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# COMMERCIAL SEX: BEYOND DECRIMINALIZATION

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This Article argues that: 1) criminal sanctions against people who offer sex for money should be repealed, 2) legal remedies and programs to protect commercial sex workers from violence, rape, disease, exploitation, coercion and abuse should be enhanced and 3)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.

“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 artistic 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, HUSTLERS, 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).

## 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

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-

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is not illegal in Canada is a limited reform when all the activities that make it possible are criminal.” Jody 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 263 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*, in 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 catego-

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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.

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-

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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 two 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 sell 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 existence 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-

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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).



ity to be autonomous, and second, that persons are entitled, as persons, to equal concern and respect in exercising that capacity. . . .

[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. . . .

. . . 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>

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>

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 . . . .

. . . .

The side effects on law enforcement are unfortunate. Police corruption is closely associated with this kind of vice control. . . .

An equally disgusting kind of enforcement practice is the use of the police or police-employed decoy to detect solicitation. . . .

. . . .

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 . . . .

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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.

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

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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

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>

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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.

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-

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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).

conomic need.<sup>60</sup> Others, while recognizing the compelling necessity for better 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 coerced by third parties.”<sup>63</sup>

Disputes among feminists go beyond the facts. Some feminists challenge the legitimacy of commercial sex within a larger vision of sexual relations. 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 heterosexual 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 dominance. . . .”<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>

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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 importance 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 overworking 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.

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.

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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—hearts, 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.

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

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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.



and at newsstands. Indeed these pedestrian forms of sexual commodification 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 implicitly 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 intimacy, 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 individualized, 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 advertising 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, especially 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 mainstream media).

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 ignore the violence; the latter, the need. Ultimately, however, Professor Radin counsels us to ignore both, so long as the “cultural 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

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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.

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>

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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 Joe 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

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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).

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-

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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-

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>

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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 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:

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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.

[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-

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119. *Ex parte* Carey, 207 P. 271, 274 (Cal. Ct. App. 1922).

120. *See* CENTERS FOR DISEASE CONTROL, 10 HIV/AIDS SURVEILLANCE REPORT 1, 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,



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-

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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. Sturm, *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. Ohlge, S. Morio, S. Mizushima, K. Kitamura, K. Tajima, A. Ito, A. Suyama, S. Ususku, 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 EISEL 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

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134. See Neil McKeganey, Marina Barnard, Alastair Leyland, Isobel Coote & Edward Follett, *Female Streetworking Prostitution and HIV Infection in Glasgow*, 305 BRIT. MED. J. 801, 802 (1992).

135. See Helen Ward, Sophie Day, Jane Mezzone, 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.

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

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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—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 (Harlon 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

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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 Bargen, 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

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

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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. Dunning, 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 (Ct. 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-

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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,

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>

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*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

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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.).



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>

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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 \*3. 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>

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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.

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-

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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.*

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

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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).

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

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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. Plankinton*, 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-

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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.

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-

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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.

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

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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.



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

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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>

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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.

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>

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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 J.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.

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: publicity,<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 Evelina Giobbe & Sue Gibel, *Impressions of a Public Policy Initiative*, 16 HAMLIN 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; Gromer 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 (Dever), 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-

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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.

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?

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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.



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

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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.

286. See *infra* Part IV.A.

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

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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

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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).

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

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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 irrebuttable 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-

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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).

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*.

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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 PLEAS 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-

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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 Mausolf 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).



tective 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, grass-roots battered women's organizations developed from the feminist and civil

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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

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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).

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

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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.

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

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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.*

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

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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.

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-

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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.*

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>

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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

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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.



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

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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.

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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.

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-

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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).

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-

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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.

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

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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

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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

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

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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.

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-

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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.



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.

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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

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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 Sclafani 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).

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>

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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 Gabel, 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.

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 III.A-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.

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

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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-

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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.

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>

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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(I)(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-

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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.



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

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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

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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 *Brukhman 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).

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

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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.

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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.

## 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

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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.

among 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-

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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.

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.

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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).