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NOTE & COMMENT: "Bad" Women Deserve Equal Protection: A Look at the Constitutionality of the Florida Prostitution Statute

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LEXISNEXIS SUMMARY:

... One way to attack these laws in Florida is to show that they violate the equal protection rights guaranteed by the Constitution of the United States. ... The next section explains and applies the equal protection analysis in order to demonstrate the unconstitutionality of Florida's prostitution statute. ... Challenging the constitutionality of Florida's prostitution statute by demonstrating that it violates women's and prostitutes' right to equal protection would bring their marginalization to the attention of the legal system, and through that legal system, to society. ... It would therefore be difficult to show that the Florida legislature intended the prostitution statute to have a disparate impact despite its facial neutrality. ... This method of attack would be the most effective in an equal protection challenge against Florida's prostitution statute. ... The *McCleskey* case offers an apt comparison to a potential equal protection challenge to Florida's prostitution statute because both challenges involve the same type of statistical evidence. ... This article suggests that an effective method to achieving that goal would be to challenge Florida's prostitution statute on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment in its enforcement. ... Invalidating Florida's prostitution statute on equal protection grounds would be effective for two reasons. ...

TEXT:

INTRODUCTION

Laws against prostitution are antiquated and based primarily on moral considerations. While there is moral outcry against the proliferation of prostitution, prostitutes themselves are allowed to take the blame and suffer the punishment for its practice. Although prostitution is often referred to as a victimless crime, the criminalization of prostitution certainly victimizes prostitutes. Laws criminalizing prostitution in the United States do nothing to benefit society and everything to harm prostitutes themselves. One way to attack these laws in Florida is to show that they violate the equal protection rights guaranteed by the Constitution of the United States. By approaching the problem from a legal standpoint, the inadequacy of the moral justifications in support of laws prohibiting prostitution becomes apparent.

This article begins with a brief overview of various feminist viewpoints and an explanation of the need for feminists to unify behind a common cause. Conflicting viewpoints among feminist groups concerning the best way to help prostitutes have weakened the ability of those groups to effect change in this area of the law as they have been able to unite to effect change in other areas, such as domestic violence, sexual harassment, and rape law. One common goal shared by feminists is to change the way in which prostitutes are viewed by society. By showing that prostitution laws are unconstitutional, feminists can prove to society that these women are being marginalized without justification.

The next section explains and applies the equal protection analysis in order to demonstrate the unconstitutionality of Florida's prostitution statute. A statute may violate the equal protection clause expressly, in effect, or in application. The Florida statute violates prostitute's equal protection rights in the way it is applied by Florida law enforcement in that significantly more women than men are arrested for prostitution. This disparate enforcement is a result of purposeful discrimination against women. Courts should carefully examine the Florida statute and refuse to accept the flimsy rationalizations offered in support of these laws.

Prostitutes are also treated unequally in comparison to other women and to other people in general. If gender is an issue, courts may apply a heightened standard in deciding the constitutionality of laws against prostitution. Gender, however, may not be implicated in every circumstance. Therefore the standard applicable to a particular situation may vary according to the magnitude of its gender implications. The evils of prostitution are not the women who practice it, but the degradation and brutality they suffer because they are not protected by the law. This paper concludes with the proposition that decriminalization of prostitution is the most effective way to remedy these evils. The inequalities that exist in the way prostitutes are viewed morally and physically must be addressed and remedied.

I. BACKGROUND

Existing ideologies and biases are reflected in the terms used by society and members of different groups to describe the selling of sex for money. Throughout this article, the term prostitution is used, not to label or categorize the type of woman involved in the activity of selling sex for money,¹ but as the most generic and recognizable term to describe this activity. Virtually every other term used to describe this activity necessarily identifies the user with a particular ideology. Any negative connotations must be borne in the interest of denying fealty to existing ideologies.

Many biases obscure what should be the main focus in the determination of whether to legalize prostitution. Conflicting viewpoints on the morality of selling sex for money, whether the true origin of prostitute's behavior is coercion rather than choice, and the desire for recognition of a woman's sexual freedom are all valid and important concerns. However, the true focus should be to better the present condition of these women, regardless of whether their behavior is immoral, coerced, or truly chosen. The tragedy of their reality is not, and never will be, changed through discourse, only action. While each group may not acknowledge common ground with the others, an examination of the terminology of even the most clearly diverging viewpoints, demonstrates the existence of such commonalities.

Society in general has clear biases against the women who enter into prostitution. Commonly used colloquialisms, such as "whore" and "slut" which carry derogatory and marginalizing connotations, reflect such biases in their contemptuousness. These terms are used not only to describe a person who sells sex for money, but also to describe any sexual woman. These terms separate "bad" women, those who are prostitutes and sexual women, from other "good" women, and perpetuate society's concept of sexual women as "bad" women.² By describing sexual women as whores and sluts, society expresses contempt for female sexual behavior. These terms are reserved for women; generally men are only referred to as prostitutes to identify their work and are not called whores or sluts in reference to general sexual activity. This attitude of contempt towards women causes sexual women, whether they prostitute themselves or not, to be treated unequally.³

"Choice" feminists describe women who sell sex for money as "commercial sex workers."⁴ The term "commercial sex worker" has been used to equate sex work with any other type of work⁵ in an effort to convey the idea that prostitution is simply a job and that prostitutes have an identity outside their work as prostitutes.⁶

Proponents of this theory believe that selling sex for money should be considered a legitimate way to earn a living and that those who chose to labor in prostitution should be protected like any other workers. n7 The "choice" feminist school of thought incorporates a general attitude toward women's liberty and reproductive autonomy, recognizing a woman's right to choose prostitution free of paternal restrictions and moral trappings. n8 In this context, "choice" feminists believe that selling sex for money should be legally recognized as a valid career choice for women. n9 This school of thought insists that women are fully capable of making the decision to sell sex for money and struggles to gain recognition and respect for this choice, thereby allowing women to enjoy the same level of sexual freedom as men. n10

Recognizing the power in a name, members of a well-known choice group, the Red Thread, n11 have embraced the term "whore" by incorporating it into the way they refer to themselves. The Red Thread, through its umbrella organization the International Committee for Prostitutes' Rights, sponsors a World Whores' Congress which disseminates statements concerning prostitutes' issues. n12 By using the term "whore" to describe themselves, the women of the Red Thread reclaim it as their own and diffuse its power to demoralize them. n13

Constraint, n14 or radical n15 feminists, describe prostitution as a form of sex discrimination, n16 and refer to women who have been forced to participate as "survivors." n17 The term "survivor" suggests a lack of choice, as does the concept of prostitution as sex discrimination. The term "survivor" would certainly not be used to refer to a person in any other form of work. Survivors rarely have any control over their situation, either initially or during their ordeal.

