age of consent could send a powerful message. Rape, or even statutory rape, is a far more serious charge than patronizing a prostitute. It carries a higher penalty and greater stigma. In addition, it seems that prosecution of statutory rape would be relatively easy, as compared to prosecution of coercion or a crime that requires proof of force and non-consent. In statutory rape cases, the girl's consent or the man's belief that she was older, even if she lied about her age, are not valid defenses.<sup>297</sup>

Some older cases suggest that juries and judges may be reluctant to convict a man of statutory rape, if they believe that the girl offered sex for money, even when the facts show a clear violation of the statutory rape laws.<sup>298</sup> Such cases underscore that such statutory rape prosecutions to protect girls engaged in commercial sex are not likely to be pursued, or to be successful, without a deep change in the attitudes and assumptions of police, prosecutors, judges and juries. Those issues are discussed next in the context of rape and domestic violence.

#### B. RAPE, MARITAL RAPE AND DATE RAPE

The basic definition of rape has remained the same since the time of Blackstone, that is, "carnal knowledge of a woman forcibly and against her

296. In *State v. Greenberg*, a 52-year-old attorney was charged with "sexual assault on a child," when he paid three 15- and 16-year-old girls for sex, after he met one of them who was a dancer at a nightclub. Nebraska law creates an irrefutable presumption that a person 16 years of age or younger cannot consent to have sexual intercourse with a person over age 19. *See State v. Greenberg*, No. A-93-1004, 1994 WL 387930, at \*1 (Neb. Ct. App. July 26, 1994). The court rejected the defendant's assertions that he could not be convicted because the girls had consented, and because they were prostitutes. *See id.* at \*2.

In *Commonwealth v. Brown*, 403 N.E.2d 424 (Mass. App. Ct. 1980), the defendant met a 14 year old girl at the home of a mutual friend. He took her to a movie and to his apartment, where they had sex. He then sent her to a bar, where another woman introduced her to men who paid her for sex. She gave the money she received to the defendant. The court rejected the defendant's argument that he could not be guilty of statutory rape because the young woman had opportunities to leave.

297. *See supra* notes 291 & 296.

298. For example, in *Commonwealth v. Collin*, 335 A.2d 383 (Pa. 1975), the defendant picked up a 14-year-old girl and spent four days having sex with her at his trailer. He pled guilty to fornication, was convicted of corrupting the morals of a minor, and paid a \$100 fine. The jury acquitted him of statutory rape. He appealed his conviction and the appellate court majority rejected his claim that he should have been allowed to introduce evidence that the girl had previously had sexual relations. Two judges of the seven judge panel dissented, expressing the view that girls who had a history of sexual activities could not be victims. "[O]ne can envision cases of precocious 14-year-old girls and even prostitutes of this age who might themselves be victimizers." *Id.* at 310.



will."<sup>299</sup> Feminist efforts to redefine rape as a crime of non-consensual sex have failed.<sup>300</sup> Nonetheless, feminists have succeeded in obtaining changes that have profoundly transformed the legal and cultural definition of rape. Most states have abolished rules that required that the rape victim prove that she offered "upmost" resistance.<sup>301</sup> Virtually every state has adopted rules limiting evidence about the past sexual conduct of rape victims.<sup>302</sup>

Until the 1970s, every state provided that a person could not be convicted of a "sex offense" unless the testimony of the victim was corroborated by medical evidence or other testimony.<sup>303</sup> In the 1980s, virtually all U.S. jurisdictions rejected special corroboration rules applicable only to women who are victims of sexual assault.<sup>304</sup> Until the 1980s, courts allowed defendants to argue and juries to infer that women who had not promptly reported an alleged rape had not, in fact, been raped; since the late 1980s courts have allowed expert testimony to explain the reasons why a rape victim might not seek police help promptly.<sup>305</sup> Finally, some state courts have read the requirement that rape be "forcible" to hold that the re-

299. 4 WILLIAM BLACKSTONE, COMMENTARIES \*210. For observations that the basic definition has not changed see Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1780 (1992); Steven J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2171 (1995).

300. For example, Susan Estrich argues that the law should define "consent" to recognize that "no" means no. See SUSAN ESTRICH, REAL RAPE 80-97, 102 (1987). She also argues that courts should "understand force as the power one need not use (at least physically)." Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1115 (1986). These broader reform proposals have not been adopted. See Schulhofer, *supra* note 299, at 2171-72.

301. See Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 36-38 (1992).

302. See generally KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 700 (1993); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986) (summarizing rape shield laws); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025 (1991) (describing and refuting common myths about rape).

Some civil libertarians and criminal defense counsel have criticized broad rape shield laws, arguing that to protect a defendant's rights to a fair trial and confrontation, rape shield laws should rely on individualized determinations, rather than blanket exclusions of evidence. See, e.g., David S. Rudenstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1 (1976).

303. See *United States v. Wiley*, 492 F.2d 547, 550-51 (D.C. Cir. 1973).

304. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 371 (6th ed. 1995); Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling and Law*, 88 NW. U. L. REV. 1271, 1319-33 (1994).

305. See BARTLETT, *supra* note 302, at 703. Experts have helped judges and juries to understand why women who have experienced "sexual violence" delay in telling their stories and offer inconsistent accounts. Common patterns of denial, embarrassment, and self-blame lead to minimization and concealment that make honest fact finding particularly challenging. See Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 127 (1992).

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quirement is met by the force inherent in the act of sex, whenever the act is nonconsensual.<sup>306</sup> These widespread changes in formal evidentiary standards treat victims of sexual assault more like victims of other crimes, and make it significantly easier to prosecute rape.

In addition to modifications of the rules governing evidence and proof, feminists persuaded states to abandon the formal substantive common law rule that a man is legally incapable of raping his wife.<sup>307</sup> In 1981, ten states flatly barred prosecutions of husbands for marital rape.<sup>308</sup> By 1990, no state retained an absolute marital rape exemption, though thirty-five states applied special rules to marital rape.<sup>309</sup> By 1994, only thirteen states "offer[ed] preferential or disparate treatment to perpetrators of spousal sexual assault."<sup>310</sup> The law in this area remains in a state of flux, with legislative proposals pending in most states.<sup>311</sup> Similarly, until the 1990s, the common assumption was that rape was not possible in a dating context, where the parties knew one another and sometimes engaged in consensual sexual relations.<sup>312</sup> Here too, the law came to recognize the possibility and the injury of date rape.<sup>313</sup>

While all these changes in formal substantive and evidentiary rules are tremendously important, indeed essential, to the successful prosecution of sexual violence against women, changes in rules are not alone sufficient without deep changes in police, prosecutorial, and judicial attitudes and practices. These are discussed in Sections D and E *infra*.

306. See, e.g., *State ex rel M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (the requirement of "physical force" is satisfied any time a defendant penetrates a woman against her will); *State v. Etheridge*, 352 S.E.2d 673, 680 (N.C. 1987) (holding that "force" may be "actual, physical force or . . . constructive force in the form of fear, fright, or coercion").

307. See SIR MATTHEW HALE, 1 HISTORY OF THE FLEAS OF THE CROWN 628 (1st Am. ed. 1847).

308. See Lisa R. Eskow, Note, *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 681 (1996).

309. See *id.* at 681-82.

310. *Id.* at 682.

311. See *id.*

312. See Beverly Balos & Mary Louise Fellow, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 601-02 (1991).

313. See Martha Mahoney, *Legal Images of Battered Women: Redefining The Issue of Separation*, 90 MICH. L. REV. 1, 68-70 (1991) (noting that the concept of date rape was the product of feminist efforts to name a particularly damaging sexual assault that was socially permitted and to seek legal redress). Schulhofer argues that if female autonomy is to be taken seriously with respect to rape, it would mean that individuals should be permitted "to act freely on their own unconstrained conception of what their bodies and their sexual capacities are for." Schulhofer, *supra* note 301, at 70.

## C. DOMESTIC VIOLENCE

Since the 1970s, the U.S. has made dramatic transformations of the law, legal practice, and popular cultural understandings in relation to domestic violence. Still, domestic violence is common.<sup>314</sup> "Recent surveys estimate that as many as four million women are victims of domestic violence each year and that three quarters of all women will suffer some violent incident in their lifetime."<sup>315</sup> Until the 1970s, the common social responses were to deny that domestic violence was common and to assert that values of family privacy did not justify public intervention to protect women. With the rise of feminism in the 1970s, scholars began to document police failure to respond to the pleas of women who sought protection against domestic abuse,<sup>316</sup> and courts and legislatures required changes in police practices.<sup>317</sup> Studies demonstrating that a policy requiring arrest of men accused of domestic violence deterred further violence, and led to a wave of state laws requiring arrest in particular circumstances.<sup>318</sup> Many states reformed laws to make it easier for a battered woman to obtain pro-

314. Determining the frequency and severity of domestic violence is difficult both because of different criteria used to measure what constitutes abuse and because domestic violence is grossly under reported. The FBI provides figures that many regard as conservative. See *Violence Against Women: Victims on the Street and in Homes, Hearings on S. 15 Before the Committee on the Judiciary*, 102d Cong. (1991). According to these figures, three to four million women are beaten by their husbands or boyfriends each year—on average one every 15 seconds; over one million of these seek medical assistance, and as many as 20% of hospital emergency room cases are related to wife battering. See *id.* at 37. Four thousand women are killed each year in domestic violence situations by their husbands or partners. Thirty percent of women who are homicide victims are killed by their husbands or boyfriends. See *id.* at 259.

The Department of Justice finds that women are more than ten times more likely than men to experience violence from an intimate. Women are as likely to be the victim of violence by an intimate as by a stranger or acquaintance. Women are six times more likely to report stranger violence than intimate violence. See U.S. DEP'T OF JUST., *VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 6-9* (1994).

315. Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1193 (1994) (quoting 1992 Senate Judiciary Committee data). See also DEBORAH L. RHODE, *SPEAKING OF SEX* (1998).

316. See Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 11 (1992). See also Sarah Mausloff Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 217 (1988).

317. See *Developments in the Law—Legal Responses to Domestic Violence, Making State Institutions More Responsive*, 106 HARV. L. REV. 1551, 1557 (1993).

318. See Joan Pennington, *Family Law Developments*, 24 CLEARINGHOUSE REV. 925, 927 (1991) (describing statutes). Other studies suggest that mandatory arrest has a deterrent effect only on suspects who are employed or otherwise "socially bonded" and may actually increase the likelihood of recidivism among unemployed suspects. See Sherman, *supra* note 316, at 30-33. Eleven articles debating the methodologies and interpretations of these studies, including feminist critiques by Cynthia Grant Bowman, Lisa A. Frisch, and Lisa G. Lerman, can be found in Symposium, *Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992).

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protective orders and to give such orders more effective force.<sup>319</sup> When women strike back and injure or kill their attackers, the law has allowed expert testimony to help dispel common myths about battered women and to educate judges and juries about the dynamics of domestic violence and the reasons that women remain in abusive situations.<sup>320</sup>

The federal Violence Against Women Act of 1994 recognizes domestic violence as a federal problem and offers two types of federal responses.<sup>321</sup> First, the Act provides modest funding for services including shelters, a national domestic abuse hotline, rape education and prevention programs, and training for state and federal judges.<sup>322</sup> The Act also creates a federal civil rights remedy for gender violence.<sup>323</sup> The few cases that have been brought have mired in the threshold question of the constitutional power of the Congress.<sup>324</sup>

## D. LEGAL RULES IN ACTION: POLICE AND PROSECUTORIAL PRACTICES

Reforms in the formal law of rape, marital rape, and domestic violence are tremendously significant. But, changes in police and prosecutorial policies and practices are even more important. In the early 1970s, grassroots battered women's organizations developed from the feminist and civil

319. See Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L. REV. 1039 (1992); Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533 (evaluating the effectiveness of mandatory arrest laws).

320. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

321. See Pub. L. No. 103-322, 108 Stat. 1796 (1994). Title II, Safe Homes for Women, creates a federal remedy for crossing a state line with intent to injure or harass a spouse or intimate partner (codified at 18 U.S.C. § 2261 (1994)) and provides for interstate enforcement of protective orders (codified at 18 U.S.C. § 2265 (1994)). See William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139 (1996); Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, 4 J.L. & POL'Y 391 (1996); Michelle W. Easterling, Note, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933 (1996).

322. See 8 U.S.C. § 1154(a) (1994) (shelters); 42 U.S.C. § 10416(3)(2)(E) (national hot line); 42 U.S.C. § 10418 (funding for rape education and prevention); 42 U.S.C. §§ 13701, 13991, 13992, 14036 (training for judges).

323. See 42 U.S.C. § 13981 (1994).

324. In *Brzonkala v. Virginia Polytechnic*, the Fourth Circuit, en banc, held that Congress lacks power, under the Commerce Clause, to provide federal remedies against sexual violence. See *Brzonkala v. Virginia Polytechnic*, 169 F.3d 820 (4th Cir. 1999) (en banc), cert. granted, 120 S. Ct. 1205 (1999). Other courts have rejected constitutional challenges, but have not fleshed out the substantive contours of the civil action under VAWA. See, e.g., *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999); *Ziegler v. Ziegler*, 28 F. Supp. 2d 691 (E.D. Wash. 1998); *Crisonino v. New York City Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997); *Anisimov v. Lake*, 983 F. Supp. 531 (N.D. Ill. 1997).



rights movements.<sup>325</sup> They educated police, prosecutors, and judges about the dynamics of domestic violence, and offered women more effective protective services.<sup>326</sup> Several required police to arrest a suspect if there was probable cause to believe that domestic violence had occurred.<sup>327</sup> Many prosecutors adopted policies against dropping domestic violence prosecutions solely on the basis of the victim's request.<sup>328</sup> Effective law enforcement programs require focused concern and commitment.

Similarly, changes in police and prosecutorial practices are essential to the effective enforcement of the law against rape, including marital rape. Many jurisdictions have created special units in the prosecutor's office focused on rape prosecutions.<sup>329</sup> Lisa R. Eskow's study of the prosecution of rape and marital rape in four California counties describes the various approaches that prosecutors have taken to the prosecution of marital rape.<sup>330</sup> There has been no comparable development in relation to the prosecution of statutory rape or violence against commercial sex workers.

#### E. BEYOND CRIMINAL PROSECUTION: PROVIDING SOCIAL SERVICES

Beyond law reform, and changes in police and prosecutorial practices, providing protective and social services is vital to safeguard and empower victims of both rape and domestic violence. In 1970 there were no shelters for battered women; by 1987 there were more than 700.<sup>331</sup> In 1998, the U.S. Conference of Mayors found that shelters for homeless people and victims of domestic violence were often filled to capacity; thirty-two percent of requests for shelter by homeless families were denied in 1998 due

325. See SUSAN SCHECTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 94, 185-89, 201 (1982).

326. See George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 847, 851-58 (1997).

327. See *id.*

328. See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996); Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994).

