

## Decriminalizing Prostitution in Recognition of Fundamental Rights

**JOHN AND TYRON WERE TOGETHER** in the privacy of John's apartment when the police intruded and arrested them. They were later convicted of engaging in "deviate" sex. In 2003, the U.S. Supreme Court overturned their convictions in *Lawrence v. Texas*, assuring Americans that federal constitutional guarantees of liberty and privacy protect an individual's right to engage in private same-sex intimacy. But if the police had discovered money on John's coffee table, the court's affirmation of John and Tyron's interests in liberty and privacy would not have protected either 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 less private than it was. The right to privacy is explicitly articulated in the California Constitution. Also, in the context of abortion rights, the state's high court said in *American Academy of Pediatrics v. Lungren* that the constitution protects a woman's exercise of "personal control over the integrity of her own body" and "her social role and personal destiny." Yet, set against that right are this state's antiprostitution provisions: Penal Code Section 647(b), which broadly criminalizes any sexual touching for money, together with other provisions that criminalize any third-party involvement in such acts.

At the outset, 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 antitrafficking 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 naive woman in prostitution is a prostitute or in violation of 647(b). Other criminal provisions address this contemptible and frightening behavior. For the adult prostitute demanding respect for autonomy and privacy rights, this conflation of his or her work with trafficking is both insulting and impenetrable. One is reminded of the red scare of the early 1950s and the effort of a blacklisted leftist playwright trying to defend against a rote association with Stalin's purges.

Amnesty International can tell the difference between prostitution and trafficking. In August it recommended decriminalizing all aspects of consensual sex work, yet it abhors sex trafficking, calling for it to be criminalized under international law. It points out there is no evidence to suggest decriminalization of sex work itself increases

sex trafficking, and third parties (pimps, brothel owners, violent clients) who exploit or abuse sex workers will remain criminalized. 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.

Stereotype-induced assumptions 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 confront sound research.

### Amnesty International can tell the difference between prostitution and trafficking.

For example, the current fixation on trafficking tends to interpret any sex work as coercive and exploitive at some level, but studies do not support this generalized image of prostitution. From the available research, it appears that most street workers 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. About 80 percent of prostitutes, though, 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 switched them as it suited her. They took 40 percent of the negotiated fee, but they provided a service, furnishing and screening clients as well as negotiating the fee. They also provided an element of security. She was always in control of her work, rejecting engagements as she chose. Her relationship with her "pimp" was not unusual for a call girl.

Author and former madam Maggie McNeil notes that, far from being coerced victims, sex workers half-jokingly criticize other women for giving sexual favors away, mocking them as "victims in need of rescue." Almodovar writes of former clients as a "great bunch of guys," recalling one who called between visits just to talk and another whom she might have married but for her choice of another man. But, in the end, 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 no brighter, and our children no safer because we imprisoned her. We just don't like thinking about her, preferring to shift our gaze to an imagined sex slave driver and comforting ourselves that we are somehow fighting that monster. ■

Jerald L. Mosley is retired from practicing employment and constitutional law as a supervising deputy attorney general at the California Department of Justice.