The radical feminist group WHISPER states that

. . . Prostitution isn't like anything else. Rather everything else is like prostitution, because it is the model for women's condition, for gender stratification and its logical extension, sex discrimination. Prostitution is founded on enforced sexual abuse under a system of male supremacy that is itself built along a continuum of coercion--fear, force, racism and poverty. n18

Constraint feminists believe that no woman would be a willing participant in her own sexual abuse, and that if prostitutes had choices, prostitution would not be among them.

The concepts of lack of control and lack of choice directly juxtapose constraint and choice feminist theories. While constraint feminists view prostitution as a desperate survival tactic with no bearing on a woman's personal freedom, choice feminists believe that prostitution is an exercise of personal freedom that should not be interfered with.

This brief description of feminist ideologies and the specific terms they are associated with demonstrates the current divisive state of feminist theory. Some authors have recognized the need for women to unite under a common theory n19 and the need to agree on the weapons the proponents of change will use to wage their war. Although the word prostitution is not devoid of connotations, it appears to have the least specific implications, and thus to be the least divisive.

A common goal shared by feminists groups is to change the way society views prostitutes. n20 The abuse of a person viewed as being equal in dignity to other members of society should not be tolerated as it is now tolerated. Regardless of the divergent ways each group addresses the issue of prostitution and would choose to remedy the harm it causes, feminists do agree that an overriding imperative is to provide prostitutes with the equal dignity and safety enjoyed by other members of our society.

II. EQUAL PROTECTION

"According to the FBI's Uniform Crime Reports, in 1993 only 35.7% of nationwide prostitution arrestees were males, while 64.3% were females." n21 In Florida, the "current methods of enforcing the laws against prostitution have resulted in one of the most egregious instances of gender bias in the legal system. The laws against prostitution are enforced primarily against women, not the men who coerce them into prostitution or the customers who use their 'services.'" n22 The difference in the way prostitution laws are enforced against men and women demonstrates an

attitude that women are more culpable than men. This attitude perpetuates the perceived and actual evils of prostitution by continuing to marginalize those women involved in the profession.

This article argues that, given the need for unity among feminists, an equal protection argument may be the most effective tool to eliminate the marginalization of prostitutes. Challenging the constitutionality of Florida's prostitution statute by demonstrating that it violates women's and prostitutes' right to equal protection would bring their marginalization to the attention of the legal system, and through that legal system, to society. n23

This assumes of course that the best way to effect change is to impact society by working through the legal system, rather than to impact the legal system by working through society. This assumption rests on the fact that views about prostitutes and sexual women are deeply entrenched in society and confused with morality. n24 The unequal way the law treats women must be changed before society's entrenched beliefs about the value of women change. Invalidating Florida's prostitution statute on constitutional grounds would demonstrate judicial support for the equal treatment of women.

Florida prostitution statute § 796.07, n25 or any statute, can violate the Equal Protection Clause of the Fourteenth Amendment in three ways. n26 While all three are explored, the third will be emphasized because it is most relevant to the situation in Florida.

A. FACIAL DISCRIMINATION

A statute may be discriminatory on its face n27 by either criminalizing certain activities and not others n28 or by punishing certain activities more harshly than others. n29 At one time, Florida's statute was discriminatory on its face because it provided harsher penalties for the act of prostitution than it did for the act of soliciting a prostitute. n30 This facial discrimination was corrected in the amended Florida statute prohibiting prostitution. n31 The current statute does not discriminate on its face but provides an equal penalty n32 for those who "offer to commit, commit, or engage in, prostitution, lewdness, or assignation," n33 and those who "solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation." n34 Since Florida's statute does not explicitly require the disparate treatment of women in either enforcement or penalties imposed, it does not violate the Equal Protection Clause on its face.

B. DISPARATE IMPACT

Even though a statute may be neutral on its face and applied in a neutral manner it may still have a disparate impact. n35 Courts will often tolerate legislation that demonstrates a disparate impact on a certain group provided that the legislation itself is rationally based. n36 By using a rational basis level of scrutiny courts defer to the legislature and allow the democratic process to take its course, presuming that "even improvident decisions will eventually be rectified." n37 However, courts will only defer to the legislature when no fundamental right is at stake, n38 or so long as the statute does not implicate impermissible classifications such as race n39 or gender. n40 As soon as any of these factors is implicated, courts will examine legislation with a stricter scrutiny.

The determination of whether a court will scrutinize a statute with more care rests on finding that either a fundamental right or an impermissible classification is implicated. A finding of disparate impact requires a two-fold inquiry: (1) whether the classification itself is covertly or overtly based on gender; n41 and if not, (2) whether the impact of the statute could not plausibly be explained on a neutral ground. n42 If the statute could not possibly be justified on neutral grounds, the impact itself would signal an impermissible classification. n43

The determination that there is a legitimate explanation for the disparate impact of the statute does not end the inquiry. At this point "the dispositive question [becomes] whether the appellee has shown that a gender-based discriminatory purpose [or a discriminatory purpose based on some other impermissible factor] has, at least in some measure, shaped the . . . legislation." n44 This question goes to the intent of the legislature in enacting the legislation. The party challenging the statute must prove that the legislature enacted the statute "because of," and not merely "in spite of," its disparate impact. n45 The Supreme Court has struggled with the application of this intent requirement

because "absent an omniscience not commonly attributed to the judiciary, it will often be impossible to ascertain the sole or even dominant purpose of a given statute." n46

Once the intent requirement has been met, deference to the legislature is no longer required. n47 Despite neutral statutory wording, if the challenger can show that the legislature intended the statute to have a disparate impact based on gender, the court is justified in applying heightened scrutiny to the legislation. n48 The court will look more critically at the legislation and require an "exceedingly persuasive justification" for it to survive a constitutional challenge. n49

There is no evidence of any improper purpose in the enactment of Florida's statute. In fact, considering that the legislature deliberately amended the statute in order to eliminate any facial discrimination against women, it might be argued that such action indicates that the legislature actually attempted to curb the effects of the original facially discriminatory statute. Even if the legislature was aware that the statute was being enforced disparately after its amendment, this would not be enough upon which to base a constitutional challenge. There must be evidence that the legislature enacted the statute "because of," not merely "in spite of" its discriminatory effects. It would therefore be difficult to show that the Florida legislature intended the prostitution statute to have a disparate impact despite its facial neutrality.

C. DISCRIMINATORY ENFORCEMENT

The third possible method of demonstrating a violation of equal protection is to show that Florida's statute, though neutral on its face, has been administered in a discriminatory manner. n50 If a statute is neutral on its face but discriminatory in application or enforcement, demonstrating that the discriminatory administration of the statute was intentional may show a violation of equal protection. n51 This standard requires a showing that two parties, similarly situated, have been treated differently for an improper purpose. If the challenger of the statute is able to make this showing of discriminatory intent, then they have been denied equal protection of the law. n52 This method of attack would be the most effective in an equal protection challenge against Florida's prostitution statute.