329. See generally LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* (1993) (a New York City prosecutor and head of the unit dealing with rape prosecutions discussing the issues). See also *id.* at 129-36 (discussing the prevalence of date and acquaintance rape and the need to further reform prosecution practices in this area).

330. See Eskow, *supra* note 308, at 698-704.

331. See SCHECTER, *supra* note 325, at 185-201; Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1048 (1991). See generally ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAW MAKING* (forthcoming 2000).

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to lack of resources.<sup>332</sup> The demand for domestic violence shelters far outstrips supply.<sup>333</sup> Similarly, rape crisis centers are indispensable in responding to the needs of rape victims.<sup>334</sup> There are important differences between rape crisis services and domestic violence shelters. Battered women's shelters offer emergency shelter, while rape crisis centers do not.<sup>335</sup> Rape crisis centers are more likely than battered women's shelters to offer counseling about rape and to serve as advocates for victims during interviews with hospitals and law enforcement officials.<sup>336</sup>

#### F. COMMERCIAL SEX WORKERS AND PROTECTION AGAINST VIOLENCE: THE POLITICS OF CHANGE

Commercial sex workers have not shared in the protections created by the transformation in the legal, public, prosecutorial, and police understanding of rape and domestic violence, or in the social services created to meet crisis needs. Commercial sex workers are often victims of rape and other forms of domestic violence.<sup>337</sup> The police systematically ignore their complaints.<sup>338</sup> As a matter of formal legal rule, these women are not excluded from the protection of the law, unlike married women thirty years ago who could not, legally, be raped by their husbands.<sup>339</sup> As a general matter, people who violate some criminal laws are not thereby barred from claiming protection of the law. People convicted of speeding or tax fraud are still entitled to protection if they are mugged. Nothing in the formal substantive definitions of the crimes of statutory rape, rape, assault, or domestic violence excludes commercial sex workers. Nonetheless, reforms to protect rape victims and battered women from abuse have not been extended to women who work in commercial sex. Indeed domestic abusers

332. See U.S. CONF. OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES: 1998, at 3. A 1990 Ford Foundation study found that 50% of homeless women and children were fleeing abuse. See Joan Zorza, *Women Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 421 (1991).

333. "Existing social services come nowhere close to meeting battered women's needs for housing, child care, vocational aid, and related support services. These inadequacies are especially acute for women of color." Rhode, *supra* note 315, at 1194.

334. See FAIRSTEIN, *supra* note 329.

335. See Eskow, *supra* note 308, at 686-87.

336. See *id.* at 686.

337. See *supra* Part IV.C.

338. The San Francisco Task Force on Prostitution reported that prostitutes "uniformly expressed fear and frustration that when they are victims of crime the police do not work to protect them or find the perpetrators." Leigh, *supra* note 283 at 81.

339. See *infra* notes 308-13.

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commonly defend themselves by asserting that the abused woman is a prostitute or a slut.<sup>340</sup>

Experience in relation to the prosecution of rape and domestic violence suggests that crimes of violence against commercial sex workers will be taken seriously and prosecuted effectively by police and prosecutors only if these people are trained and sensitized to the special problems presented by violence against women in commercial sex. Effective enforcement also requires that victims of violence must be given a reliable sense that authorities will listen to their complaints. The literature of reform in relation to rape and domestic violence reveals almost no concern with the situation of commercial sex workers.

Domestic violence shelters often explicitly exclude commercial sex workers. According to Baldwin:

Domestic violence shelters remain in effect inaccessible to women and girls in prostitution, for reasons as precise as express policies excluding drug and alcohol dependent women from admission to shelters, as well as denying access to women who engage in illegal activities of any kind . . . . [O]nce women are admitted to shelters, they often feel constrained to lie about their circumstances, reducing the possible benefits of proffered support to a painful farce.<sup>341</sup>

Space is limited.<sup>342</sup> Women in the shelter may feel more comfortable if the excluded groups are kept out.<sup>343</sup> Funders sometimes impose restrictions.<sup>344</sup> The only groups that offer shelter to sex workers threatened by violence are a number of small organizations that offer "rescue" services. BREAKING FREE, a non-profit organization founded in Minnesota in 1996 provides counseling, advocacy, job training, and referral services for

340. See LENORE E. WALKER, *THE BATTERED WOMAN* 114-15 (1979) ("Sexual jealousy is almost universally present in the battering relationship."). In one collection of 33 women's accounts of their experiences being battered, nearly one-third had been accused of prostitution or labeled as "whores" during the course of beatings and rapes. See GINA NICARTHY, *THE ONES WHO GOT AWAY: WOMEN WHO LEFT ABUSIVE PARTNERS* 290 (1987). Professor Margaret Baldwin observes that a woman seeking protection of the laws against rape and domestic violence often makes an affirmative claim that she is not a prostitute. See Baldwin, *supra* note 50, at 81.

341. See Baldwin, *supra* note 50, at 79-80. Gay and lesbian victims of domestic violence face similar exclusions. Minnesota provides reimbursement only for services to women abused by a man, hence excluding lesbians. Indiana limits services to women abused by a spouse or former spouse. See Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming A Domestic Sphere While Risking Negative Stereotypes*, 8 *TEMP. POL. & CIV. RTS. L. REV.* 325, 345 (1999).

342. See *supra* notes 331-34 and accompanying text.

343. See Knauer, *supra* note 341, at 347.

344. See *id.*

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women wanting to leave commercial sex work.<sup>345</sup> While the service seems laudable, women who do not wish to leave commercial sex work also have a legitimate claim to protection against criminal violence.

It is disturbing that commercial sex workers are denied protection against violence. Commercial sex workers may be in greatest need of police, prosecutorial, and social services to enable them to resist violence.<sup>346</sup> The plight of teen sex workers is particularly compelling. As suggested earlier, enforcement of statutory rape laws against men who purchase sex from underage girls seems feasible, justifiable, and likely to discourage commercial sex with teenagers.<sup>347</sup> But such an enforcement effort will not happen without a focused police and prosecutorial effort. Further, criminal law enforcement does not address the underlying situations that lead girls to commercial sex.<sup>348</sup>

In suggesting that it is time for people concerned about violence against women to focus on the problems of sex workers, I do not mean to criticize earlier heroic feminist efforts to expand protections for victims of rape and domestic violence. In a legal and cultural regime that denied the possibility that a married woman could be raped by her spouse, it was not realistic to imagine that a commercial sex worker could also be raped. In a world in which rape is something that only happens between strangers, not between friends and sometime sexual partners, it is understandable that victims would claim legitimacy from the fact that they were not a prostitute. Given the serious political and financial constraints under which battered women's shelters operate, it is easy to appreciate why they would not want to deal with sex workers or teens. But, the movement of people concerned about violence against women has achieved some substantial success. It is now time to extend concern to a broader range of women.

Removing criminal sanctions against commercial sex would make it easier to protect sex workers from violence and rape, because women could complain without fearing prosecution. But, even if the criminal sanctions

345. See Giobbe & Gibel, *supra* note 263, at 37.

346. Michelle S. Jacobs asks, "Can it be that in our campaign to bring an end to violence against women we have inadvertently excluded some women from the protection of our theoretical umbrella? . . . Are there some women whose struggle to live free from violence is of no concern to us as feminist legal theorists." Jacobs, *supra* note 287, at 460.

347. See *supra* Part IV.A.

348. Some girls become involved in commercial sex when they leave abusive homes and have no place to live. Others leave home because their parents lose their jobs, are terminated from public assistance or are evicted. See Sanchez, *supra* note 21, at 559-62. There are few shelters for teen women. Particularly if a girl uses drugs or has become involved with commercial sex, few supportive social services are available. See Baldwin, *supra* note 50, at 80-81.

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against commercial sex remain, much more could be done to apply general criminal law to protect these women from violence. Essex County, New Jersey offers one model of more effective police protection for commercial sex workers.<sup>349</sup> When Patricia A. Hurt became the county's first black woman chief prosecutor, she announced that her top priority was to address a series of unsolved murders of sex workers in Newark, New Jersey. She created a task force of fourteen detectives who worked to develop trusting relations with the women who work on the street. Task force members arrested several people for crimes against prostitutes ranging from murder to sexual assault.<sup>350</sup> The task force confronted a challenge in building cases for a jury that rested on the testimony of commercial sex workers. But, as one member of the task force observes, "Just because you've prostituted yourself, doesn't mean that you weren't beaten and raped."<sup>351</sup> When sex workers come to understand that the officers know this, they are willing to trust them and provide information. The officers encouraged street workers to jot down license plate numbers and remember names and identifying features. The fact that commercial sex is illegal makes the job of those seeking to protect them from violence more difficult, but not impossible.

Just as rape was not effectively prosecuted until special units were created to provide support to the victims and to prosecute with skill and vigor,<sup>352</sup> so too, it seems unlikely that violence against sex workers will be addressed effectively without focused programs. Further, opposition to programs like that in Newark can be anticipated. Why should a society in which crime is rampant and police resources generally insufficient to the task devote special attention to protecting commercial sex workers against violence and coercion? The objection has some force. Patricia A. Hurt's answer is that because commercial sex workers are particularly vulnerable, they deserve special help from the law enforcement community.<sup>353</sup> Other officers involved in the program offer a different, instrumentalist, justification for the program. Because the sex workers spend a good deal of time on the street, they are valuable sources of information about a range of criminal activity that threatens a poor community.<sup>354</sup>

Similarly, the San Francisco Task Force on Prostitution recommended that local prosecutors adopt a policy declining to prosecute those who en-

349. See Alan Feuer, *Guardians on the Streets of Despair*, N.Y. TIMES, July 28, 1998, at B1.

350. See *id.*

351. *Id.*

352. See *supra* Part IV.D.

353. See Feuer, *supra* note 349, at B1.

354. See *id.*

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gage in commercial sex.<sup>355</sup> The Task Force "concluded that prosecution of prostitution has exacerbated problems in the industry including violence and chemical dependency, while enforcement further marginalizes prostitutes."<sup>356</sup> It found that "prostitutes are afraid to call the police when they are crime victims, for fear of being arrested themselves."<sup>357</sup> The group urged that the resources saved by ending the prosecution of commercial sex workers be redirected toward more vigorous enforcement of laws against noise, trespassing, and littering<sup>358</sup> that fuel neighborhood concerns. Further, they called for "training to improve the ability of the District Attorney's office to successfully prosecute cases of rape and other assault in which prostitutes and other sex workers are the victims."<sup>359</sup>

From a political perspective, one attractive feature of the programs adopted in Newark and proposed in San Francisco is that they can be adopted at the local level. While local officials cannot repeal state criminal laws, local authorities have large discretion to determine whether and how laws will be enforced.<sup>360</sup> In the short term, it seems unlikely that any state legislature would adopt the reforms advocated in this article. But a local mayor or district attorney might do so. Feminists, commercial sex workers, social workers, clergy, and others concerned about violence against commercial sex workers, and the exploitation of children, could seek reforms from local officials. Local experiments, along the lines attempted in Essex County and proposed in San Francisco, would allow other localities and states to evaluate whether these changes are wise. The disadvantage of local reform instituted as a matter of discretionary law enforcement policy is that it is fragile. In Newark, Patricia Hurt was removed from office, for reasons unrelated to her initiative on commercial sex.<sup>361</sup> The recommendations of the San Francisco Task Force were rejected, and prosecution of commercial sex workers stepped up when a more conservative administration came to power.<sup>362</sup>

355. See Leigh, *supra* note 283, 67 n.40.

356. *Id.* at 68.

357. *Id.*

358. See *id.*

359. *Id.* at 72.

360. See *id.* at 68 (discussing the San Francisco Task Force Report's analysis of these jurisdictional issues).

361. See Ronald Smothers, *Whitman Voids Official Powers of a Prosecutor*, N.Y. TIMES, July 28, 1999, at A1.

362. See Leigh, *supra* note 283, at 89.



## V. SEX AS WORK

"[P]rostitutes prefer it here."

"Prefer it to what?"

"To being Unwomen who work in toxic waste sites."

—Margaret Atwood, *The Handmaid's Tale*

Many commentators observe, in passing, that if commercial sex were legal it could be "treated as any other profession."<sup>363</sup> These brief references to the status of commercial sex as work do not grapple with serious problems that exist under the current regime of criminalization and that might be better addressed, or exacerbated, if criminal penalties were removed. Part IV, on violence and coercion, articulated an assimilationist vision, arguing that commercial sex workers would benefit if commercial sex were legalized and these workers were encompassed within the protection of the laws against rape, statutory rape, and domestic violence, as transformed by feminist efforts since the 1970s. In relation to work it is less clear that assimilationist principles are appropriate or helpful to commercial sex workers. If criminal sanctions are removed and commercial sex workers are subject to the same work place rules and public regulations applicable to other low wage, contingent workers, sex workers would remain vulnerable as workers. In relation to work, more than assimilation is needed for commercial sex workers.

Four related questions need to be considered. First, should sex work be regarded as different from other forms of work? Second, what are the likely practical effects of "treating prostitution like any other profession" and applying rules generally applicable to work? Third, can women be forced to engage in commercial sex as a condition of subsistence, or denied public benefits if they have a history of supporting themselves through commercial sex work? Fourth, would the decriminalization of commercial sex increase economic pressures on women who would prefer not to sell sex for money? Even though commercial sex is illegal, women are now

363. Tracy Clements asserts that if criminalization ended, "prostitutes could organize and demand better working conditions, set professional standards, advertise, and regulate the industry." Clements, *supra* note 26, at 87. David Richards suggests that if commercial sex were decriminalized, "probably the best way to aid prostitutes to protect themselves from unfair business dealings with customers and pimps would be to provide legal facilities in the form of unions of prostitutes that would bring the force of collective organizational self-protection to this atomistic profession." Richards, *supra* note 36, at 1281-82. COYOTE says, "[Legalization would] involve no new legislation to deal specifically with prostitution, but merely leave the businesses which surround prostitution subject to general civil, business, and professional codes." JENNESS, *supra* note 44, at 69 (quoting COYOTE documents). See also *supra* note 161.

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subject to enormous economic pressures—direct and indirect, public and private—to sell sex for money.

