

SEX, MONEY, AND THE CONSTITUTION

John and Tyron were together in the privacy of John's apartment when the police intruded and arrested them both. They were charged and convicted of engaging in "deviate" sex. When, in 2003, the U.S. Supreme Court overturned their convictions in *Lawrence v. Texas*, it assured Americans that the federal constitutional guarantees of liberty and privacy protect an individual's right to engage in private same-sex intimacies. But, despite the court's affirmation of John and Tyron's interests in liberty and privacy, if the police had discovered money on John's coffee table, those vital interests would not have protected either man from a prostitution conviction under the laws of nearly every U.S. jurisdiction including California.

It is time for California courts to consider what it is about the money on the table that would have made John and Tyron's intimacy any the less private than it was. The right to privacy is explicitly articulated in this state's Constitution (art. I, § 1), and, in the context of abortion rights, the high court has said the Constitution protects a woman's exercise of "personal control over the integrity of her own body" and over "her social role and personal destiny."¹ Set against that right are this state's anti-prostitution provisions: Penal Code section 647(b), which broadly criminalizes any sexual touching for money, together with other provisions which criminalize any third-party involvement in such acts.

At the outset, however, any mention of decriminalizing the exchange of sex for money will have to confront the image of the trafficked sex slave. In the popular imagination, prostitution is increasingly thought of in tandem with trafficking, and the passions generated by anecdotes of women and children forced or duped into prostitution hang in the air ready to sweep away any deliberative discussion of private, adult, consensual sex for money. But this image is a distortion of what characterizes prostitution itself in this country.

In California, trafficking involves the deprivation of the victim's liberty through force or fraud or a minor's involvement in commercial sex, while section 647(b) makes no reference to force, fraud or minors. The latter is not an anti-trafficking law, and its repeal would give no comfort to traffickers. In fact, neither the pimp who brutalizes or steals from a prostitute nor the kidnaper or defrauder of a naïve woman in prostitution is himself a prostitute or in violation of 647(b). Other criminal provisions address his contemptible and frightening behavior. For the adult prostitute demanding respect for her own autonomy and privacy rights, this conflation of her work with trafficking is both insulting and impenetrable. One is reminded of the red scare of the early 50s and the effort of a blacklisted leftist playwright trying to defend himself against a rote association with Stalin's purges.

Amnesty International can tell the difference between prostitution and trafficking. In August it recommended decriminalization of all aspects of consensual sex work, yet it abhors sex trafficking and calls for it to be criminalized under international law. It points out that there is no evidence to suggest that decriminalization of sex work itself increases sex trafficking, and third parties who exploit or abuse sex workers will remain criminalized. The pimp who coerces, the brothel owner who exploits and the buyer who is violent will still be criminals under Amnesty's model.

Amnesty is not alone. Other national and international bodies that support decriminalization include Freedom Network USA, an organization of 38 providers of service to victims of trafficking, Human Rights Watch, the World Health Organization, and the UN sponsored Global Commission on HIV and The Law.

Stereotypes fueling the assumption that there must be a compelling state interest to override the prostitute's constitutional right to privacy do not fare well when expressions of

disdain are replaced by sound research. For example, with the current fixation on trafficking, there is a compulsion to interpret any sex work as coercive and exploitive at some level, but studies do not support any such generalized image of prostitution. From the available research, it appears that most street workers, for example, do not work for a pimp, and a 1991 study of Los Angeles County street workers found their average earnings were higher than the average for working women overall. But about 80% of prostitutes are not street workers. They work indoors. Former call girl and author Norma Jean Almodovar gives us a view of the high end of the market. She chose her own madams to work for and she switched them as it suited her. They took 40% of the negotiated fee, but they provided a service. They furnished and screened the clients, negotiated the fee and provided an element of security. She was always in control of her work, and she could turn down an engagement as she saw fit. Her relationship with her “pimp” was not unusual for a call girl.

Author and former madam, Maggie McNeill, notes that, far from being coerced victims, sex workers half-jokingly criticize other women for giving their sexual favors away, mockingly referring to them as “victims in need of rescue.”

Almodovar writes of her former clients as a “great bunch of guys,” recalling one who would call between visits just to talk and another whom she would have considered marrying but for her choice of another man. In the end, though, she spent time in prison because she gave advice to another adult who asked her about becoming a call girl. Our lives are no better protected, our futures are no brighter and our children are no safer because we imprisoned her. But we don’t like thinking about *her*. We prefer to shift our gaze to an imagined sex slave driver and comfort ourselves that, somehow, we are fighting that monster.

¹ *American Academy of Pediatrics v. Lungren*, (1997)16 Cal.4th 307, 332-333.