"Unequal administration of facially neutral legislation can result from either misapplication (i.e., departure from or distortion of the law) or selective enforcement (i.e., correct enforcement in only a fraction of the cases). In either case, a showing of intentional discrimination is required." n53 Error, mistake in judgment, or even arbitrary administration of a statute is not sufficient to show a violation of equal protection. n54

Florida's prostitution statute is not being misapplied by any government actor because arrests and prosecutions occur as dictated by the statute. However, the statute may be challenged on grounds of selective enforcement because although the letter of the statute is being followed, government actors are selective in the way they enforce it. In every aspect of the statute's enforcement, women are treated in a discriminatory manner. n55 "Police uniformly focus on apprehending prostitutes rather than customers," n56 state attorneys' offices offer customers the option of testifying against the prostitute in exchange for immunity, n57 and judges commonly sentence prostitutes for first-time offenses but withhold adjudication for customers. n58 Although the statute itself only deals with the type of behavior that warrants arrest and the sentencing guidelines for punishing that behavior, each government actor is responsible for upholding the equal protection of the law at every stage in the criminal process.

A showing of selective enforcement must meet the original requirements of this third type of equal protection violation. Two parties similarly situated must be treated differently for an improper purpose. A statutory challenger would therefore bear the burden of showing three things: (1) that she was similarly situated to another party; (2) that she was treated differently from that other party; and (3) that there was an improper purpose for the disparate treatment. Heightened scrutiny would be triggered upon a showing that the improper purpose was specifically to harm a suspect class such as race, or in this case gender.

Gender is only considered a quasi-suspect class and therefore only triggers intermediate scrutiny rather than the strict scrutiny merited by race. n59 Nevertheless, in recent cases the fatal effect of this intermediate standard on

legislation has approached that attributed to strict scrutiny. n60 Thus, demonstrating that Florida's prostitution statute is being selectively enforced for the improper purpose of causing harm to women is a critical step in the process, because proof of this would result in the application of heightened scrutiny, which would all but ensure the statute's demise. However, this step is also the most difficult in the process.

Before attempting to show improper purpose, however, a challenger must first show that she is similarly situated to another party and is being treated differently from that other party. Even the first step in the process has met with resistance. Not all courts admit that the prostitute and the customer are similarly situated. n61

In *State v. Sandoval*, the defendant argued that a statute governing the conduct of prostitutes violated the requirement of equal protection because it required harsher penalties for repeat offenders, whereas the statute governing the conduct of customers did not. n62 The court found this disparity in penalties justifiable, concluding that the crimes committed by the prostitute and the customer were different and therefore warranted different treatment. n63 Since the penalties for prostitution and for solicitation of a prostitute were the same for males and females, the court found that the statute did not discriminate with regard to the sex of the individual. n64 It is easy for a court to conclude that the prostitute and the customer are not similarly situated when the legislature addresses their behaviors under different statutes and each statute dictates a different penalty.

Other courts and legislatures, however, have acknowledged that although the technical definitions of the crimes of prostitution and solicitation of a prostitute may be different for purposes of categorization, in reality, prostitution and solicitation of a prostitute are simply two halves of the same crime. n65 In *Commonwealth v. An Unnamed Defendant*, the legislature indicated that it intended for prostitutes and customers to be considered similarly situated by including both the acts of prostitution and solicitation of a prostitute in the same statute and requiring equivalent penalties for both. n66 The court held, after hearing police testimony that only female prostitutes were targeted and customers were rarely if ever arrested, that dismissal of the charges against the prostitute was warranted due to the "arbitrary and unequal application of impartial laws." n67 The Florida legislature has included both the act of prostitution and the act of solicitation of a prostitute under one statute and assigned equivalent penalties to both, indicating that the Florida legislature views the prostitute and the customer to be similarly situated.

Once a statutory challenger has shown that she is similarly situated to another party, she must then show that she has been treated differently from that similarly situated party. Statistical evidence is one way to show that prostitutes and customers are treated differently. In *McCleskey v. Kemp* n68 a black man was convicted of murdering a white police officer during the course of a planned robbery. n69 The jury found the existence of two statutory aggravated circumstances and sentenced McCleskey to death. n70 McCleskey challenged the sentence on the basis that the state's sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments. n71 McCleskey offered as evidence a statistical study that concluded that defendants charged with killing whites were 4.3 times more likely to receive a death sentence in Georgia as defendants charged with killing blacks, and that black defendants were 1.1 times more likely to be sentenced to death than other defendants. n72

The Supreme Court, while admitting that the statistical evidence demonstrated a general trend, held that McCleskey had offered no evidence that the "decisionmakers in *his case* acted with discriminatory purpose." n73 The statistical evidence in the study was insufficient by itself to convince the Court that the state's death penalty sentencing statute was administered in a purposefully discriminatory manner in any specific case. n74 The Court denied McCleskey's equal protection claim. n75

The *McCleskey* case offers an apt comparison to a potential equal protection challenge to Florida's prostitution statute because both challenges involve the same type of statistical evidence. Despite statistically evidenced, blatant discriminatory enforcement, proving individualized discrimination would be a heavy burden to bear, as demonstrated by *McCleskey*.

A commission appointed by the Supreme Court of Florida to examine prostitution found that Florida's statute was

being administered in an unequal manner. n76 The number of prostitutes arrested and convicted is much higher than that of customers. n77 This is the same type of statistical evidence used in *McCleskey* to show a general bias against a protected class. The difficulty is proving that the discrimination resulted from bias towards the individual for an improper purpose (such as gender or race) rather than a legitimate law enforcement purpose. Courts in criminal cases have recognized this as a heavy burden n78 and, except in certain limited contexts, have typically been unwilling to accept statistical evidence alone to prove improper purpose. n79

Unfortunately, it is the nature of statistics that they apply generally rather than individually, so the accused prostitute must offer some other evidence that the trend shown to be statistically prevalent was involved in the individual case. Alternatively, if the prostitute is unable to show individual discrimination, a pattern of discrimination in the police department's arrest record or the attorney's office's prosecution record should suffice. n80

A prostitute may be able to support statistical evidence with testimony that the officer in her case was following a departmental policy of targeting prostitutes rather than customers. n81 However, this technique has met with unreliable success. n82 Similarly, a prostitute may claim that she was not given the same opportunities as the customer in the way in which she was prosecuted. n83 Customers are often given the opportunity to testify against the prostitute, whereas prostitutes are not given the same opportunity. n84 This type of challenge may be more effective in demonstrating discrimination against the individual because it is apparent when a prosecutor has engaged in this conduct. n85 Police officers, on the other hand, are unlikely to be enthusiastic about testifying to a purposeful departmental policy to target prostitutes rather than customers.

Once it has been shown that either the police officer or the prosecutor had an improper purpose in arresting or prosecuting the individual prostitute, the burden shifts to the state to "rebut the presumption of unconstitutional action." n86 This presumption may be rebutted by showing that the discriminatory purpose did not cause the disparate impact or that the state would have reached the same result regardless of the discriminatory purpose. n87 In other words, if the police or prosecutors can justify their discriminatory practices in terms of legitimate law enforcement and prosecutorial concerns, the court will deny the equal protection claim. Although courts in other states have found the equal protection argument valid enough to sustain reversal of convictions against prostitutes, n88 courts in Florida have yet to take this argument seriously, n89 rarely allowing a case to proceed to the point where the burden actually shifts to the state.