## A. CONFLICTING PARADIGMS OF WORK AND SEX

Two recent articles, one theoretical<sup>364</sup> and the other empirical,<sup>365</sup> compare sex work and other forms of paid labor. Professor Martha Nussbaum contrasts sex work with a variety of other jobs—factory work, domestic household labor, singer, masseuse, professor. She concludes that, except for the professor, commercial sex seems relatively attractive. For example, she compares sex work with the work of a woman plucking feathers from chickens. According to Nussbaum:

Both face health risks, but the health risk in prostitution can be very much reduced by legalizations and regulation, whereas the particular type of work the factory worker is performing carries a high risk of nerve damage in the hands, a fact about it that appears unlikely to change. The prostitute may well have better working hours and conditions than the factory worker; especially in a legalized regime, she may have much more control over her working conditions. She has a degree of choice about which clients she accepts and what activities she performs, whereas the factory worker has no choices but must perform the same motions again and again for years. The prostitute also performs a service that requires skill and responsiveness to new situations, whereas the factory worker's repetitive motion exercises relatively little human skill and contains no variety.

... [On the other hand t]he factory worker suffers no invasion of her internal private space, whereas the prostitute's activity involves such (consensual) invasion. Finally, the prostitute suffers from social stigma, whereas the factory worker does not . . . .<sup>366</sup>

Kimberly-Anne Ford used a different methodology to reach similar conclusions. She interviewed a matched sample of street sex workers and hospital aides and orderlies. She found the work of both similar in many ways.<sup>367</sup> Hospital workers were more likely to be high school graduates, and, on average, start work at an older age.<sup>368</sup> Sex workers were ten times

364. See Nussbaum, *supra* note 79.

365. See Kimberly-Anne Ford, *Evaluating Prostitution as a Human Service Occupation*, in PROSTITUTION, *supra* note 2, at 420.

366. Nussbaum, *supra* note 79, at 701-02 (footnotes omitted).

367. "[E]ach type of worker must relate to the client or patient on an intimate level. Both workers have direct contact with the client/patients' physical body. They both experience similar occupational health hazards from spending numerous hours in a standing position." Ford, *supra* note 365, at 421.

368. See *id.* at 422.



more likely to have been subject to sexual harassment, but orderlies were more likely to have been subject to physical violence.<sup>369</sup> Sixty percent of sex workers report that their pay is good and 73.1% have savings; by contrast only ten percent of hospital workers say their pay is good and fewer have savings.<sup>370</sup> Eighty-five percent of sex workers have refused a potential client, whereas less than half of hospital workers have refused to care for a particular patient.<sup>371</sup> Hospital workers are much more likely to be satisfied with their work than sex workers.<sup>372</sup>

These authors suggest that, on a variety of scales, sex work is like other work, better in some respects and worse in others.<sup>373</sup> This Section argues that it is wrong to think of sex work as essentially similar to other forms of work. While sex work is like other work in many respects, it is and should be regarded as categorically different from other kinds of work. Authentic, voluntary consent is the sine qua non of legitimate sex, whether commercial or not. By contrast, there is a widespread social expectation that competent adults must work, whether they want to or not.<sup>374</sup> Nussbaum, in her analysis demonstrating the similarities between sex work and other work makes an interesting move. In referring to sex work she always inserts the phrase "(consensual)," as in the passage quoted above.<sup>375</sup> By contrast, she does not qualify the work of the chicken-plucker as "consensual." It seems unlikely that many chicken-pluckers do this work as a free and voluntary choice. This Article affirms Nussbaum's implicit intuition that consent matters more in relation to sex work than it does in relation to plucking chicken feathers. But defending this intuition is complex.

369. *See id.* at 426.

370. *See id.* at 428.

371. *See id.*

372. *See id.* at 430.

373. David Richards makes the same point:

Commercial sex is no more the sale of sexual organs than is the sale of a mover's muscles, or a model's beauty or a lawyer's legal talent. . . . Many people in highly remunerated service professions engage in boring, sometimes socially wasteful work that they know sacrifices their better talents and that leads to deep alienation and emotional detachment. If prostitution is to be criminalized as degraded work, much other work in the United States, a fortiori, would have to be criminalized. We are not prepared to do so in the latter case because of considerations that apply to prostitution as well: in a society committed to equal concern and respect for autonomy people are entitled to make choices for themselves as to trade-offs between alienation, social services, and remuneration. . . . It is impossible to see how sexual services can be distinguished from other cases.

Richards, *supra* note 36, at 1257-59.

374. *See* GEORGE J. ANNAS, SYLVIA A. LAW, RAND E. ROSENBLATT & KENNETH R. WING, AMERICAN HEALTH LAW 746 (1990) (quoting Howard Lesnick's unpublished draft). *See also* Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833 (1983) (reviewing JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983)).

375. *See* Nussbaum, *supra* note 79, at 701-02.

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Professor Howard Lesnick describes the prevailing legal and cultural paradigm of work:

The dominant view conceives of work as an exchange relationship. Work is a burden, i.e. the giving up of "leisure" in return for compensation. The utility of the work is defined by the user, initially the employer as the direct purchaser of labor, ultimately the consumer. The employer decides what it contracts to buy; the employee "fills the job." The worker has a role defined by the job and does not own the job. The value of work for the worker is only as a means toward self-sufficiency separate from work. The worker has no legitimate interest in the product, but only in the pay and working conditions, which affect him or her personally.<sup>376</sup>

Many serious observers confirm Lesnick's characterization of the dominant paradigm of work as something that people are forced to do to earn money to support a life in which meaning will be found outside of the work context.<sup>377</sup> The law reflects the view that able bodied people must work as a condition of subsistence,<sup>378</sup> and that a worker has no legitimate voice in defining the goals or content of the job.<sup>379</sup>

By contrast, the dominant paradigm of sex says that individual, mutual, informed consent separates good from evil. Consensual sex is highly valued. Non-consensual sex is a serious crime. Consent is key. All commentators on sexuality and commercial sex share a commitment to individ-

376. ANNAS ET AL., *supra* note 374, at 746 (quoting Lesnick).

377. For example, Sigmund Freud observes:

No other technique for the conduct of life attaches the individual so firmly to reality as laying emphasis on work; for his work at least gives him a secure place in a portion of reality, in the human community . . . Professional activity is a source of special satisfaction if it is a freely chosen one . . . And yet, as a path to happiness, work is not highly prized by men. They do not strive after it as they do after other possibilities of satisfaction. The great majority of people only work under the stress of necessity, and this natural human aversion to work raises most difficult social problems.

SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 27 (1962).

378. Subsistence support is limited to people presumed unable to support themselves through work, that is, the aged, blind, disabled, and children and their primary care takers. Grants are set at a level lower than can be earned from a minimum wage job. Caretakers of children are required to work if jobs and child care are available. See Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1252-61, 1262-67 (1983); Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 477-81 (1997) [hereinafter Law, *Ending Welfare*].

379. The classic case, *NLRB v. Yeshiva Univ.*, holds that faculty at a private university are not employees entitled to unionize under the National Labor Relations Act because they "determined . . . the product to be produced, the terms upon which it will be offered, and the customers who will be served." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980).

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ual agency and choice in sexual matters in relation to adults, and disagree only on how choice can best be realized.<sup>380</sup>

How do we reconcile the conflict between the concept of sexuality as a mutually consensual experience and the concept of work as a burden that people are legitimately forced to bear? A society could address this paradigm conflict by saying that the norm of authentic consent, generally applicable to sexual relations, should control and that people should not be forced to engage in commercial sex, as a condition of subsistence. Even if commercial sex is legal, many women regard it as inconsistent with their deepest sense of self and inconsistent with moral and religious principles. We should recognize that choice with respect to sexual relationships is so integral to individual identity and integrity that sex should not be compelled, even if it could provide subsistence to a person who would otherwise depend on the state. But why should personal choice be given such high value in relation to sex, if it is denied in relation to many other issues of profound and legitimate importance to individuals? As Section C *infra* explains, work requirements often deny people choice about matters of profound personal importance and conscience belief.

#### B. THE APPLICATION OF TRADITIONAL WORK LAW TO COMMERCIAL SEX

This Section explores what it would mean to treat commercial sex "as any other profession" or employment. If commercial sex were decriminalized women might work in an organized context, such as the ranches in Nevada or the brothels in Hawaii during World War II. This Section first considers sex as work in an organized context and explores the rights and protections that the law provides to employees. It concludes that there are many obstacles to applying employee protection laws to sex workers and that the concrete benefits of these laws are likely to be minimal. Second, this Section explores the rights and protections that sex workers might enjoy as independent professionals.

In the United States, many state and federal laws that protect workers only apply to the employer/employee relationship. The employee status triggers the protection of laws governing minimum wage, workers' compensation, unemployment compensation, protection against sex discrimi-

380. See *supra* Part II on the decriminalization of *consensual* adult sexual activity. See also *supra* Part IV.B on the legal change recognizing that sex between married people is legitimate if consensual and rape if it is not.

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nation, including sexual harassment, and the right to unionize.<sup>381</sup> In addition, benefits, including health insurance and pensions, are often tied to employment.<sup>382</sup>

Laws defining employee rights and benefits distinguish between "employees," who are entitled to the benefits of the law, and "independent contractors," who are not. The distinction between employees and independent contractors is complex and indeterminate.<sup>383</sup> The key factors include "the degree of control over the worker's work, the worker's opportunity for profit or loss, the worker's investment in tools and materials, whether the work requires skill, the duration of the relationship, and whether the service is an integral part of the employer's business."<sup>384</sup>

Many commercial sex workers are inappropriately classified as "independent contractors" rather than "employees." For example, the Nevada ranches characterized workers as "independent contractors," even though the ranch managers exert substantial control over their lives and work.<sup>385</sup> Similarly, erotic dancers are often classified as "independent contractors" even though the establishment managers exercise the forms of control that typically characterizes the employment relation.<sup>386</sup> The problem is not unique to sex workers. Internal Revenue Service studies "demonstrate massive fraud on the part of employers in this area."<sup>387</sup> Nonetheless

381. See Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 571 (1996).

382. See Clements, *supra* note 26, at 66-67.

383. The standard "is a complex and manipulable multi factor test which invites employers to structure their relationships with employees in whatever manner best evades liability." Middleton, *supra* note 381, at 569.

384. *Id.* at n.86. In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court held that the common law test, as stated by the Court in that case, should apply. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). The Court also recognized that a broader "economic realities" test had been developed in the context of the Fair Labor Standards Act. Compare *United States v. Silk*, 331 U.S. 704 (1947) (economic realities test), with *Nationwide Mut. Ins. Co.*, 503 U.S. 318 (common law test). See also *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (comparing the two tests). For a discussion of how these factors apply to exotic dancers, see Margot Rutman, *Exotic Dancers' Employment Law Regulations*, 8 TEMPLE POL. & CIV. RTS. L. REV. 515, 538-45 (1999).

385. See *supra* text accompanying note 221; Bingham, *supra* note 212.

386. Margot Rutman's study of exotic dancers reports that the "industry is desperately trying to maintain classifying exotic dancers as independent contractors to minimize employment tax liability and also render dancers incapable of receiving employment protection." Rutman, *supra* note 384, at 550.

387. Middleton, *supra* note 381, at 569 (quoting U.S. Gen. Accounting Office, Pub. No. GAO/T- GGD-94-194, *Tax Administration: Improving Independent Contractor Compliance with Tax Laws*, Testimony before the House Comm. on Small Business 5 (1994)) ("Based on a 1984 study, the IRS estimated that, among 5.2 million businesses both small and large, fifteen percent misclassified 3.4 million employees as independent contractors.").



whether commercial sex workers are better off as "employees" or as "independent contractors" requires exploration of the concrete benefits that attach to the status as employees.<sup>388</sup>

Under the federal Fair Labor Standards Act employees are entitled to earn the minimum wage.<sup>389</sup> In several recent cases involving exotic dancers courts have rejected employer claims that the women were independent contractors rather than employees and required compliance with the minimum wage, overtime, and record-keeping provisions of the FLSA.<sup>390</sup> The guarantee of a minimum wage is of little consequence to many commercial sex workers who earn more than that.<sup>391</sup> The women who earn least, street workers, are most difficult to characterize as "employees," rather than independent contractors.<sup>392</sup> Margot Rutman observes that exotic dancers are often better off economically as independent contractors than as employees, even though the employee status triggers other legal protections.<sup>393</sup>

Similarly, state workers' compensation programs, providing payment for workplace related injuries, distinguish between employees and independent contractors. Two recent cases involving workers' compensation claims by exotic dancers reach opposite conclusions,<sup>394</sup> under similar legal standards and facts.<sup>395</sup> In workers' compensation cases, in addition to

388. See Rutman, *supra* note 384, at 558-59.

389. See 29 U.S.C. §§ 201-219 (1998).

390. See *Reich v. Circle C. Invs., Inc.* 998 F.2d 324, 327 (5th Cir. 1993) (applying the economic realities test, the court found that dancers were employees); *Reich v. Priba Corp.*, 890 F. Supp. 586 (N.D. Tex. 1995) (same, even though dancers had signed agreements stating that they were independent contractors); *Jeffcoat v. Department of Lab.*, 732 P.2d 1073 (Alaska 1987) (same under state minimum wage law); *Harrell v. Diamond A. Entertainment, Inc.*, 992 F. Supp. 1343 (M.D. Fla. 1997) (denying summary judgment and deciding exotic dancers are employees under FLSA standards).

391. See *supra* note 220 and accompanying text.

392. See *Sanchez, supra* note 21, at 566.

393. See Rutman, *supra* note 384, at 531.

394. Compare *Cy Inv., Inc. v. National Council on Compensation Ins.*, 876 P.2d 805, 807 (Or. Ct. App. 1994) (exotic dancer is an independent contractor and not entitled to workers' compensation; noting method of payment is a factor that favors classification as independent contractor if taxes are filed as independent contractors and dancers are paid hourly wage), with *Hanson v. BCB Inc.*, 754 P.2d 444, 446 (Idaho 1988) (exotic dancer is an employee under the "right to control" standard).