III. JUSTIFICATIONS FOR THE DISCRIMINATORY TREATMENT OF PROSTITUTES ARE INVALID

If a Florida court did allow a prostitute's challenge to reach the point where the burden shifted to the state, any rationales offered by the police to legitimize their practices would still have to be overcome.

A. FEMALE PROSTITUTES AND MALE PROSTITUTES ARE TREATED EQUALLY

To date, the equal protection argument has not been used very often in Florida. If it were, the Florida police department would probably offer the same arguments to legitimize their discriminatory practices as have been used by other police departments in these types of cases. n90 For example, in *People v. Superior Court of Alameda County*, n91 the court accepted the police department's argument that the crime of prostitution is distinct from that of solicitation of a prostitute and that law enforcement is justified in treating these crimes differently. n92 It might also be claimed that regarding the crime of offering to prostitute oneself, male and female prostitutes are treated equally. n93

This argument is flawed for several reasons. First, men and women who are prostitutes are not always treated equally. n94 This may be due to the same gender discrimination seen in the disparity between arrests of prostitutes and customers. Even if the law is enforced equally against both male and female prostitutes, this may not reflect an unbiased attitude toward women, but rather an intolerance of other groups. For example, many male prostitutes are homosexual,--a class that has historically and continually been treated as second class citizens. n95

The second flaw is that it is illogical to consider prostitution a more severe crime justifying harsher treatment. Florida's statute does not indicate that the legislature intended differential treatment of prostitution and solicitation of a

prostitute. n96 The subsections for prostitution and solicitation of a prostitute both fall under the general heading of prostitution, n97 and both soliciting and offering are under the same subheading of types of behaviors that are unlawful. n98 Furthermore, the penalty for any of these unlawful activities is the same. n99 The statute thus gives no indication that the legislature intended for these two behaviors to be treated differently and in fact expressly endorses their equal treatment by requiring the same punishment for each. n100

B. PROSTITUTES AS PROFITEERS

In *Alameda County*, police officers accused of discriminatory treatment asserted that, although they intentionally targeted prostitutes rather than customers, it was not with the intent to discriminate against women, but was a strategy to target those who profited financially from the exchange. n101 They argued that similar methods were used for gambling (in which the debt holder was targeted) and for drugs (in which the dealer was targeted). n102 The participants fell into a pyramidal structure with customers on the lowest tier, prostitutes in the middle, and pimps at the top. n103 The police claimed they put the most effort into pursuing pimps, then they targeted prostitutes, and focused the least amount of attention on the customer. There are numerous problems with this argument.

Most importantly, the prostitute is not the profiteer, n104 the pimp is the profitee. n105 If the police claim to be targeting the profiteer, there should be more police effort to target pimps. This is not the case. n106 In Florida, "prosecutions for male clients and *pimps* are nearly nonexistent." n107 Prostitutes are targeted because they are supposedly making a profit, and are thus more culpable. However, the men who coerce prostitution, whether customers or pimps, are actually more culpable because "they are the ones who organize, maintain, and pay for the institution of prostitution." n108

Moreover, prostitution is not analogous to selling drugs. In the police officer's pyramidal structure, a pimp is analogous to a major drug distributor, a prostitute to a street dealer, and the client to a drug purchaser. n109 It is implicit in this structure that prostitutes and pimps are somehow on different levels of the same business. But the businesses of the pimp and the prostitute are very different, as is the relationship between pimp and prostitute and the relationship between street dealer and distributor. The pimp exerts a great deal of control over the activities of the prostitute n110 and the amount of profit she will receive from her efforts. The relationship between a dealer and a distributor is much more commercial and certainly much less arbitrary.

Another distinction between drug dealers and prostitutes is that the former provide a potentially deadly product to the customer. A customer who solicits a prostitute is more of a danger to the prostitute than the prostitute is to the customer. n111 The danger that drug dealers pose to customers justifies the unequal enforcement of drug laws against them and consequent harsher penalties. n112 Following that same reasoning, the danger a customer poses to a prostitute should justify selective enforcement against, and harsher penalties for, the *customer* rather than the prostitute.

Lastly, there are no equal protection implications, gender-related or otherwise, in the selective enforcement of drug statutes. In some cases the legislature has even endorsed the disparate treatment of the customers of drug dealers and the dealers themselves under the rationale that dealers are simply taking advantage of a weakness or need for drugs that the addict is unable to control. n113

In the context of prostitution, the Florida legislature has enacted an express statutory requirement that prostitutes and customers be held equally responsible. However, other members of society, including law enforcement officials, may see men as merely the victims of prostitutes. n114 Some people believe men have certain inevitable needs that are acceptable for them to fulfill. n115 Prostitutes simply take advantage of those needs and require money to fulfill them. n116 This view of prostitution makes the male customer the victim of the hardened prostitute. This narrative is not born out in the reality of prostitution. n117 Men are certainly not the victims in this situation and should not be treated as such.

Police target prostitutes in the belief that the prostitute's crime is worse than that of the customer. Arguably, the

customer has the greater responsibility. "The men create the market, and the women who supply the demand pay the penalty." n118 The men truly have a choice, but prostitutes are often forced, either by pimps or by the need to feed their families or themselves, into an occupation they would not otherwise choose. n119 A greater degree of control over the crime committed is typically, in the American justice system, an indication of the greater severity of the crime. n120

IV. "BAD" WOMEN DON'T GET EQUAL PROTECTION

Intent notwithstanding, prostitutes receive unequal treatment in many ways. People commonly associate prostitution with other crimes and immoral behavior such as theft and drug use. These associations lead to the marginalization of prostitutes. Decriminalization of prostitution would help to alleviate this unfair treatment, n121 and deal with commonly associated problems in a more effective way.

There are several bases commonly proposed in support of arguments to undermine the decriminalization of prostitution. Each of these bases has equal protection implications. Moral objections to women's sexual behavior are based on discriminatory views of gender roles and judgments about personal value. In most circumstances, women support those of their own who suffer or have suffered discrimination. In the case of prostitution, however, the blind eye the legal system turns to the violence endured by prostitutes is partly a function of the opportunism of women who are not prostitutes and who better their own conditions at the expense of prostitutes. This opportunism is deemed acceptable by society and encouraged by the legal system because of misconceptions and misjudgments about the value of women who are prostitutes in comparison to those who are not.