395. In *Cy Investment*, women who successfully auditioned could sign up for shifts on a weekly schedule. Dancers were paid a fee for every shift worked, averaging \$6.00 an hour. In addition to these wages, dancers earned "substantial tips, which exceeded their wages." *Cy Investment*, 876 P.2d at 806. The dancers signed a form contract at the end of each shift, indicating the hours of each woman's shift and compensation received. Dancers supplied their own costumes and music. The form also indicated that the dancer was responsible for her own taxes and workers' compensation; the dancers generally reported their earnings on Schedule C forms, deducting as business expenses. *Cy's* reported the compensation paid to the dancers to the IRS on Form 1099s, as "non-employee compensation." Supervision of dancing performances was limited to regulation of time spent on and off stage. Fines were imposed for "failing to confirm their scheduled appearances, tardiness, failing to complete their shift, and

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demonstrating that the injured worker is an employee, the claimant must demonstrate that the injury arose out of the course of employment. The "arising out of" requirement usually demands a showing of a causal connection between the risk of injury and the employment.<sup>396</sup> In *Hanson v. BCB Inc.*, the plaintiff was shot and killed in the parking lot of the bar late at night as she was leaving her work as an exotic dancer. Her husband and son filed for survivors' benefits provided by the state workers' compensation law. The defendant did not contest that the injury was employment related, but only argued, unsuccessfully, that she was not an employee. Given the level of violence associated with sex-related work,<sup>397</sup> it seems fair to conclude that violence is a risk associated with sex work.<sup>398</sup> Other courts have held that sex worker injuries from alcohol-related accidents are compensable under workers' compensation.<sup>399</sup> While workers' compensation protection is an important benefit for people who are injured at work, or for the surviving families of those who are killed, employers have wide latitude to structure work to avoid the employer/employee relationship.<sup>400</sup> Further, for many sex workers the long-term benefit of workers' compensation protection that comes with the employment relationship may be outweighed by greater freedom and earnings of the independent contractor.<sup>401</sup>

The distinction between independent contractors and employees is also key to eligibility for unemployment compensation. While federal law requires that states adopt an unemployment compensation system, the details are left to the states. Exotic dancers who demonstrate that they are full-time employees have qualified for unemployment compensation and

touching the mirrors on employment stage." *Id.* The arrangements in *Hanson* were similar, though the owner testified that Hanson often came late and left early. In *Hanson* the owner supplied the music. Hanson's pay was a split of the cover charge (divided solely and equally among the dancers), the tips each woman received from customers, and one free drink a night. There was no written contract and no arrangement for the withholding or payment of taxes. *See Hanson*, 754 P.2d at 445.

396. *See* 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW 6.00 (1998).

397. *See supra* Part IV.

398. For a broad statement of the injuries arising out of sex work and an argument that they should be compensated by workers' compensation, see Margaret Baldwin, "A Million Dollars and an Apology": *Prostitution and Public Benefits Claims*, 10 HASTINGS WOMEN'S L.J. 189, 198-203 (1999).

399. *See, e.g.*, 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995) (workers' compensation benefits for injuries sustained in car crash driving home from work as a B-girl; employer encouraged co-worker driver to drink excessive alcohol and hence injury occurred in the course of employment); Panagos v. Industrial Comm'n, 524 N.E.2d 1018 (Ill. App. Ct. 1988) (same).

400. *See supra* text accompanying notes 381-84.

401. *See supra* note 396 and accompanying text.

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required employers to contribute to the compensation fund.<sup>402</sup> However, most states require coverage only for employees who work for an employer who hires more than a minimal number of workers.<sup>403</sup> In addition, all states exclude part-time workers from mandatory coverage for unemployment compensation, and part-time workers are typically defined as those who work less than twenty hours a week.<sup>404</sup> Employers increasingly rely on part-time workers, and almost one-fifth of the entire U.S. workforce now works part-time.<sup>405</sup> While some workers prefer part-time work, the numbers of involuntary part-time workers has grown rapidly.<sup>406</sup> If commercial sex were legal, it is probable that employers could join the growing trend to rely on part-time workers to avoid liability for unemployment compensation.

The employment relationship also triggers the protection of the federal anti-discrimination laws, including the laws against sexual harassment.<sup>407</sup> Even though commercial sex workers offer sex for money, they also sometimes experience unwanted advances, harassment, and violence.<sup>408</sup> Actionable sexual harassment may take two forms: (1) "quid pro quo," where sexual favors are demanded in exchange for a job, a promotion, or other work-related benefit, and (2) "hostile work environment," where the atmosphere or situation at work becomes unbearably uncomfortable or offensive due to jokes, posters, comments, touch, or other behavior. Justice Rehnquist, writing for a unanimous Court in 1986 noted that "hostile work environment" (that is, non-quid pro quo) harassment violates Title VII because employees have "the right to work in an environment free from dis-

402. See, e.g., *In re PNS Agency, Inc.*, 488 N.Y.S.2d 297 (App. Div. 1985) (holding exotic dancers are employees and employer owes unpaid unemployment insurance contributions).

403. See John C. Williams, Annotation, *Part-Time or Intermittent Workers as Covered by or Eligible for Benefits Under State Unemployment Compensation Acts*, 95 A.L.R.3d 891 (1979).

404. See Middleton, *supra* note 381, at 572.

405. See Chris Tilly, *Reasons for the Continuing Growth of Part-Time Employment*, MONTHLY LAB. REV., Mar. 1991, at 10.

406. Involuntary part-time work increased 178% between 1970 and 1990. By 1992, more than six million workers worked part-time involuntarily, a 26% increase from only two years before. See Middleton, *supra* note 381, at 564 n.18 (citing KELLY SERVICES, INC., THE FLEXIBLE WORKFORCE IN A CHANGING ECONOMY 51 (1994) (citing U.S. Bureau of Labor Statistics data)).

407. Title VII of the 1964 Civil Rights Act, as amended, forbids discrimination on the basis of, among other characteristics, sex. See 42 U.S.C. § 2000e-2 to e-3 (1998). It applies to employers with more than 15 employees. See 42 U.S.C. § 2000e(b) (1998). Title VII's prohibition on sex discrimination includes sexual harassment. See 29 C.F.R. § 1604.11 (1995). See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

408. See *supra* Part IV. See also Sanchez, *supra* note 21, at 567 (reporting that men who serve as agents for exotic dancers frequently insist upon sex as a condition for a referral). If these men are "employers" of more than 15 workers, they may be liable for quid pro quo harassment.

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criminy intimidation, ridicule, and insult."<sup>409</sup> The Court further ruled that "[f]or [non-quid pro quo] sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."<sup>410</sup> EEOC guidelines provide that "[a]n employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees in the work-place, where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action."<sup>411</sup> Lower courts have applied this principle to hold employers liable for customer harassment that creates a hostile work environment.<sup>412</sup>

How, if at all, do these general principles apply to commercial sex workers? The easiest and earliest cases involve situations in which employers require women workers to dress and behave in sexually provocative ways, while doing work in which sexual titillation is not an obvious or necessary part of the job. For example, when a New York City management company required a female lobby attendant to wear a revealing costume and customers subjected her to repeated sexual harassment, the court found the employer liable.<sup>413</sup> In these, and other cases, the courts found that sexual provocation was not an essential part of the job and invited customer harassment.<sup>414</sup> The harder question is whether legal protection against sexual harassment extends to women whose job it is to offer sexual titillation, or sex itself, for money.

409. *Meritor*, 477 U.S. at 65.

410. *Id.* at 67. In *Harris v. Forklift Systems, Inc.*, a unanimous Court developed its test for hostile work environment sexual harassment. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The Court held that a plaintiff is not necessarily required to prove psychological harm to recover damages for this type of harassment. Justice Sandra Day O'Connor explained, "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.* at 22. "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. . . . [W]hile psychological harm, like any other relevant factor, may be taken into account, no single factor is required." *Id.* at 23.

411. 29 C.F.R. § 1604.11(e) (1995).

412. See, e.g., *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992) (hotel liable for sexual harassment of female black-jack dealer by male customers). See also Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought by a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 281-95 (1998).

413. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981).

414. See *EEOC v. Newton Inn Assocs.*, 647 F. Supp. 957 (E.D. Va. 1986) (determining waitresses required to wear provocative costumes and subject to harassment); *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986) (same). See also *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (holding that airline, billing itself as Love Air, would hire only attractive women as flight attendants). Court ruled in favor of a class of men denied employment holding that "Southwest is not a business where vicarious sex entertainment is the primary service provided." *Id.* at 302.

The closest case on point involved a claim by waitresses at a Hooters Restaurant that the employer's requirement that they wear scanty costumes, combined with promotion of burgers with sex appeal, subjected the plaintiffs to unwanted and predictable sexual harassment, for which the employer was responsible. The restaurant settled with the plaintiffs on confidential terms,<sup>415</sup> and thus the case provides little precedential support or guidance for future claims by sex workers who assert employer responsibility for unwanted customer harassment. The case has generated much popular and academic commentary. Some observers argue that women who work at Hooters, or in other contexts in which sexual titillation is a significant part (or all) of the service offered, assume the risk of sexual harassment, and that employers cannot reasonably be held responsible when it occurs.<sup>416</sup> Others assert that even when a woman is hired to offer some forms of sexual observation, conversation, or physical contact, the woman should nonetheless be free to determine what is welcomed, and that employers should be responsible for customer behavior that is unwelcome, beyond the scope of employment and reasonably known to the employer.<sup>417</sup> As the Supreme Court has recognized, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome' . . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome. . . ."<sup>418</sup> Even if sexual harassment law applies to erotic dancers, nude dancers, and commercial sex workers as a matter of theory and doctrine, women asserting such claims would face formidable practical difficulties of proof, both in showing that

415. See *Sexual Harassment Suits at Hooters Are Settled*, MINNEAPOLIS STAR TRIB., May 11, 1994, at 1B.

416. See Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1122 (1995) (arguing for a "limited assumption of risk defense in sexual harassment law . . . allowing individuals to choose to work in sexually charged environments and recognizing that employees can and should face the consequences of their choices"). See also Robert J. Alberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447, 470-502 (1994) (proposing a sliding scale classification of jobs based on reasonable employee expectations).

417. See Burstein, *supra* note 412, at 314; Jeannie Sciafani Ree, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 203 (1997).

418. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986). Mary Jo Shaney argues for "a consent standard that would require courts to focus on whether the victim overtly consented to the sexual conduct rather than on whether the victim resisted a harasser's behavior." Mary Jo Shaney, Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109, 1112 (1986). Mary F. Radford suggests that the burden of proving welcomeness should be shifted from the plaintiff to the defendant, and that the scope of inquiry should be narrowed to those interactions between the plaintiff and the defendant. Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 77 N.C. L. REV. 499, 524-34 (1994).

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customer behavior was unwelcome and that the employer had reasonable opportunity to know and prevent it.<sup>419</sup>

In the United States health insurance and pension benefits are traditionally provided through employment.<sup>420</sup> Commercial sex workers have little access to health insurance, or health care services, through either public or private insurance programs.<sup>421</sup> Employers are not required to offer health insurance or pensions and many do not. Many commercial sex workers are not employees.<sup>422</sup> Even if they are employees, as for example, exotic dancers, employers typically do not provide health coverage or pension benefits to part-time workers.<sup>423</sup>

Lack of health insurance is a problem for over sixteen percent of Americans.<sup>424</sup> This is a deep problem in the U.S., and it is only growing worse. It is difficult to imagine a politically realistic scenario in which the U.S. will commit itself to providing health insurance for all its citizens.<sup>425</sup>

419. Margot Rutman's in-depth analysis of the law applicable to erotic dancers expresses doubt about the value of sexual harassment law. "When true sexual harassment does occur it may be difficult to distinguish from ordinary conduct of the dancers and customers . . . . Applying the traditional notions of sexual harassment in an environment like a strip club becomes virtually impossible." Rutman, *supra* note 384, at 532-33.

420. See Middleton, *supra* note 381, at 561.

421. See Clements, *supra* note 26, at 64-71.

422. See *supra* text accompanying notes 381-86.

423. Each year since 1987 bills have been introduced in Congress to require that, if an employer offers health insurance and pension benefits to full-time workers, it must also offer them on a pro-rated basis to part-time and temporary workers. The bills have never moved out of committee. See Middleton, *supra* note 381, at 583-84.

424. See Robert Pear, *More Americans Were Uninsured in 1998, U.S. Says*, N.Y. TIMES, Oct. 4, 1999, at A1. The spreading gap between the wages of workers in menial jobs and those of skilled college graduates contributes to the growing gap in access to health insurance. After taking inflation into account, wages for high school graduates fell 11% from 1973 to 1997, while those of college graduates rose 17%. Between 1992 and 1997, the percentage of heads of households with high school diplomas who lacked health insurance coverage rose from 26.2% to 28.6%. But for those with college degrees, the percentage was much lower and only rose from 7.8% to 8.1%. See Jon Cabel, Kimberly Hurst, Heidi Whitmore & Catherine Hoffman, *Class and Benefits at the Workplace*, HEALTH AFF., May/June 1999, at 144. The authors also found that low-paid workers in companies with high proportions of well-paid employees were more likely to be offered health insurance benefits. In other words, a waitress in the General Motors cafeteria is more likely to have health insurance than a person doing the same work at McDonald's. See also Peter L. Kilborn, *Low-Wage Businesses Add to Number of Uninsured Workers*, N.Y. TIMES, May 3, 1999, at A20.

425. Professor James Morone offers this comment on the defeat of the Clinton Health Plan: Since the 1920s, American corporations have offered their employees a private welfare system. . . . The [1993-94] Clinton plan's employee mandate was a typical example. Now, after seven decades, the corporate welfare state is coming to an end. A new international economic order is creating an economy of "hollow corporations" and "contingent workers." . . . The Clinton administration's failure to lock in health care coverage for full-time employees is more than the latest miss in a long line of health care reform failures. This time we face the rapid disintegration of American health security, not just the safety net but the basic structure.

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Because the U.S. has been exceptionally unable to create programs to assure health care, or health insurance, to all people, we have often created focused programs to deal with particular health problems or population groups.<sup>426</sup> COYOTE's work in the 1990s suggests the possibility of creating focused programs to provide health care services to commercial sex workers, motivated by the concern about sexually transmitted disease.<sup>427</sup>

People who argue that criminal penalties against commercial sex workers should be abolished, and who also recognize the vulnerability of those who provide sex for money, sometimes suggest that unionization might provide protection.<sup>428</sup> One of the most effective ways for commercial sex workers to promote decent working conditions and protect themselves from violence, abuse, and health and safety hazards, is to work in a collective context. That seems to be the lesson of Hawaii during World War II, and Australia.<sup>429</sup> Unionization is possible only in a context in which people work as employees.

The unionization experience of exotic dancers and other legal sex workers is not encouraging. Despite the exponential growth of exotic and nude dancing in the United States,<sup>430</sup> only one establishment, the Lusty

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James A. Morone, *Nativism, Hollow Corporations, and Managed Competition: Why the Clinton Health Care Reform Failed*, 20 J. HEALTH POL. POL'Y & L. 391, 395-96 (1995).