Moral objections to the institution of prostitution basically turn on gender roles. n122 In 1908, the Supreme Court summed up the traditional moral justification for criminalizing prostitution:

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." n123

Selling sex for money contradicts stereotypical female behavior. n124 Having sex with a man who is not a woman's husband and not for the purpose of procreation goes against a woman's nature and must be legally guarded against. n125 The state criminalizes prostitution not only for 'the benefit of women, but also for 'men, because it discourages women from threatening the male dominated hierarchy by becoming financially independent. n126

Women who are not prostitutes distinguish their behavior from that of prostitutes to prove their own innocence when they are sexually victimized. Although this has aided in the prevention of sexual abuse in other areas of the law, it has actually impeded legal reform in the area of prostitution. Women who are not prostitutes separate themselves from prostitutes, considering themselves "good women" who do not engage in inappropriate sexual behavior. n127 Not only do "good women" distance themselves from prostitutes in a moral sense, they actually compare themselves to prostitutes in a legal sense to the prostitutes' detriment. n128 Legal reformers, working for progress in the areas of rape, domestic abuse and sexual harassment, have stressed the difference between "good women" and "bad women" in order to distance themselves from the type of behavior that is deserving of abuse--sexual behavior. n129 Women can convince courts to accept their innocence by distancing themselves from this type of behavior. Women who were raped profess that they weren't "asking for it," n130 victims of domestic abuse claim they were faithful and monogamous, n131 and women who were sexually harassed assert that they did not welcome the advances made toward them. n132 Equating this demure behavior with innocence places a mark of guilt on the opposite behavior. In this way, prostitutes can be raped or abused without consequence because legally they are willing participants in their own abuse.

Prostitutes are allowed to be physically, emotionally, and sexually abused because society does not find them worthy of protection. n133 Prostitutes, both women and children, face rape, brutality, subjugation, and degradation from men on a daily basis. n134 Pimps, customers, and even police officers not only deny them protection, but they

perpetrate crimes upon them. n135 Since prostitutes "choose" their profession, they assume the risk of the harms that befall them. They do not deserve equal protection.

While this is not a sound conclusion to reach with respect to any woman, it is especially devastating for juvenile prostitutes. "Prostitutes are the victims of coercion and all who become prostitutes are coerced." n136 However, juvenile prostitutes are more than the victims of coercion, they are frequently victims of incest or sexual abuse. n137 This abuse makes young girls more susceptible to prostitution later in life and further disproves any claim that women "choose" prostitution and therefore deserve the abuse they receive. Children certainly do not choose to be abused, they do not choose to be continually returned to a family where they receive abuse, n138 and they do not choose to have basically only one option for survival.

Women and children who are prostitutes suffer rape, robbery, and abuse, yet the law does not prosecute these crimes. Simply because of the activity these women and children engage in, it is impossible to commit a crime against them.

V. DECRIMINALIZATION OF PROSTITUTION

Equal protection violations, both gender-based and otherwise, are evidence that both society and the legal system marginalize prostitutes. The disparate way in which prostitution laws are enforced to women's detriment and the crimes the legal system allows to be perpetrated on prostitutes prove that something must be done to protect our women and children. Decriminalization is the only way to serve the dual purpose of eliminating discriminatory enforcement and, at the same time, requiring the police to prosecute those who have been allowed to abuse women for so long without consequences.

By eliminating the statute itself on grounds that it is unconstitutional the court would eliminate any criminal penalties for prostitutes and those involved in the prostitution industry. By holding the statute unconstitutional as a violation of equal protection even in its current facially neutral state, the Florida courts would make it very difficult for the legislature to rewrite the statute to satisfy any standard of constitutionality. Police would, of course, no longer be justified under the law in arresting prostitutes, and the courts would send a clear message that criminal penalties for prostitution are unjust.

By declaring the statute unconstitutional, the courts bring prostitutes out of the margins and into the protected realm of society. It would no longer be acceptable for police, pimps, customers, or other women, to engage in harassing, abusing and using prostitutes. In fact, this behavior would be met with legal consequences rather than societal indifference. Legal consequences will force society to treat prostitutes with the dignity that every human being deserves.

CONCLUSION

In order for progress to be made in the area of prostitution legislation, advocates must share common goals and agree on methods by which to reach those goals. One goal, universally shared by advocates of prostitutes' rights, is to ensure that prostitutes receive the same respect and protection enjoyed by other members of society. This article suggests that an effective method to achieving that goal would be to challenge Florida's prostitution statute on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment in its enforcement. Though the constitutionality of a statute may be challenged on equal protection grounds in its facial construction, its effect, or its enforcement, the abundance of evidence of the unequal way in which the statute is enforced in Florida makes the third option the most viable.

Invalidating Florida's prostitution statute on equal protection grounds would be effective for two reasons. First, a judicial mandate to treat prostitutes equal in dignity to other members of society would begin to influence society to believe that prostitutes *deserve* that dignity. Second, such a mandate would allow prostitutes to be legal members of society, and thus entitle them to protection against the violence they face in their profession. Even "bad" women deserve dignity and protection.

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Equal Protection Level of Review Constitutional Law Equal Protection Scope of Protection Criminal Law & Procedure Criminal Offenses Sex Crimes Prostitution Elements

FOOTNOTES:

n1 See Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 525 (2000). The author asserts that "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, and more recently, the offer of sex for money. But a common secondary meaning of 'prostitution' is any service to 'an unworthy cause.'" *Id.*, quoting Webster's New World Dictionary 1080 (3d College ed. 1994).

n2 See Cynthia Chandler, *Feminists as Collaborators and Prostitutes as Autobiographers: De-Constructing an Inclusive Yet Political Feminist Jurisprudence*, 10 HASTINGS WOMEN'S L. J. 135, 140 (1999) (equating sexual women with "bad" women in the eyes of society and claiming that because of this distinction, society considers sexual women less worthy of protection than "good" women, or non-sexual women).

n3 Consider the arbitrariness of social compartmentalization of prostitution into the forbidden-by-law category, and other women's behavior into the acceptable-at-law category. Many women choose to marry for money, many women receive lavish gifts for their "services," and many women have a requirement of being treated by the man a certain number of times, or even forever, before they will sleep with him. This is behavior that is in essence, sex in exchange for something of monetary value, if not money itself. There is a very fine line between accepted social behavior and what law enforcement officials consider prostitution.

n4 See generally Chandler, *supra* note 2, at 137 (referring to the two basic countervailing feminist ideologies of choice and constraint which will be used throughout this article). See also Law, *supra* note 1, at 524 (using the term "commercial sex worker"). Feminist ideologies have been divided in various ways. One "fairly traditional" author uses the categories liberal, socialist, and radical feminism. Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth,"* 4 COLUM. J. GENDER & L. 26, 28-29 (1994).

n5 See Law, *supra* note 1, at 586 (This same author also rejects the term "prostitute" because it "conflates work and identity") *Id.* at 525.

n6 See *id.* at 525 ("Women who sell sex for money typically have other identities, that is, daughter, mother, athlete, musician, et cetera.") *Id.*

n7 See *id.* at 599-600 (supporting the idea that commercial sex work should be a legitimate and legal form of work, but concluding that including commercial sex work in the category of professionalism would be more beneficial to sex workers in protecting their rights than considering them employees).

n8 *See* Chandler, *supra* note 2, at 140.

n9 *See id.* at 137. *See also* Law, *supra* note 1, at 586 for a position that prostitution is a legitimate employment choice.