426. For example Title X allocates block grants to states to fund qualified family planning providers. See Family Planning Services and Population Research Act of 1970, 42 U.S.C. §§ 300-300a-8 (1994). In 1994, 6.6 million women received contraceptive services from more than 7,000 subsidized family planning clinics. For women who lack private health insurance and who do not qualify for Medicaid, Title X clinics are often their only source of primary health care. See Jennifer J. Frost, *Family Planning Clinic Services in the United States, 1994*, 28 FAM. PLAN. PERSP. 92, 92 (1996). As another example, in 1997 Congress appropriated \$20.3 billion for 1998 to 2003, to enable states to expand health services for low income children through the Children's Health Insurance Program (CHIP). See Balanced Budget Act of 1997, § 2101(a), Pub. L. No. 105-33, 111 Stat. 251 (1997).

427. Beginning in 1987, the California Department of Health has funded COYOTE to do AIDS outreach and education. JENNESS, *supra* note 44, at 99. Priscilla Alexander, former head of COYOTE comments:

We have been contacted by public health departments and AIDS projects around the country requesting information on how to develop AIDS prevention projects. The first thing we say is that the most important element to a successful program is to hire prostitutes to develop and staff the project, and surprisingly, most agree to this. And so, for the first time in history, experience as a prostitute is becoming a requirement for legitimate employment.

JENNESS, *supra* note 44, at 103. See also Sarah Crosby, *Health Care Provision for Prostitute Women: A Holistic Approach*, in PROSTITUTION, *supra* note 2, at 409 (describing a neighborhood health and social services program for commercial sex workers in Manchester, England, in the early 1990s).

428. See *supra* note 363.

429. See *supra* Parts IIIA-B.

430. Nude dance clubs alone constitute "an expanding \$3-billion-a-year industry that [in 1995] drew 10 million customers to about 2,200 clubs around the country." James Brooke, *Rockies Ski Resorts Send Strip Clubs Packing*, N.Y. TIMES, Sept. 25, 1996, at A14.

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Lady in San Francisco, has recognized a union.<sup>431</sup> Where women have sought to organize a union, they have been rebuffed by established labor organizations.<sup>432</sup> Only a small minority of all U.S. workers are now unionized.<sup>433</sup> Amongst those whose work is structurally most similar to sex workers, that is, part-time, temporary service work primarily done by women, unionization is rare.<sup>434</sup> The collective bargaining agreement established at the Lusty Lady after months of negotiation provides for one sick-day and one holiday, New Year's Eve, on which workers can receive time and one-tenth pay.<sup>435</sup>

In short, treating commercial sex "like any other profession" is not likely to offer commercial sex workers much assurance of unionization, access to health insurance, or decent working conditions. Rather, commercial sex workers, like other part-time, self-employed, and contingent workers, confront problems of economic and social insecurity that are particularly acute in fields, like commercial sex, where most of the workers are women.<sup>436</sup> It seems more likely that such problems would be addressed through measures applicable to all workers, and extended to commercial sex workers if commercial sex were legal, rather than through special programs for commercial sex workers.

Professionalism may provide an alternative model for the organization of commercial sex work. The classical professions—law and medicine—require long education in a complex subject and deal with matters in which incompetence has serious adverse affects.<sup>437</sup> Commercial sex does not seem to fit this description.<sup>438</sup> But not all professionals have undergone a long education in a complex subject, or provide a service that can cause serious harm if done badly. Barbers and beauticians, practical nurses, massage therapists, social workers and many others are licensed professionals. The hallmarks of professionalism are control of access to defined forms of

431. See Rutman, *supra* note 384, at 552-56.

432. See *id.* at 554.

433. In 1999, 13.9% of wage and salary workers in the U.S. were unionized, 9.5% in the private sector and 37.5% of government workers. See BUREAU OF LAB. STAT., U.S. DEP'T OF LABOR, UNION MEMBERS IN 1998 (1999).

434. Women are less unionized than men (11.4% to 16.2%), part-time workers are unionized less than full-time workers (6.5% to 15.5%), and service industries other than police and firefighters are only 8.6% unionized. See *id.*

435. See Rutman, *supra* note 384, at 555.

436. See Middleton, *supra* note 381, at 558-60.

437. See ELIOT FRIEDSON, PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE 81-104 (1970); Talcott Parsons, *Introduction to MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 59 (1947).

438. See Richards, *supra* note 36, at 1282.



work and definitions of standards of excellence. Groups that consider themselves professionals use a variety of ways of communicating safety and excellence to potential customers. For example, private, professionally controlled organizations certify that licensed physicians possess the additional quality of, for example, a member of The American College of Surgeons.<sup>439</sup>

Often professionals seek to enlist the power of the state to create licensing programs that control who is allowed to practice, for example, law or medicine. Professionals licensed by the state enjoy wide latitude while those not licensed are guilty of the crime or offense of unauthorized practice. In many cases licensing results because the professional group seeks it as a form of legitimation and as a tool of self-regulation.<sup>440</sup> Given the long history of state punishment of commercial sex and disrespect for the interests of women who sell sex, commercial sex workers are unlikely to seek state-controlled licensing, even if commercial sex were legal. Further, the experience of Nevada and Australia confirms that licensing is unlikely to serve the needs of the people licensed.<sup>441</sup>

If commercial sex were legal, professional workers might attempt other means of assuring customers of a standard of quality and safety. Alternatively, they might create private organizations that would certify that its members met certain standards of health and safety, or were qualified to meet the special needs of the elderly or the inexperienced. Licensing and accreditation have not been a panacea for assuring excellence in health care and other professions. But, at the same time, they do provide models of professionally controlled mechanisms of assuring excellence.

#### C. SUBSISTENCE AND EXPLICIT CONDITIONS REQUIRING COMMERCIAL SEX WORK

Can commercial sex or other sex work be required as a condition of public assistance? I first thought hard about the legalization of commercial sex in 1971 when I spent a few months in Las Vegas, Nevada, working as a lawyer with the local welfare rights organization in a successful effort to reverse a state action summarily terminating aid to half of the state's re-

439. See *Koefoot v. American College of Surgeons*, 652 F. Supp. 882 (N.D. Ill. 1986) (rejecting an antitrust challenge to a determination to expel the plaintiff from the ACS). The court found that the professional credential had pro-competitive benefits because it "enables consumers to more quickly find a product or service that they desire." *Id.* at 904.

440. For a description and criticism of professional licensing see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 139-60 (1962).

441. See *supra* Parts III.A-B.

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ipients of Aid to Families with Dependent Children.<sup>442</sup> Nevada was then debating whether to make commercial sex legal in Las Vegas. The sophisticated poor women I worked with in Las Vegas were unanimously opposed to legalization. They said, "If it is legal, the welfare department will require us to work as prostitutes." I argued with them, asserting in my lawyerly way that commercial sex could be legal, but not required. I still believe that legalization without compulsion is possible and wise. But, as this Section demonstrates, our legal and social treatment of poor women lends much support to the fears of the Las Vegas welfare mothers that compulsion will follow legalization.

Under current law, even though commercial sex is illegal, disabled women<sup>443</sup> who earn money providing commercial sexual services are denied subsistence benefits for which they are otherwise qualified.<sup>444</sup> For example, in *Bell v. Commissioner of Social Security*,<sup>445</sup> there was no dispute about the fact that Ms. Bell was disabled.<sup>446</sup> Rather, benefits were denied because she was currently engaged in "substantial gainful activity," that is, selling sex for money. As the Seventh Circuit explained, "If you are substantially gainfully employed, that is the end of your claim, even if you have compelling medical evidence that you really are disabled."<sup>447</sup> Because Ms. Bell was substantially gainfully employed as a commercial sex worker, the Social Security officials were not required to consider her claim that her "prostitution was symptomatic of a serious mental disorder and whether it was driven by her drug addiction."<sup>448</sup>

442. The Welfare Director, George Miller, used the newly developed computer system to match any person who appeared on both the work list, as having had taxes or benefits deducted, against the welfare list. Everyone who appeared on both was terminated. Las Vegas has a tourist economy in which many mothers with children work when they can, but still qualify for public aid. See also *Nevada Cuts Welfare*, N.Y. TIMES, Jan. 12, 1971, at A20.

443. Supplemental Security Income (SSI) benefits provide for persons who are "unable to engage in any substantial gainful activity by reasons of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 416(l)(1) (1995).

444. See *Love v. Sullivan*, No. 91 C 7863, 1992 WL 86193 (N.D. Ill. Apr. 22, 1992); *Speaks v. Secretary of Health & Hum. Servs.*, 855 F. Supp. 1108 (C.D. Cal. 1994); *Bell v. Commissioner of Soc. Sec.*, 105 F.3d 244 (6th Cir. 1996).

445. 105 F.3d 244.

446. Ms. Bell suffered from long term cocaine and alcohol dependence. *Bell*, 105 F.3d at 245. In 1994, Congress amended the Social Security Act to deny SSI benefits to disabled people when alcoholism or drug addiction was a "contributing factor material to the commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(C) (1996). See *Stengel v. Callahan*, 983 F. Supp. 1154 (N.D. Ill. 1997), for a description of the Congressional intent and an analysis of the constitutionality of the exclusion.

447. *Bell*, 105 F.3d at 247 (citing *Jones v. Shalala*, 21 F.3d 191, 193 (7th Cir. 1994)).

448. *Id.* at 246-47.

The cases denying SSI benefits to disabled women who were engaged in "substantial gainful activity" in the form of commercial sex were preceded by two sets of earlier cases. First, earnings from illegal transactions have long been subject to federal income taxation.<sup>449</sup> This makes sense. But, taxing illegally earned income is different from denying subsistence benefits to disabled people or mothers of young children because they support themselves through illegal activities or have a history or a prospect of doing so. In the tax context, the activity is all in the past and the tax reduces the profit of the illegal activity and provides an additional incentive to avoid it. But the subsistence benefits context is quite different. A rule that says to disabled people, "earnings from illegal activities categorically disqualify you from disability benefits," implicitly suggests that the individual should continue to support herself in whatever way she can.

A second related set of cases holds that disabled people who earn money through theft or drug sales are engaged in substantial gainful activity, and hence not qualified for SSI.<sup>450</sup> The courts in these cases reason that unless earnings from illegal activities are considered, then "[t]he thief would be qualified, the honest man disqualified."<sup>451</sup> The argument has force and has been adopted by Congress.<sup>452</sup>

But present and future eligibility for subsistence benefits raises more complex issues in relation to earnings from illegal activities than does taxation. Certainly it does not make sense to give benefits to people who earn good money from illegal activity.

All of the reported cases involving SSI claims by disabled women who earn money from commercial sex involve disqualification at the first step of the SSI eligibility process. Generally, determining SSI eligibility involves a five step process.<sup>453</sup> Step 1 asks whether the individual is en-

449. *United States v. Sullivan*, 274 U.S. 259, 263 (1927) held that the earnings from unlawful activities come within the meaning of "gross income" and are therefore subject to income tax.

450. See *Dotson v. Shalala*, 1 F.3d 571 (7th Cir. 1993). In that case, the ALJ found that Mr. Dotson's work as a chainsaw thief involved substantial activity. He had to case an area, plan how to steal the property, actually steal it, and deliver it to small businesses for sale. See *id.* at 574, 577-78. "[L]ifting and carrying the saws . . . [is] significant *physical* activity [and] . . . the planning and execution of the larceny entail[ed] significant *mental* activity." *Id.* at 574. By contrast, in *Corrao v. Shalala*, the court found that an occasional drug dealer was not engaged in substantial gainful activity, and hence not disqualified to receive SSI. *Corrao v. Shalala*, 20 F.3d 943 (9th Cir. 1994).

451. *Jones v. Shalala*, 21 F.3d 191, 192 (7th Cir. 1994). See also *Bell*, 105 F.3d at 246.

452. "[W]hen determining whether an individual is engaged in substantial gainful activity, the Secretary shall consider services performed or earnings derived from such services without regard to the legality of such services." Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296 (amending 42 U.S.C. § 423(d)(4)(1994)).

453. See *Clements*, *supra* note 26, at 72.

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gaged in substantial gainful activity. If she is, she is disqualified and denied benefits. If the applicant is not engaged in substantial gainful activity, Steps 2-4 address the question whether she is disabled. Finally, if she is disabled and not engaged in substantial gainful activity, Step 5 asks whether the individual's impairment, age, education, and work experience precludes him or her from doing any other type of work currently available in the national economy.<sup>454</sup>

Ms. Bell was thirty-four years old, had finished eight years of school, had been addicted to drugs since she was fourteen, and had never held a regular job.<sup>455</sup> But neither her conceded disability nor her bleak job prospects were relevant because she was already engaged in substantial gainful activity as a prostitute.<sup>456</sup> Most observers read these cases as holding that women who are able to support themselves through commercial sex may not obtain SSI, even if they are disabled and have no other job prospects.<sup>457</sup> Others point out that the cases do not tell us what would have happened if Ms. Bell had stopped earning money from commercial sex and then applied for SSI.<sup>458</sup>

Even if it is justifiable to deny benefits to a disabled woman who is currently earning substantial income from illegal commercial sex, it seems wrong to deny benefits to otherwise qualified women because they once earned money from commercial sex, or might be able to do so. None of the courts that considered these cases addressed the issue. Social Security guidelines do not do so. In the context of the decided cases, it would be quite simple for Social Security officials to say, "Benefits are denied because you are now earning substantial income from prostitution. But if you stop earning income, we will consider whether you are disabled and whether there is other work that you might be able to do." Because neither the cases nor the regulations say anything like that, a Social Security administrator or benefit advocate could not confidently advise a disabled woman that if she stopped selling sex her claim would be considered on the

454. See 20 C.F.R. § 416.920 (1995).

455. See *Bell*, 105 F.3d at 245.

456. The magistrate's decision, reversed in *Speaks*, observed that "the Secretary's denial of plaintiff's claim for SSI—without deciding that plaintiff is capable of any other activity—is tantamount to telling her that it is expected that in the future she will earn her living through prostitution." *Speaks v. Secretary of Health & Hum. Servs.*, 855 F. Supp. 1108, 1111 (C.D. Cal. 1994).

457. Tracy Clements reads the cases as saying that "if a woman leaves prostitution and subsequently finds that she cannot secure or maintain legal employment—due to her physical or mental impairment, or to a wide range of social factors—the fact that she once worked as a prostitute may bar her from receiving SSI." Clements, *supra* note 26, at 82.

458. Conversation with Clinical Law Professor Nancy Morawetz, New York University School of Law (July 1, 1999).



merits and the government would not require her to continue to sell sex as a condition of aid.

In the United States at the close of the twentieth century, large numbers of women sell sex and sexual titillation for money.<sup>459</sup> A large proportion of these women, particularly those who work on the street, lack other marketable skills.<sup>460</sup> Disproportionate numbers of these women suffer from physical and mental disabilities.<sup>461</sup> If asked whether disabled women should be denied subsistence because they could support themselves through prostitution, it is likely that most Americans, from across the political spectrum, would say no.<sup>462</sup> Indeed most would find the policy shocking and absurd. Nonetheless, it is the policy that we have adopted implicitly and sub silentio.

More generally, poor women might fear that if commercial sex is legal, it will be compelled as a condition of subsistence because the U.S. has a long history of denying aid to women who are judged to be "unworthy,"<sup>463</sup> particularly those who have had a sexual relationship outside marriage.<sup>464</sup> Poor women have little reason to expect that the state will respect their choices in relation to the nature of work they can be required to do. Women can be required to pick up garbage, including dead rodents and urine soaked mattresses.<sup>465</sup> Often these women are not provided gloves or other protective clothing, or bathroom facilities.<sup>466</sup> This work is not compensated, but is rather required as a condition of receiving subsistence aid.<sup>467</sup> Such work is required of women with very young children who are

459. See *supra* notes 12-13, 17-18.

460. See *supra* note 25.

461. See Sanchez, *supra* note 21, at 279.

462. Despite the fact that most people who think and write about commercial sex are opposed to criminal sanctions, see *supra* Part I, most Americans believe that commercial sex should be a crime. DEPARTMENT OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at 174, tbl.2.99 (1997).

463. See LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935 (1994).

464. See RANDY ALBELDA & CHRIS TILLY, GLASS CEILINGS AND BOTTOMLESS PITS: WOMEN'S WORK, WOMEN'S POVERTY 114 (1997); Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 L. & POL'Y 205, 205 (1997).

465. See Testimony, *Welfare As They Know It*, HARPER'S MAGAZINE, Nov. 1997, at 24-29.

466. The federal Occupational Health and Safety Act does not apply to people working as state or city employees, which includes many workfare participants. See *Department of Labor Guidance on How Workplace Laws Apply to Welfare Recipients*, Daily Lab. Rep. (BNA) No. 103, at E3 (May 29, 1997).

467. See *Bruchman v. Giuliani*, 662 N.Y.S.2d 914 (Sup. Ct. 1997) (requiring that workfare hours be credited against the assistance grant at the prevailing wage rate, under a New York law that expired in 1997, and holding that federal law requires that hours be credited at the federal minimum wage rate).

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forced to leave them with inadequate childcare.<sup>468</sup> Frequently the work women are required to do as a condition of subsistence aid denies them control over family life, and exposes them to the risk of sexual and other forms of harassment.<sup>469</sup> In relation to the poor, the assumption is that no work is demeaning to the worker, if someone is willing to pay for it.

As suggested above, one way around the conflict between legal and cultural expectations that people seeking subsistence aid from the state can be required to do whatever work is available, and the equally strong cultural norm that sex is legitimate only if it is consensual, is to allow women to decline work that violates strongly held conscientious beliefs and personal values. For a time, the Supreme Court interpreted the Constitution to hold that the state could not deny benefits to people who were willing to work at a large range of jobs, but had strong religious and conscientious objections to particular jobs and working conditions.<sup>470</sup> The principle that the constitution prevents the state from telling individuals that they may only receive benefits if they give up fundamental liberties and convictions has not been limited to religiously based beliefs and liberties.<sup>471</sup> The norm that consent defines the bounds of legitimate sexual relations is an historically grounded, traditional fundamental liberty and it is possible to argue that the state may not constitutionally condition subsistence benefits on submission to coerced sex.

Unfortunately, the principles described in the prior paragraph have been largely abandoned by the Supreme Court, especially in relation to poor women challenging restrictions on benefits that burden the exercise of

468. See MARK GREEN, PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, WELFARE AND CHILD CARE: WHAT ABOUT THE CHILDREN (1997) (indicating that in 1997, 30,000 eligible poor children were on waiting lists for child care services). The City announced that 105,000 parents would be assigned to workfare in the coming year. The study finds that a majority of poor children are cared for in situations that are unregulated and unsafe. See *id.*

469. See, e.g., *Woolfolk v. Brown*, 538 F.2d 598 (8th Cir. 1976).

470. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (state may not deny unemployment benefits to person who refuses to work on Saturdays for religious reasons). See also *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (finding state must modify its unemployment compensation requirement that beneficiaries may not refuse work without "good cause" to accommodate to Jehovah's Witness who refused, for religious reasons, to work in weapons production).

471. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state may not deny welfare to new residents because people have a fundamental right to travel from state to state); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (state may not limit medical services to established residents). In 1999 the Supreme Court affirmed that states may not discriminate against new residents by offering them welfare benefits limited to what they would have received in the state from which they came. *Saenz v. Roe*, 119 S. Ct. 1518 (1999). While the scope of the decision is not entirely clear, it is the first time in decades that the Court has found a welfare policy unconstitutional.



fundamental liberties. In *Dandridge v. Williams*,<sup>472</sup> the Court rejected the claim of a poor grandmother who sought additional aid to enable her grandchild to join the family.<sup>473</sup> In *Wyman v. James*,<sup>474</sup> the Court held that public assistance may be terminated if a woman receiving aid refuses to "consent" to an investigative "home visit," even though the Fourth Amendment otherwise prohibits government officials from non-consensual visits without a warrant based on reasonable cause to suspect wrongdoing.<sup>475</sup> Similarly, even though the right to choose abortion is a fundamental constitutionally protected liberty,<sup>476</sup> and the federal Medicaid statute requires states to pay for all medically necessary physician services,<sup>477</sup> the Supreme Court approved a federal law excluding coverage for medically necessary abortions from the otherwise comprehensive Medicaid program.<sup>478</sup> Following these cases, lower courts have approved rules that deny aid to children born to women receiving public aid, even though such rules provide strong incentives for abortion.<sup>479</sup>

These cases suggest that the state enjoys a large freedom to condition receipt of public assistance upon the sacrifice of otherwise constitutionally protected rights. Perhaps courts would see a policy that conditioned aid on a requirement that a woman engage in commercial sex as so egregious that the policy would be found to violate constitutional liberty. But this conclusion is far from clear.

472. 397 U.S. 471 (1970).

473. *See id.* at 485 (denying strict scrutiny of state welfare rule despite its involvement with "the most basic economic needs of impoverished human beings").

474. 400 U.S. 309 (1971).

475. *See id.*

476. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833 (1992).

477. *See* 42 U.S.C. § 1396 (1998). "The medicaid agency may not deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230 (1978). So, for example, the state may not deny coverage for sex-reassignment surgery, if the physician certifies that it is a medically necessary treatment. *See Pinneke v. Preisser*, 623 F.2d 546, 548 (8th Cir. 1980). *See also White v. Beal*, 555 F.2d 1146 (3rd Cir. 1977) (striking down a policy that made eyeglasses available to persons who needed them because of eye pathology but denied them to persons suffering from other types of visual impairment).

478. *See Harris v. McRae*, 448 U.S. 297 (1980).

479. *See C.K. v. Shalala*, 883 F. Supp. 991, 1015 (D.N.J. 1995) (approving a federal waiver to allow New Jersey to deny aid to children born to women receiving AFDC). Not surprisingly, abortion rates increased after the imposition of the child exclusion rule. *See Iver Peterson, Abortions Up Slightly for Welfare Mothers*, N.Y. TIMES, May 17, 1995, at B7.

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## D. ECONOMIC INCENTIVES AND COMMERCIAL SEX

Explicit work requirements are not the most important means by which the state demands work of poor women. Subsistence aid programs are limited to particular "categories" of poor people: the aged, blind, disabled, and relatives caring for children under the age of eighteen.<sup>480</sup> People who do not fall into the favored categories, that is, able-bodied people between the ages of eighteen and sixty-five who do not have a child under age eighteen, are "presumed" able to support themselves. Further, even if women qualify for subsistence grants because they are found to be disabled or are responsible for the care of a child under the age of eighteen, grants are so low that people receiving aid still have strong economic incentives to supplement their income to survive.<sup>481</sup>

In 1996, Congress acted to increase the already strong work incentives provided by categorical exclusions, low grant levels, and explicit requirements for wage work. The Personal Responsibility and Work Responsibility Act of 1996 (PRA) rejects the claim that poor people are "entitled" to help from the state, whatever their circumstances.<sup>482</sup> Further, the PRA requires that virtually all caretakers receiving aid participate in workfare or community service,<sup>483</sup> prohibits states from providing federal aid to any family for more than five years,<sup>484</sup> and sharply limits state discretion to count as "working" people who are attending school or vocational education programs.<sup>485</sup> For many people, our welfare policy's presumption of family support or economic self-sufficiency is false.

As powerful as welfare policy is in providing incentives for work, whether legal or illegal, larger economic incentives and policies are undoubtedly more significant. As many as thirty percent of American workers are "contingent workers": part-time and temporary.<sup>486</sup> In the late

480. See JOEL HANDLER, *THE POVERTY OF WELFARE REFORM* 10-28 (1995).

481. In 1992, only 25% of all single-parent families were lifted out of poverty by a combination of public assistance, food stamps, and work, down from 39% in 1979. See HOUSE COMM. ON WAYS AND MEANS, GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 1173 (1994).

482. "This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part." PRA § 101(b) (amending Social Security Act, 42 U.S.C. §§ 601-617 by adding §§ 401-419). See also Law, *Ending Welfare*, *supra* note 378, at 483-88.

483. See PRA § 101(b) (amendment § 402(a)(1)(A)).

484. See *id.* (amendment § 408(a)(7)(A)).

485. See *id.* at § 103(a)(1) (amendment § 407(c)(1)(D)). Vocational education training may not exceed 12 months and academic education may count as work only until the recipient obtains a high-school diploma. See *id.* §§ 407(d)(8) and (10).

486. See Middleton, *supra* note 381, at 558.

1990s, while the stock market soared and made the wealthy few much richer, most Americans experienced economic decline; the inflation-adjusted average compensation of private sector U.S. employees, including benefits, fell 7.6% between 1987 and 1997. Over that period, real hourly wages either stagnated or fell for most of the bottom sixty percent of the working population.<sup>487</sup> Median family income in 1996 was only 0.6%, or \$285, above its 1989 level.<sup>488</sup> Further, American families avoided falling further behind only by working harder. The typical married-couple family worked 247 more hours per year in 1996 than in 1989, or more than six weeks' worth of additional work, just to keep from falling behind.<sup>489</sup>

## VI. CONCLUSION: THE POLITICS OF REFORM

Enforcement of criminal penalties against commercial sex consumes enormous amounts of police resources.<sup>490</sup> Virtually all of those law enforcement resources are directed at punishing women who sell sex for money, rather than towards protecting them from violence and abuse.<sup>491</sup> Concerns about transmission of venereal disease, and particularly HIV, do not justify criminal prohibitions against commercial sex, and indeed, probably compound the problem.<sup>492</sup> Law enforcement seemingly has little effect on the incidence of commercial sex.<sup>493</sup> Similarly, the 1996 San Francisco Task Force on Prostitution found that increases in unemployment

487. See LAWRENCE MISHEL, JARED BERNSTEIN & JOHN SCHMITT, *THE STATE OF WORKING AMERICA* 126 tbl.3.3 (1998).

488. See *id.* at 41.

489. See *id.* at 2.

490. See Pearl, *supra* note 10, at 769. The 1996 San Francisco Task Force on Prostitution estimated that enforcement of the laws against prostitution cost over \$7.6 million in direct costs in 1994. See Leigh, *supra* note 483, at 66-67, 77. Those costs included: personnel and vehicle costs for the vice police, incarceration pending an initial court appearance, the costs of attorneys to prosecute those accused of prostitution and to defend low income women, longer term incarceration, and the costs of mandatory testing. The enforcement of the prostitution laws also generates other indirect costs to the city, not included in the \$7.6 million figure. Another way to measure the magnitude of the investment is to look at the proportion of prosecutorial and judicial resources devoted to enforcing prostitution laws against women who sell sex. In 1994, there were 5,269 prostitution related arrests, of which 2,400 were taken to court. Those 2,400 cases represent somewhat more than one-fourth of the Municipal Court's total caseload of 8,000 cases a year. See *id.* at 75.

491. See Katyal, *supra* note 57, at 795-96. The 1996 San Francisco Task Force also heard testimony from sex workers who complained of "abuse and violence from clients, street violence, attacks by men who target prostitutes, and even by the police. . . . They uniformly expressed fear and frustration that when they are victims of crime the police do not work to protect them or to find the perpetrators." Leigh, *supra* note 483, at 81. See also *supra* Part IV.

492. See *supra* Part II.C.

493. Packer asserts "that the incidence of prostitution has [not] been seriously reduced by criminal law enforcement." Packer, *supra* note 41, at 47.

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low wage workers and cut backs in social services and public assistance were more powerful determinants of the incidence of commercial sex than law enforcement efforts.<sup>494</sup> Professor Marcia Neave suggests that legal policy "shapes the form of prostitution rather than the numbers of people involved in it."<sup>495</sup>

Would there be more commercial sex if it were legal? Would it be more oppressive or coercive? We know that the prohibition of alcohol reduced alcohol consumption.<sup>496</sup> It is not clear that the same pattern would hold true for commercial sex. The motivations and incentives of buyers and sellers, the structures of markets, and the larger social and moral contexts seem significantly different in relation to alcohol and commercial sex. Sweden, the nation with the fewest criminal restrictions on commercial sex, also has the lowest incidence of it.<sup>497</sup> But not much weight can be given to these transnational experiences. Whether decriminalization resulted in an increase in commercial sex would depend upon the terms and conditions upon which it was done. Possibly, if prostitution were decriminalized and the substantial resources used to enforce the laws against commercial sex were redirected to the prosecution of rape, statutory rape, and violence against commercial sex workers, demand would decline as men understood that abuse could result in criminal sanctions. Alternatively, if women understood that they could work in commercial sex and that the police would protect them against violence and rape, perhaps more women would find this work attractive. We do not know.

Targeted responses to enable women to resist both violence and economic coercion are most likely to be developed at the local level. For example, if a locality developed a program to help commercial sex workers who were victims of statutory rape, rape or abuse, it could include a component to offer services to help victims who would like to leave commercial sex work to find alternative means of economic support. As the prior discussion of SSI and disabled women demonstrates, a disabled commercial sex worker needs a sophisticated advocate to qualify for the SSI benefits that would enable her to avoid commercial sex work. Similarly, mothers of young children need effective advocates to obtain the education, training, work, or subsistence that might enable them to be less economi-

494. See Leigh, *supra* note 483, at 66-67.

495. "The best I can really say is that there is no evidence of a dramatic increase in prostitution as a result of removal of criminal penalties. . . . [I]f police enforcement targets street prostitution, women will move off the street but continue to do sex work." Neave Letter, *supra* note 27.