n10 *See* Chandler, *supra* note 2, at 140 ("[Choice feminists] argue that women have sexual desires which, although not necessarily identical to those of men, can equal men's in intensity." *Id.*).

n11 Fechner, *supra* note 4, at 33. Based out of the Netherlands where prostitution is legal, and made up of prostitutes and ex-prostitutes, the Red Thread "organizes women in prostitution to assert their civil rights. . educates the public, provides legal and health education to prostitutes, acts as a community center for women in prostitution, and advocates for decriminalization of prostitution for all parties." *Id.*

n12 *See id.* at 35-36.

n13 *See id.* at 72 n.2 (comparing the desire of prostitutes to reclaim the terms whore and prostitute to the reclamation of the word "queer" by lesbians and gay men).

n14 *See* Chandler, *supra* note 2, at 139-41 (indicating that the word constraint is meant to reflect the constraints of a male dominated society on women's lives).

n15 *See id.* at 140-41 (asserting that Catharine MacKinnon's position that there is no female sexuality outside of the established male hierarchy has come to exemplify the radical feminist movement).

n16 *See* generally CATHARINE A. MacKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech* (1994), in FEMINISM UNMODIFIED 163, 175-95 (1987) for a discussion of the human rights statute written by MacKinnon and Andrea Dworkin, characterizing pornography and prostitution as sex discrimination.

n17 *See* Fechner, *supra* note 4, at 72 (advocating the perspective of radical feminists: "Hopefully, we will one day recognize the harm done to women in prostitution without blaming them for it. We will see them as survivors of their subordinate position in society rather than as simply perpetrators or victims.").

n18 *See id.* at 47, quoting SARAH WYNTER, *WHISPER: Women Hurt in Systems of Prostitution Engaged in Revolt*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY (Frederique Delacoste & Priscilla Alexander eds., 1987).

n19 *See* Fechner, *supra* note 4, at 72 (concluding that women should unite behind a radical feminist theory because it "best comports with the facts of prostitution by directly confronting the problems of gender inequality, violence, economic disparities, poor health, and inaccurate public perceptions without propagating myths that glamorize prostitution"); *see also* Chandler, *supra* note 2, at 178 (advocating a united methodology which includes choice within constraint as the most powerful: "Exclusion is less likely with a feminism founded on the assumption that solidarity and inclusion is ultimately politically desirable, than in a rhetoric of truth which hides and denies its exercise of power to exclude.").

n20 See Alexandra Bongard Stremmer, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J. L. & PUB. POL'Y 189, 199 (1995).

n21 Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 19 (1999), citing Department of Justice, Federal Bureau of Investigation, *Crime In The United States 1994*, UNIFORM CRIME REPORTS, 283 (1994).

n22 Ricki Lewis Tannen, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, xxxvii (1990).

n23 While men are also prostitutes, this article concerns itself for the most part with women's issues. The assertions made are not undermined by the existence of male prostitutes because "most prostitutes are women." See Stremmer, *supra* note 20, at 193 n.41. Any relevance that male prostitutes may have to the equal protection analysis will be addressed in that analysis.

n24 See *id.*, at 192, citing Belinda Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN'S RTS. L REP. 99 (1989) (discussing commentator Belinda Cooper's concept of the "conservative moral approach," saying, "ingrained cultural beliefs about sexuality and the role of women justify convictions of prostitutes under the conservative moral analysis").

n25 FLA. STAT. § 796.07 (1999).

Prohibiting prostitution, etc.; evidence; penalties; definitions

(1) As used in this section:

(a) "Prostitution" means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

(b) "Lewdness" means any indecent or obscene act.

(c) "Assignment" means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

(d) "Sexual activity" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation; however, the term does not include acts done for bona fide medical purposes.

(2) It is unlawful:(a) To own, establish, maintain, or operate any place, structure, building, or conveyance for the purpose of lewdness, assignment, or prostitution.

(b) To offer, or to offer or agree to secure, another for the purpose of prostitution or for any other lewd or indecent act.

(c) To receive, or to offer or agree to receive, any person into any place, structure, building, or conveyance for the purpose of prostitution, lewdness, or assignment, or to permit any person to remain there for such purpose.

(d) To direct, take, or transport, or to offer or agree to direct, take, or transport, any person to any place, structure, or building, or to any other person, with knowledge or reasonable cause to believe that the purpose of such directing, taking or transporting is prostitution, lewdness, or assignment.

(e) To offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignment.

(f) To solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignment.

(g) To reside in, enter, or remain in, any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution, lewdness, or assignment.

- (h) To aid, abet, or participate in any of the acts or things enumerated in this subsection.
- (i) To purchase the services of any person engaged in prostitution.
- (3) In the trial of a person charged with a violation of this section, testimony concerning the reputation of any place, structure, building, or conveyance involved in the charge, testimony concerning the reputation of any person residing in, operating, or frequenting such place, structure, building, or conveyance, and testimony concerning the reputation of the defendant is admissible in evidence in support of the charge.
- (4) A person who violates any provision of this section commits:
 - (a) A misdemeanor of the second degree for a first violation, punishable as provided in § 775.082 or § 775.083.
 - (b) A misdemeanor of the first degree for a second or subsequent violation, punishable as provided in § 775.082 or § 775.083.

n26 *See* E&T Realty v. Strickland, 830 F. 2d 1107, 1112 n.5 (11th Cir. 1987).

n27 *See, e.g.*, Hooper v. Bernalilo County Assessor, 472 U.S. 612 (1985); Dandridge v. Williams, 397 U.S. 471 (1970).

n28 *See* Law, *supra* note 1, at 530 (while "every state in the United States defines the actions of a person who offers or provides sex for money as a crime," only "some states make it a crime to buy sex").

n29 *See* FLA. STAT. § 796.03 (historical and statutory notes).

n30 *See* Stremler, *supra* note 20, at 193-94 (citing Fla. Stat. § 796 for an example of a state that had altered its prostitution statute to criminalize both the solicitation and procurement of prostitution as opposed to simply solicitation).

n31 FLA. STAT. § 796.07 (1999).

n32 FLA. STAT. § 796.07(4).

n33 FLA. STAT. § 796.07(2)(e).

n34 FLA. STAT. § 796.07(2)(f).

n35 *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

n36 New York Transit Auth. v. Beazer, 440 U.S. 568, 592-94 (1979) (holding that the New York Transit Authority's refusal to employ persons who use methadone does not violate the Equal Protection Clause of the Fourteenth Amendment).

n37 *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (holding that Congress did not violate equal protection by requiring retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system, but not those covered by the Civil Service retirement and disability system).

n38 *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (holding unconstitutional a statutory provision which denied welfare assistance to residents who had not resided within that jurisdiction for at least one year immediately preceding their applications for such assistance). Here, the independent right at stake was the right to travel.) *Id.*

n39 *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that denying black children admission to public schools because of their race violates the Equal Protection Clause of the Fourteenth Amendment).