496. Alcohol consumption fell sharply during Prohibition. See DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 23-25 (1979).

497. See *supra* note 182.

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cally dependent on commercial sex work. Such a service could also perform an important function educating the public and policymakers about the realities of the lives of poor women and the extent to which economic desperation drives them to engage in commercial sex.<sup>498</sup>

This proposal is no magic bullet. Even if commercial sex were decriminalized throughout the United States, and every community had an aggressive well-funded program to protect commercial sex workers from rape and violence and to help them qualify for the jobs, benefits, and services that would enable them to reject commercial sex, commercial sex would remain economically attractive to many women, including many who would much prefer to support themselves and their families in some other way. The problems lie deeply in the increasingly hierarchical distribution of wealth, income, and opportunities for meaningful work. Addressing the problems of commercial sex workers will not solve those problems. On the other hand, it seems wrong to continue to ignore the special problems that these women confront and to exacerbate them through the law.

498. See Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URBAN L.J. 1159 (1995).

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# **EXHIBIT 6**

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## PROSTITUTION, DRUG USE, AND COPING WITH PSYCHOLOGICAL DISTRESS

—AMY M. YOUNG, CAROL BOYD, AMY HUBBELL

*The purpose of this study was to explore the severity of substance abuse and reasons for using drugs among prostituting African American women who smoke crack cocaine. Specifically, we were interested in examining whether prostitutes use drugs as a means of coping with intra- and interpersonal experiences commonly associated with their occupation. Using a convenience sample of 203 African American women with a history of crack smoking, participants were interviewed and asked a variety of questions including whether they had ever engaged in prostitution as a source of income and the severity of and reasons for their drug use. Women who were prostituting, in contrast to those who were not, were found to have a significantly higher severity of drug use and were significantly more likely to use drugs to increase confidence, control, and closeness to others and to decrease feelings of guilt and sexual distress. We argue that women may enter prostitution in order to fund their drug use; however, prostitutes likely increase their drug use in order to deal with distress caused by activities associated with their occupation. The need to address the mental health issues of prostitutes who are abusing illicit drugs is discussed.*

### INTRODUCTION

Previous research on women who engaged in prostitution has found a high rate of drug abuse among this population (Kuhns, Heide, & Silverman, 1992; El-Bassel et al., 1997; Nadon, Koverola, & Schludermann, 1998; Potterat, Rothenberg, Muth, Darrow, & Phillips-Plummer, 1998). Among the reasons for women entering into prostitution, drug addiction itself is one of the main explanations given by researchers (Weeks, Grier, Romero-Daza, & Puglisi-Vasquez, 1998; Kuhns, et al; Gossop, Powis, Griffiths, & Strang, 1994). Prostitution may be the only means with which to finance a drug habit for

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YOUNG, BOYD, HUBBELL

many drug-abusing women who often lack education and skills, which often leads to the entrapment of women who prostitute in this sex-for-drugs lifestyle (Gossop et al.). The need for drugs, both physical and emotional, often overpowers prostitutes' aversion toward the degrading aspects of their occupation (Weeks et al.). While previous research suggests that women enter into prostitution as a means to support their drug use, it is often overlooked that prostitutes may cope with the negative aspects of their job by using drugs, further perpetuating the downward cycle of prostitution and drug addiction.

Toward the goal of better understanding the context in which women use drugs, the purpose of this investigation was to examine how activities associated with prostitution may affect the severity and nature of women's drug use. We argue that, even though prostitutes may have started prostituting in order to support their drug use, the psychological distress caused by activities associated with their occupation leads to them to increase their drug use as a means of coping.

Despite the fact that the occupational activities of prostitutes would seem to clearly create psychological distress, few studies have examined the degree to which prostitutes report psychological distress. Farley and Barkan (1998) found that 68% of the 130 prostitutes in their sample met the criteria for a diagnosis of post-traumatic stress disorder (PTSD). However, they argued that the high rate of PTSD was caused by lifetime experiences of violence, both as adults in prostitution and as children, rather than by the act of prostitution itself. In another study, El-Bassel and colleagues (1997) found that drug-using prostitutes scored higher than drug-using non-prostitutes from the same community on several measures of psychological distress, such as depression, anxiety, and paranoid ideation, and suggested that psychological distress among prostitutes was brought about by the dangerous and degrading circumstances surrounding their work.

Several studies have documented the use of drugs to cope with prostitution, but they primarily focus on drug abuse other than crack cocaine. Older studies by James (1976) and Silbert, Pines and Lynch (1982) acknowledged that narcotics (especially heroin) were often used by prostitutes to ease their ability to work and to cope with the stress of their particular occupation. Gossop and colleagues (1994) conducted a more recent study in which predominantly heroin-using prostitutes in London were found to use heroin and alcohol during prostitution in order to feel more detached from their work and to deal with its stresses. Although these studies provide insight into the link between prostitution and drugs, they do not address the more recent phenomenon of crack-addicted prostitutes. The work conditions of prostitutes who use crack cocaine may be particularly stressful, suggesting that this population may be especially likely to use drugs to cope with the stress associated with prostitution. Unlike more well paid and often better protected prostitutes or escorts, crack-addicted street prostitutes have little control over what type of sexual transaction takes place (Morrison, McGee, & Ruben, 1995). Moreover,

## PROSTITUTION, DRUG USE, AND COPING

the power often lies with the client who pays a woman to withstand acts that amount to various forms of sexual abuse (Inciardi, 1993; Morrison et al.). Such desperate, degrading, and at times violent circumstances of crack using prostitutes make it even more likely that they would suffer from psychological distress and feel the need to turn to drugs in an attempt to relieve their distress. One study that focused specifically on crack use and prostitution found that crack reduced some prostitutes' inhibitions toward their work and even made them feel more sexual (Feucht, 1993). However, the findings from this study were based on a qualitative analysis of 39 prostitutes and have yet to be validated in other studies.

The purpose of the present study was to build upon previous research to explore whether prostitutes use drugs as a means of coping with intra- and interpersonal experiences commonly associated with their occupation. We conducted secondary analysis of an existing data set of 208 urban African American women who smoked crack cocaine. Using secondary analysis, we explored whether there were differences in their level of drug abuse as well as the reasons they reported for using drugs. Specifically, we hypothesized that women who were prostituting would show evidence for a more severe level of addiction to drugs than the women who were not prostituting and that women who were prostituting would report using drugs to help them cope with various interpersonal and intrapersonal experiences that are commonly associated with prostitution. Furthermore, we examined whether the differences in the severity of addiction and the reasons for drug use were still present between the groups when we controlled for a history of sexual trauma, given the high prevalence of sexual trauma commonly reported among prostitutes (Simons and Whitbeck, 1991; James and Meyerding, 1978; Silbert and Pines, 1981).

## METHOD

### PROCEDURE

This descriptive investigation was a secondary analysis of an existing 1992-1995 data set pertaining to women's crack cocaine use; the primary study of urban African American women's health and cocaine use was funded by the National Institute on Drug Abuse. Women were eligible for the study if they were over the age of 18 and had used at least \$100 worth of crack cocaine per week. Women who were enrolled in one of two treatment programs in a large metropolitan area were asked to be part of the study ( $n=152$ ). The treatment program required these women to remain abstinent from illegal and mood altering drugs while in treatment. A smaller sub-sample of women who were currently using crack cocaine was also obtained ( $n=56$ ) through informal contacts within a community that had a significant crack cocaine problem. Women who were currently using crack were contacted in their homes and interviewed at a local library while women in treatment were interviewed within the treatment facilities. Each interview required approximately three hours to complete. The questionnaire included standardized measures as well as open-ended questions regarding the women's drug and alcohol use, family

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and social network, physical and psychological health. Informed consent was obtained and because women were reporting criminal activities, a Certificate of Confidentiality from the Department of Health and Human Services was obtained by the principal investigator. At the end of the interview each woman received \$20.

#### PARTICIPANTS

For the secondary analysis, a convenience sample consisting of the 203 participants who responded to all questions about prostitution and drug use was drawn from the primary study sample of 208. The mean age of the women was 30.6 (SD=5.42), and they ranged in age from 19 to 48 (see Table 1). Forty-eight percent ( $n=94$ ) had completed some high school, 34% ( $n=66$ ) were high school graduates, and 18% ( $n=37$ ) had completed some college. Twenty-two percent ( $n=42$ ) were employed either full- or part-time, 46% ( $n=90$ ) were unemployed and looking for work, while 32% ( $n=63$ ) were unemployed and not looking for work. The sample had low household incomes; 79% ( $n=136$ ) had reported an income of less than \$10,000, and only 7% ( $n=13$ ) reported an income over \$15,000. Sixty-four percent ( $n=128$ ) of the women had never married, 18% ( $n=36$ ) were divorced, widowed, or separated, and 18% ( $n=37$ ) were either married or living as married. Nearly all the women had children (92% or 151). No significant differences were found between the women who were prostituting and the women who were not with regard to these background variables.

#### INSTRUMENTS

*Prostitution as a source of income.* Participants were asked whether or not they used prostitution as a source of illegal income. A dichotomous variable was created that discriminated between "yes" and "no" responses to this item.

*Severity of substance abuse.* The women were also asked a series of questions about their drug and alcohol use, both in terms of their substance use in general and in terms of their use of specific substances (i.e., marijuana, amphetamines, sedatives, cocaine, HCL, crack cocaine, heroin, opiates, PCP, psychedelics, inhalants, and alcohol). For each of the specific substances, the participants were asked whether they believed that they are or were addicted to the drug. Responses for each of the substances were summed to provide a measure of the number of drugs participants reported being addicted to.

*Reasons for substance use.* Participants' reasons for using drugs and alcohol were measured with a series of six questions about the effects each substance generally had on the participant. Using a three-point scale (1= Never True, 2=Sometimes True, 3=Usually True), participants indicated the extent to which each drug they used made them feel: 1) more confident, 2) more in control, 3) more open with others, 4) less guilty, 5) closer to others using the drug, or 6) less distressed about being sexual with a partner. Responses were summed



## PROSTITUTION, DRUG USE, AND COPING

TABLE 1  
 DEMOGRAPHIC INFORMATION FOR WOMEN WHO ARE PROSTITUTING  
 AND WOMEN WHO ARE NOT

	All women in sample (N=203)	Women who are prostituting (N=72)	Women who are not prostituting (N=131)
Age, Mean (SD)	30.6 (5.42)	30.3 (5.49)	30.6 (5.44)
Education, % (n)	100% (197)	100% (68)	100% (130)
Some high school	48% (94)	53% (36)	45% (58)
High school graduate	34% (66)	31% (21)	35% (45)
Some college	18% (37)	16% (11)	20% (27)
Employment, % (n)	100% (195)	100% (71)	100% (124)
Employed	22% (42)	20% (14)	23% (28)
Looking for work	46% (90)	44% (31)	47% (59)
Not looking for work	32% (63)	36% (26)	30% (37)
Income, % (n)	100% (173)	100% (59)	100% (114)
Less than \$10,000	79% (136)	72% (43)	82% (93)
\$10,000-\$15,000	14% (24)	14% (8)	14% (16)
Over \$15,000	7% (13)	14% (8)	4% (5)
Marital status, % (n)	100% (201)	100% (72)	100% (129)
Never married	64% (128)	69% (50)	61% (78)
Divorced/widowed/ separated	18% (36)	14% (10)	20% (26)
Married/living as married	18% (37)	17% (12)	19% (25)
Have children, % (n)	100% (164)	100% (58)	100% (106)
Yes	92% (151)	95% (55)	91% (96)
No	8% (13)	5% (3)	9% (10)
Number of drugs used, Mean (SD)	2.68 (1.02)	2.76 (1.05)	2.64 (1.00)
Age of first drug use, Mean (SD)	15.47 (4.52)	15.44 (5.16)	15.49 (4.15)

across substances to provide indicators of the extent to which drugs affected the women in particular ways. These six measures were used as continuous variables in the statistical analyses.

*History of sexual abuse.* Participants were asked if they had ever experienced any incident of sexual abuse. Sexual abuse was defined broadly as an incident in which someone tried to make them, not necessarily violently, have sexual activity they really did not want, and included intercourse as well as other forms of sexual activity. A dichotomous variable was created that discriminated between "yes" and "no" responses to this item.

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*DATA ANALYSIS STRATEGY*

Data were analyzed using SPSS 9.0. Student T-tests and Pearson's chi-square tests were used to make group comparisons between women who were prostituting and those that were not prostituting. Demographic information was first analyzed to determine if there were group differences in the backgrounds of the two groups. Hypothesis testing was then conducted by determining whether there were group differences for variables concerning the women's drug use and their reported reasons for using drugs. Finally, multivariate ANOVAs were conducted to determine whether there were group differences between women prostituting and women who were not on the severity and reasons for drug use when history of sexual trauma was controlled for in the analyses.

**RESULTS**

Our first hypothesis was that women using crack cocaine who were prostituting would be more severely addicted to substances than women using crack cocaine who were not prostituting. Our predictions based on this expectation were confirmed (see Table 2). The women in our sample who were prostituting were addicted to a significantly greater number of drugs than those who were not prostituting (prostituting=1.54, not prostituting=1.22,  $p<.05$ ).

We also hypothesized that women who were prostituting would be more likely to report using drugs to cope with various interpersonal and intrapersonal experiences commonly associated with prostitution. It was found that prostituting women were significantly more likely to use drugs because they felt that the drugs increased

**TABLE 2**  
DIFFERENCES BETWEEN WOMEN WHO ARE PROSTITUTING AND WOMEN WHO ARE NOT FOR  
NUMBER OF ADDICTIONS AND REASONS FOR DRUG USE

	Women who are prostituting (N=72) Mean (S.D.)	Women who are not prostituting (N=131) Mean (S.D.)	T-value
Number of drugs addicted to	1.54 (1.01)	1.22 (0.91)	2.30*
Drugs increase confidence	2.47 (.55)	2.17 (.68)	-3.31**
Drugs increase control	2.32 (.60)	2.12 (.68)	-2.14*
Drugs increase closeness to others	2.20 (.68)	1.97 (.71)	-2.12*
Drugs decrease guilty feelings	2.35 (.67)	2.09 (.70)	-2.63**
Drugs increase ability to be open	2.30 (.55)	2.14 (.68)	-1.87*
Drugs reduce sexual distress	2.11 (.67)	1.85 (.68)	-2.53*

Note: \* $p<0.10$ , \*\* $p<0.05$ , \*\*\* $p<0.01$

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their feelings of confidence (prostituting=2.47, not prostituting=2.17,  $p<.01$ ), sense of control (prostituting=2.32, not prostituting=2.12,  $p<.05$ ), and feelings of closeness to others (prostituting=2.20, not prostituting=1.97,  $p<.05$ ) and decreased their feelings of guilt (prostituting=2.35, not prostituting=2.09,  $p<.01$ ) and sexual distress (prostituting=2.11, not prostituting=1.85,  $p<.05$ ). There was also a trend toward prostituting women using drugs because they increased their ability to be open with others more often than non-prostituting women (prostituting=2.30, not prostituting=2.14,  $p<.10$ ). In order to rule out the possibility that these differences between prostituting and non-prostituting women could be explained by varying histories of sexual abuse, we reran all hypotheses testing analyses with history of sexual trauma entered as a control variable. Significant differences between the prostituting and non-prostituting women were still present for all hypothesis-testing variables.

#### DISCUSSION

Findings from this study indicate that severity of substance addiction and explanations for substance use are related to prostitution in a sample of African American women who smoke crack cocaine. Women who were prostituting, in contrast to those who were not, were found to be more severely addicted to drugs and more likely to use drugs as a means for coping with various intrapersonal and interpersonal experiences commonly associated with prostitution. Specifically, we found that the women who were prostituting were more likely to report using drugs to increase their feelings of confidence, sense of control, and feelings of closeness to others and to decrease their feelings of guilt and sexual distress. Despite this heavy reliance on crack cocaine, however, it is difficult to determine causality between drug dependence and prostitution. Even women who use drugs before engaging in prostitution have often been found to become heavier users after becoming prostitutes (James, 1976). It is likely that prostitution and drug use is a self-perpetuating cycle in which the engagement in one leads to an increase in the other. Although women may start working as prostitutes in order to finance their drug habits, there are a number of aspects of prostitution that often cause psychological distress and trauma, which in turn may lead to increased drug use as a means of coping. Beyond the risks of disease, violence and rape, there may be something about the very act of prostitution that causes psychological distress among prostitutes. As Farley and Barkan (1998) argue, prostitution itself should be seen as a form of violence against women, which is bound to have traumatic effects on its victims.

Our findings support previous research on prostitution and drug use among women who are using heroin and alcohol regarding the severity of addiction and the reported reasons for drug use (Gossop et al. 1994; Feucht, 1993; James, 1976; Silbert, Pines, & Lynch, 1982), suggesting that the relationship between drug use and prostitution may be similar for women using crack cocaine as for women using these other drugs. As found in previous studies based on heroin



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and alcohol using samples (El-Bassel et al., 1997; Nadon et al., 1998; Kuhns et al., 1992), we found that prostitutes were more severely addicted to substances than women not prostituting. However, it may be that crack cocaine using prostitutes are more severely addicted to drugs than prostitutes using substances besides crack cocaine, given that crack cocaine is often cited as a highly addictive substance (Marx, Aral, Rolfs, Sterk, & Kahn, 1991; Bouknight, 1990; Smart, 1991). The intense, short-lived high, coupled with the small, low-cost quantities readily available on the street make crack cocaine a more compulsive drug in contrast to other drugs, with its users craving more as soon as the effect of the drug wears off. This pattern of addiction is especially conducive to prostitution, in that crack users tend to go on binges of crack use in which all of their money is spent on crack and they become willing to do most anything, including prostitution, to get more of the drug and renew their high (Fullilove, Lown, & Fullilove, 1992). This desperate, drug-driven form of prostitution is, in turn, lowering the cost of prostitution due to the increasing number of women willing to exchange sex for drugs or for just enough money to buy a small amount of crack (Feucht; Miller, 1995; Inciardi, 1993).

Our finding that the women in our sample who were prostituting were more likely to use drugs to cope with intrapersonal and interpersonal experiences is not surprising in light of what is known about the attributes of their occupation. The subservient, humiliating nature of prostitution suggests that these women would tend to feel less confident and in control while working, and would wish to regain these feelings, and the ability to feel close to others, after being sexually involved with a stranger or strangers. Since a large portion of prostitutes will become drug users at some point in their lives (e.g., Plant, Plant, Peck & Setters, 1989), illicit drugs present an accessible means of coping with the distress associated with the degrading aspects of the work. Indeed, the women in our sample who worked as prostitutes were more likely than those who were not prostitutes to use drugs in order to increase feelings of confidence and closeness to others and boost their sense of control. Other studies have found that women engaged in prostitution use drugs and alcohol to feel more confident on the job, more calm and able to suppress negative feelings, and more relaxed and sociable (Gossop et al., 1994; Silbert et al., 1982; Feucht, 1993).

The women in our sample who were prostituting were also more likely to use drugs to decrease their feelings of guilt and sexual distress than the women who were not prostituting. This aspect of their drug abuse seems particularly useful for their occupation, eliminating their inhibitions toward the act of prostitution and desensitizing them to its traumatic effects. Prostitutes have otherwise been found to use drugs because it makes their work easier and more bearable by taking their minds off what they are doing and making them feel more detached from the situation (Gossop et al., 1994; Silbert et al., 1982; James, 1976). There is little doubt that the risks involved with their work, such as having large numbers of partners and infrequent use of condoms and the

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incidence of violence on the job, are also sources of great anxiety that may be suppressed by the use of drugs and alcohol. Inciardi (1993) has demonstrated that crack using prostitutes in particular, especially those that exchange sex for crack, have even more distressful working conditions, often having no control over the kinds of sexual activities in which they engage or even the number of partners involved. In some crack houses, a "house girl" is hired to provide sex, in whatever form and with however many people, to the house's customers in exchange for crack, food, and a place to stay. Other women who come to crack houses to get high are often willing to perform debasing and perverse acts for even a hit off a crack pipe (Inciardi). It is not surprising given these work conditions that prostitutes have also been found to feel stigmatized by society due to the nature of their work (El-Bassel et al., 1997; Fullilove et al., 1992). Our research also suggests that these feelings of stigmatization may lead women who are prostituting to feel guilty about their occupation and to turn to drugs as a means of escaping guilty feelings.

The findings from our study are particularly informative given our limited knowledge about psychological distress and drug use among prostitutes who use crack cocaine. Previous research on prostitution among crack users has found that prostitution leads to psychological distress in a sample of street recruited, predominantly drug-using women (El-Bassel, 1997); our study expands upon this work by suggesting that prostitutes may increase their drug use as a means to cope with the psychological distress caused by prostitution. Thus, it may be that women begin to prostitute in order to finance their drug habits, but their drug use may increase over time out of a need to ameliorate psychological distress that is brought about by the degrading nature of their work. As part of a qualitative analysis, Feucht (1993) described a similar relationship between drug use and prostitution in which drug use was seen both as an addiction that necessitated prostitution as a means of obtaining crack and as a useful means of coping that enabled prostitutes to deal with the distress brought upon by their occupation.

While we are suggesting that it is necessary to address the mental health issues of prostitutes in order to fully understand the interplay between prostitution and drug use, it is just as important to contextualize our findings within a broader framework that acknowledges the social, economic, and political factors that indirectly shape the lives of prostitutes. Few women would choose prostitution if they were not constrained by their lack of education and/or the absence of jobs that pay a living wage for single mothers. Such barriers to adequate wages are clearly an issue for our sample, given that the majority of them have a minimal level of education, are single, and have children (see Table 1). Thus, the prevalence of prostitution could be reduced by not only attending to the mental health needs of prostitutes that appear to perpetuate the prostitution-drug use cycle, but in addition by addressing the larger social and economic forces that also contribute to their need to engage in prostitution.

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The findings of this analysis should be viewed in light of the limitations of secondary data. The study group was restricted to a single convenience sample of urban African American women who smoke crack cocaine, and the results should be interpreted without generalizing beyond the sample. Another limitation is that a social desirability bias could affect the validity of the data; however, in our experience, women such as the ones selected for our sample accurately report activities such as prostitution, drug use, and sexual abuse. If there are biases, we believe that it is because these events are being underreported.

However, despite the limitations, we believe that this descriptive study provides insights that will lead to future, more rigorous investigations. Certainly, further research that advances knowledge about the lives of prostitutes and the negative consequences of prostitution is needed to assist health care providers and policy makers in understanding and helping this population. Evaluation of substance abuse treatment for underprivileged women that accounts for sexual trauma should also be done to determine the most effective methods of intervention.

#### ACKNOWLEDGMENTS

Special thanks to Stephanie McVey, Flint Odyssey House, Inc., and Evangeline Women's Program for their support. The authors also appreciate the support from The National Institute on Drug Abuse K20 DA00151 (Principal Investigator, C. Boyd), which funded this study. This investigation was also supported by the University of Michigan and the National Institutes of Health, National Research Service Award T32 DA 07267 from the National Institute on Drug Abuse.



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9 IN THE UNITED STATES DISTRICT COURT  
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 11 OAKLAND DIVISION

13 **EROTIC SERVICE PROVIDER LEGAL,  
 14 EDUCATION & RESEARCH PROJECT;  
 15 K.L.E.S.; C.V.; J.B.; AND JOHN DOE,**

16 Plaintiffs,

17 v.

18 **GEORGE GASCON, in his official capacity  
 as District Attorney of the City and County  
 19 of San Francisco; EDWARD S.  
 BERBERIAN, JR., in his official capacity as  
 20 District Attorney of the County of Marin;  
 NANCY E. O'MALLEY, in her official  
 21 capacity as District Attorney of the County  
 of Alameda; JILL RAVITCH, in her official  
 22 capacity as District Attorney of the County  
 of Sonoma; and KAMALA D. HARRIS, in  
 23 her official capacity as Attorney General of  
 the State of California,**

24 Defendants.  
 25

Case No. 4:15-CV-01007-JSW

**[PROPOSED] ORDER GRANTING  
 MOTION TO DISMISS WITH  
 PREJUDICE**

Date: August 7, 2015  
 Time: 9:00 a.m.  
 Dept: 5, 2d Floor  
 Judge: The Hon. Jeffrey S. White  
 Trial Date: None Set



1 This matter is before the Court on the Attorney General's Motion to Dismiss, joined in by  
2 defendants George Gascon, in his official capacity as District Attorney of the City and County of  
3 San Francisco; Edward S. Berberian, Jr., in his official capacity as District Attorney of the County  
4 of Marin; Nancy E. O'Malley, in her official capacity as District Attorney of the County of  
5 Alameda; and Jill Ravitch, in her official capacity as District Attorney of the County of Sonoma.  
6 The Court has reviewed and considered the motion, the request for judicial notice filed therewith,  
7 and the papers filed in support of and in opposition to the motion.

8 As a preliminary matter, the Court finds that the requirements for judicial notice have been  
9 met. *Intri-Plex Technologies, Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007). The  
10 Court therefore grants the Attorney General's request for judicial notice.

11 With respect to the motion itself, the Court finds good cause to grant the motion.  
12 Prostitution and the solicitation of prostitution are crimes in California, punishable as  
13 misdemeanors under California Penal Code section 647(b). The complaint asks this Court to  
14 strike down section 647(b), claiming that, on its face and as applied, the law violates their  
15 Fourteenth Amendment rights to substantive due process, their First Amendment rights to free  
16 speech and freedom of association, and analogous provisions of the California Constitution.

17 The standard for review of the statute is rational basis, not heightened or strict scrutiny. *See*  
18 *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013). There is no fundamental right to  
19 engage in prostitution or to solicit prostitution. Neither is prostitution or solicitation expressive  
20 conduct protected by the First Amendment. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704-05,  
21 707 (1986). And the relationship between prostitute and client is not an expressive association  
22 protected by the First Amendment. *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1195-96 (9th  
23 Cir. 1988). There also exists no substantive due process right to work as a prostitute. *See Bd. of*  
24 *Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972).

25 Plaintiffs' analogous claims under the California Constitution are barred by the Eleventh  
26 Amendment, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). But even if they  
27 were not, they are foreclosed by multiple California decisions upholding the constitutionality of  
28

1 section 647(b). *See, e.g., People v. Caswell*, 46 Cal. 3d 381, 390, 250 515 (1988); *People v.*  
2 *Superior Court (Hartway)*, 19 Cal. 3d 338 (1977).

3 Section 647(b) is facially constitutional. It is rationally related to California’s interest in  
4 deterring human trafficking and coercion, violence against prostitutes, the spread of AIDS and  
5 venereal disease, and crimes incidental to prostitution, as well as California’s interest in deterring  
6 commodification of sex. *See Coyote Publ’g, Inc. v. Miller*, 598 F.3d 592, 600, 603 (9th Cir.  
7 2010) (acknowledging the link between prostitution and trafficking in women and children and  
8 holding that a legislature appropriately may object to prostitution’s “commodifying tendencies –  
9 to the buying and selling of things and activities integral to a robust conception of  
10 personhood. . . .”); *United States v. Carter*, 266 F.3d 1089, 1091 (9th Cir. 2001) (holding that  
11 prostitution carries with it the risk of physical injury); *Love v. Superior Court* 226 Cal. App. 3d  
12 736 (1990) (upholding mandatory AIDS testing and counseling for person convicted of soliciting  
13 where the Legislature “has determined that those who engage in prostitution activities represent a  
14 high-risk group in terms of their own health, in contracting AIDS, and in terms of the health of  
15 others, in spreading the virus”).

16 Plaintiffs’ as-applied challenge fails because their allegations are not directed at a specific  
17 application of the statute. *See, e.g., Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998).  
18 The complaint alleges no facts that would make an otherwise valid statute unconstitutional as  
19 applied to the individual plaintiffs.

20 Leave to amend the complaint need not be granted if “it is clear that the complaint could  
21 not be saved by an amendment.” *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d  
22 940, 946 (9th Cir. 2005). The complaint cannot be amended to save plaintiffs’ facial challenge to  
23 the statute. And any as-applied challenge is not ripe, as the factual allegations of the complaint  
24 establish that none of the individual plaintiffs is engaged in conduct that violates the law, and  
25 therefore none is currently at risk of prosecution. *See Hoye v. City of Oakland*, 653 F.3d at 857-  
26 58 (observing that the court generally declines to entertain as as-applied challenge that would  
27 require it to speculate as to prospective facts); *Legal Aid Serves. v. Legal Serves. Corp.*, 608 F.3d  
28 1084, 1096-97 (9th Cir. 2011) (holding that enforcement actions against others is not tantamount

1 to an enforcement action against plaintiffs and does not support an as-applied challenge); *see also*  
2 *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555 (holding that complaint must allege facts sufficient to  
3 “raise a right to relief above the speculative level”).

4 The Motion is hereby **GRANTED** and this action is **DISMISSED WITHOUT LEAVE**  
5 **TO AMEND.**

6 **IT IS SO ORDERED.**

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Dated:

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The Honorable Jeffrey S. White  
United States District Judge