n40 *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that an Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18 invidiously discriminates against males in violating a man's right to the equal protection of the law).

n41 *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979).

n42 *See id.*

n43 *See Washington v. Davis*, 426 U.S. 229, 242 (1976).

n44 *See Feeney*, 442 U.S. at 276 (upholding legislation that gave preference to veterans and had a disparate effect on the number of women hired). Although the level of scrutiny that the court utilizes depends on the type of classification, here, as in *Feeney*, the alleged classification is gender-based.

n45 *See id.* at 279.

n46 *See id.* at 282 (Marshall, J., dissenting).

n47 *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (holding that respondent failed to carry the burden of proving discriminatory purpose in the Village of Arlington Heights' denial of its request to rezone a parcel of land for low- and moderate-income housing).

n48 *See id.* at 265-66.

n49 *See Feeney*, 442 U.S. at 273.

n50 *See Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

n51 *See id.*

n52 *See* Strickland v. Alderman, 74 F.3d 260, 264 (11th Cir. 1996) ("In order to prevail on an equal protection claim based upon the application of a facially neutral statute, it must be established that: 1) the plaintiff was treated differently than similarly situated persons; and 2) the defendant unequally applied the facially neutral statute for the purpose of discriminating against the plaintiff.").

n53 E&T Realty v. Strickland, 830 F.2d 1107, 1112-13 (11th Cir. 1987).

n54 *See E & T Realty*, 830 F.2d at 1114.

n55 *See* Tannen, *supra* note 22, at 900-03 (discussing the discriminatory treatment of women in the numbers of arrests, and the manner of prosecution and sentencing).

n56 *See id.* at 900.

n57 *See id.* at 901.

n58 *See id.* at 902.

n59 *See* United States v. Virginia, 518 U.S. 515, 574 (1996).

n60 *See id.* at 532-33.

n61 *See* State v. Sandoval, 649 P.2d 485, 487 (N.M. Ct. App. 1982) (explaining that since the prostitute and the customer are not similarly situated, it is acceptable for the New Mexico legislature to treat each group differently).

n62 *Id.*

n63 *Id.*

n64 *Id.* *See also* discussion *infra* Part III A.

n65 *See* Commonwealth v. An Unnamed Defendant, 492 N.E.2d 1184, 1185 n.1 (Mass. Ct. App. 1986) (*quoting* the General Law c. 272, § 53A which reads, "Any person who engages, agrees to engage, or offers to engage in sexual conduct with another person in return for a fee, or any person who pays, agrees to pay or offers to pay another person to engage in sexual conduct with another natural person may be punished by imprisonment in a jail or house of correction for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.")

n66 *Id.*

n67 *See id.* at 1186-88, quoting *Commonwealth v. Franklin*, 385 N.E.2d 227 (1978).

n68 481 U.S. 279 (1987).

n69 *See id.* at 283.

n70 *See id.* at 285.

n71 *See id.* at 286.

n72 *See id.* at 287.

n73 *See McCleskey*, 481 U.S. at 292 (emphasis added).

n74 *See id.* at 291-93.

n75 *See id.* at 299.

n76 *See Tannen*, *supra* note 22, at xxxvii.

n77 *See id.* at 900.

n78 *See United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978) (quoting from *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) ("To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, 1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and 2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.")).

n79 *See McCleskey*, 481 U.S. at 293-94.

n80 *See State v. Tookes*, 699 P.2d 983, 988 (Haw. 1985). Unfortunately, this is also a very difficult standard to meet. *See Lefler*, *supra* note 21, at 23.

n81 In *Commonwealth v. An Unnamed Defendant*, 492 N.E.2d 1184, 1186 (Mass. App. Ct. 1986), the defendant was able to show discriminatory intent by offering the testimony of an officer that it was department policy to arrest prostitutes and not customers. The court in this case did not apply the federal standard which would shift the burden to the state after a showing of discriminatory intent, but rather employed a three-prong test in which defendant had to demonstrate "that a broader class of persons than those prosecuted has violated the law. . .that failure to prosecute was either consistent or deliberate. . . and that the decision not to prosecute

was based on an impermissible classification such as race, religion, or sex." *Id.*, at 1188.

n82 In *Commonwealth v. King*, 372 N.E.2d 196, 204-05 (Mass. 1977), an officer offered testimony that it was department policy to arrest prostitutes and not customers. The court rejected this as proof of discriminatory intent, pointing to other laws in place specifically aimed at customers and claimed that defendant had not shown that those laws were not being enforced. However, the issue before the court was not whether other laws were being enforced but rather whether the prostitution law was being enforced equally. If the court would not accept this testimony as proof of discriminatory intent, "it is hard to imagine what better evidence. . . a defendant could show." Lefler, *supra* note 21, at 23.

n83 See Tannen, *supra* note 22, at 901 (*quoting* the conclusion of the Commission's Study on gender bias: "In every case the predominantly female prostitution population is receiving more severe treatment, both in the courtroom and with regard to bail or jail, than is their more numerous but less beleaguered clientele.").

n84 See *id.* This discrepancy is justified with the claim that prostitute's testimony is unreliable and her crime more severe. However, prostitutes are only considered unreliable because they have criminal records that customers lack because the two are prosecuted unequally. See *id.*

n85 See *Oyler v. Boles*, 368 U.S. 448, 456 (accepting statistical evidence that only certain felons had been proceeded against under a recidivist statute, but denying that this statistical evidence established a violation of equal protection since defendant failed to allege that the selection was based on any impermissible classification).

n86 See *Washington v. Davis*, 426 U.S. 229, 241(1976), *quoting Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).

n87 See *Washington*, 426 U.S. at 239-41.

n88 See *Bell v. State*, 369 So.2d 932, 934 (1979) (where defendants alleged that police officers participated in the illegal act of prostitution, but were not prosecuted, the court denied that this selective enforcement violated equal protection).

n89 See *Commonwealth v. Unnamed Defendant*, 492 N.E.2d 1184, 1188 (Mass. App. Ct. 1986).

n90 See James R. Stout and Thomas S. Tanana, Esq., *Could California Reduce AIDS by Modeling Nevada Prostitution Law?*, 2 SAN DIEGO JUSTICE J. 491, 497 (1994) ("The legislative purposes for enacting California prostitution laws generally fall into the following categories: 1) reducing the transmission of sexually transmitted diseases and HIV, 2) reducing ancillary crime associated with prostitution, 3) reducing the offensive public display of sexuality, 4) reducing the exploitation of prostitutes, and 5) discouraging prostitution because it has traditionally been considered immoral."). Cf. Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE J.L. & FEMINISM 329 (1992) (discussing police justifications for enforcing prostitution laws).

n91 19 Cal.3d 338 (1977).

n92 *See id.* at 349 (Oakland Police Department admittedly targeted the prostitutes whom they considered the "profiteers.").

n93 *See Commonwealth v. King*, 374 Mass. 5, 15 (1977).

n94 *See State v. Devall*, 302 So.2d 909, 910 (La. 1974) (in which the court upheld a statute that was discriminatory on its face by specifically criminalizing the behavior of female prostitutes but not male prostitutes).

n95 *See Watkins v. United States Army*, 847 F.2d 1329, 1345(9th Cir. 1988), *vacated and aff'd on other grounds en banc*, 875 F.2d 699, 724 (1989), *cert. denied sub nom. United States Army v. Watkins*, 498 U.S. 957 (1990) (finding that homosexuals suffered a history of purposeful discrimination, having been "the frequent victims of violence, . . . excluded from jobs, schools, housing, churches, and even families").

n96 FLA. STAT. § 796(2001).

n97 FLA. STAT. § 796.03-07(2001).

n98 FLA. STAT. § 796.07(2)(e)-(f) (2001).

n99 FLA. STAT. § 796.07(4) (2001).

n100 FLA. STAT. § 796.07(4) (2001).

n101 *See People v. Superior Ct. of Alameda County*, 19 Cal.3d 338, 349 (1977).

n102 *See id.* at 350.

n103 *See id.* at 351.

n104 *See Lefler*, *supra* note 21, at 21 ("By far the most outrageous claim in the California Supreme Court's opinion was that police apprehend the 'profiteer' by going after prostitutes.").

n105 *See id.*

n106 *See Kandel*, *supra* note 90, at 333 ("Boston police fail to target the worst criminal offenders--pimps.").

n107 Tannen, *supra* note 22, at 906 (emphasis added).

n108 *Id.*

n109 *See* People v. Superior Court of Alameda County, 19 Cal.3d at 350.

n110 *See* Law, *supra* note 1, at 591. Law discusses whether prostitutes would be considered "employees" or "independent contractors" should prostitution be legalized. In considering the factors that are used to distinguish an employee from an independent contractor, Law concludes that the amount of control exerted over the lives and work of prostitutes indicates that they should be considered employees rather than independent contractors. *Id.*

n111 *See* Lefler, *supra* note 21, at 21 ("Pimps and tricks subject prostitutes to crimes of rape, beatings and robberies.").

n112 *See id.*

n113 *See id.*

n114 *See* People v. Draper, 169 A.D. 479, 484 (N.Y. 1915) ("It must be entirely obvious that the purpose of the Legislature was not to place in the hands of . . . prostitutes, voluntarily accompanying . . . men upon a night's debauch, the power to blackmail these erring brothers, under threat of a term in State prison, but rather to reach and punish those conscienceless vampires who make merchandise of the passions of men.").

n115 *See* Stremler, *supra* note 23, at 193 (presenting the point of view that there is "an inherent male need for sex which creates a demand that women engaged in prostitution could, and should, be entitled to fulfill").

n116 *See id.*

n117 *See* Tannen, *supra* note 22, at 906 ("Prostitutes are most often the victims of coercion. Most women do not choose freely to prostitute themselves. Prostitution is an attempt to survive.").

n118 *See* People v. Edwards, 180 N.Y.S. 631, 634 (1920).

n119 *See* Tannen, *supra* note 22, at 906.

n120 Murder carries a greater penalty if it is premeditated as opposed to being committed in the heat of passion.

n121 Many authors make the distinction between legalization and decriminalization. Basically, the difference between the two is that "legalization" carries with it a full regime of government regulations and controls, "whereas decriminalization simply removes any criminal penalty for engaging in prostitution, soliciting of prostitution, or any other prostitution related crime. Kandel, *supra* note 90, at 331. *See generally* Law, *supra* note 1 (arguing for decriminalization of prostitution in general as a way of protecting women from abuse); 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) (proposing regulation of prostitution as being more effective in eliminating the negatives associated with prostitution than simple decriminalization).

n122 See Law, *supra* note 1, at 542 ("The core moral argument for the criminal prohibition of prostitution rests on a vision of women, their sexuality, and the role of marriage.").

n123 United States v. Bitty, 208 U.S. 393, 401 (1908), *quoting* Murphy v. Ransey, 114 U.S. 15, 45 (1885).

n124 See Kandel, *supra* note 90, at 335 (suggesting that police, in their discretion, choose to arrest women because they "dare to require payment for their sexual service").

n125 See Carol H. Hauge, *Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality*, 8 N.Y. INT'L L. REV. 23, 41 (1995). Assertion is better supported by Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 51(1995).

n126 See *id.* at '50.

n127 See Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 MICH.J. GENDER & L. 65, 66 (1993) [hereinafter Baldwin, *Strategies of Connection*]. Baldwin's article, part of a Symposium on Prostitution, urges women to see the connection between themselves ("other women") and prostitutes. She points out that a distinction is often made as though it is "thought to describe something meaningful and real." Baldwin, *Strategies of Connection*, at 66. Her article demonstrates that the conditions prostitutes suffer daily are the same conditions all women share and the fact "that men hurt, despise, and exploit women and girls in and by prostitution should be connection enough for feminism." *Id.*

n128 See ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 204 (1983) ("The woman's effort to stay innocent, her efforts to prove innocence, her effort to prove that she was used against her will is always and unequivocally an effort to prove she is not a whore.").

n129 See Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 66-81 (1992) [hereinafter Baldwin, *Split at the Root*] (explaining how reformers in the areas of rape, spousal abuse and sexual harassment ultimately make progress by distinguishing the behavior of the victims of these crimes from the behavior of prostitutes).

n130 See *id.* at 69.

n131 See *id.* at 72.

n132 See *id.* at 77.

n133 See Stremler, *supra* note 20, at 194-5, *quoting* Shuster, *supra* note 121 at 10 n.65 ("One reason for discriminatory law enforcement against female prostitutes is that they are considered expendable; few persons, other than perhaps their pimps, will miss them if they are incarcerated.").

n134 See Baldwin, *Split at the Root*, *supra* note 129, at 80, *citing* ELEANOR MILLER, STREET WOMAN

138 (1986).

n135 Baldwin summarizes an analysis of victimization rates among 200 street prostitutes in San Francisco, including a statistic that 41% of the women were victimized by someone other than the john an average of 2.6 times per woman (e.g., forced into sex for no pay with police, being beaten by police, being beaten by other prostitutes). *See* Baldwin, *Split at the Root*, *supra* note 129, at 99, *citing* Mimi H. Silbert & Ayala M. Pines, Occupational Hazards of Street Prostitutes, 8 *Crim. Just. & Behav.* 395, 396-97 (1981). Only 1% mentioned reporting to the police. *See id.*

n136 Tannen, *supra* note 22, at 896.

n137 *See id.* at 894 n.420 ("Smith and Mitchell's data showed 95% of all juvenile prostitutes to be victims of violent physical abuse, with 90% as victims of sexual abuse by a non-family adult and 85% as victims of incest. Seven out of every eight incest victims is female."), *citing* L.SMITH & S. MITCHELL, *JUVENILES IN PROSTITUTION, FACTS VERSUS FICTION* 23-24 (1984).

n138 *See* Tannen, *supra* note 22, at 895.