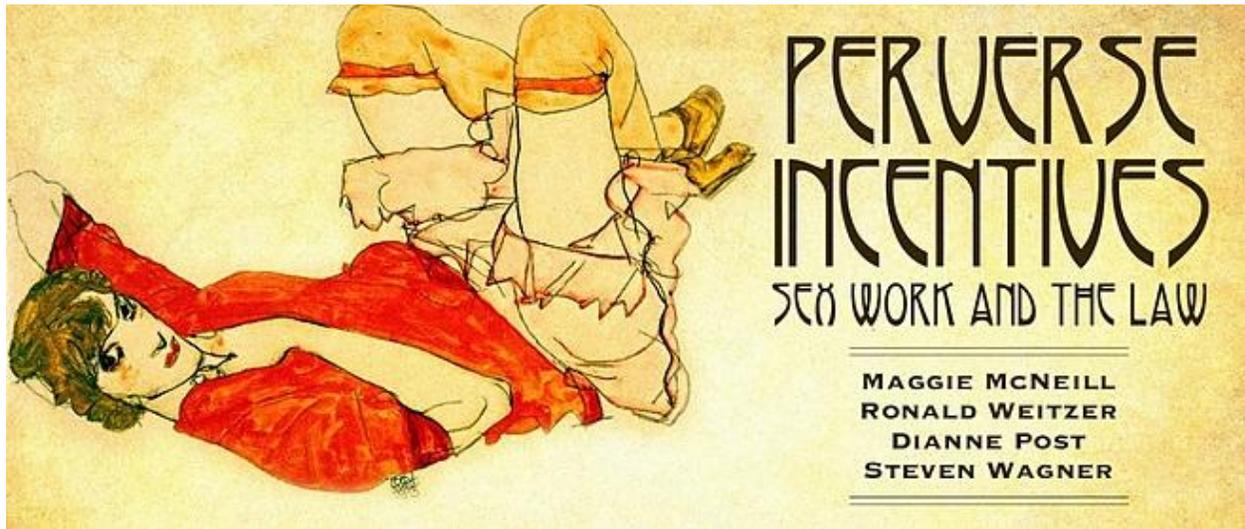


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Prostitution as a Legal Institution



By

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Response Essays
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Unlike other types of “vice,” alternatives to prevailing prostitution policy in America are rarely debated. Maggie McNeill’s lead essay is thus a welcome first step in interrogating the American model of criminalization and considering potentially superior policies.

Americans have one existing example of an alternative to criminalization: Brothel prostitution has been legal in Nevada’s rural counties since 1971, without problems. And a few other jurisdictions have recently considered a more tolerant policy. A 2007

bill in the Hawaii state legislature, endorsed by the ACLU, would have decriminalized indoor prostitution and zoned street prostitution into particular areas. And two cities (Berkeley and San Francisco) have recently voted on ballot measures that would have *de facto* decriminalized prostitution. In 2008, a sizeable minority (42%) of San Franciscans voted for a measure that instructed police to discontinue making prostitution arrests. It is conceivable that a similar measure might

pass in some city, if not a state, in the foreseeable future.

Unfortunately, the vast majority of research on prostitution internationally has focused on systems where all or most of the preconditions for prostitution are illegal. Thus, what we think we “know” about prostitution may be colored by research confined to how it manifests under criminalization, rather than where it is legal. Imagine researching only countries where abortion is criminalized and occurs in unsafe and shady circumstances – then generalizing those skewed findings to “abortion.” This is the situation for prostitution: many of the assumptions and public policies regarding it are based on either folk wisdom or ignorance of the full panoply of policy regimes.

McNeill is right about several things. Starting with her central point, there is absolutely no reason why sexual commerce cannot be viewed and treated like other kinds of work. What makes it different from other work is the *stigma* attached to it and a set of *stereotypical assumptions* about the participants and the working conditions. But research shows that such assumptions (e.g., abuse, exploitation, violence) are by no means inherent in prostitution. The first step in normalizing prostitution, as I write in my book *Legalizing Prostitution*, is that “consensual adult prostitution be officially recognized as work and that participants be accorded the rights and protections available to those involved in other occupations.”^[1]

McNeill is also right to mention conflict over prostitution policy. Such conflict should not be surprising: it is a staple of other controversial issues, such as same-sex marriage, marijuana legalization, and doctor-assisted suicide. Opponents are often well organized, media savvy, and influential with politicians. In the prostitution arena, the most important “anti” forces (1) equate prostitution with sex trafficking, (2) demand blanket criminalization where it currently

doesn't exist, or (3) champion the Swedish system where the clients of sex workers, but not the workers themselves, are criminalized. These forces have met with success, in many nations, in redefining prostitution in ideological terms, creating new offenses and stiffer punishments, and defeating proposals for legalization. McNeill is right to criticize these misguided and counterproductive policies and the fallacious claims on which they have been based.^[2] Draconian punishments for consenting adults who exchange sex for money compel them to operate underground, exposing both parties to risk of victimization and exploitation. I should also point out that all of these anti-prostitution campaigns are blatantly gender-biased: they ignore male and transgender workers and are obsessed with controlling women's bodies – women who are denied individual agency and respect for their decisions and depicted as passive victims. Such anti-feminist paternalism is part of the answer to George Carlin's famous question: “Sex is legal. Selling is legal. Why is selling sex illegal?”

I don't know whether McNeill has conducted her own research. Relying on others' writings, she does recapitulate several mistakes that deserve correction here. First, the criminalization model is not confined to a handful of countries, as she claims. It is essentially – *de facto* if not *de jure* – the reigning system in several nations, where the act of prostitution may be “legal” but everything surrounding it, including solicitation or communication regarding price and service, is criminalized. Second, I know of no society that has adopted a policy of pure “decriminalization,” entirely lacking in government regulation. It is a myth that New Zealand and New South Wales, Australia, have decriminalized prostitution with no regulatory apparatus. New Zealand decriminalized prostitution in 2003 but coupled this with nuisance-abatement laws for street prostitution and regular inspections of sex businesses by the police,

health department, and social services. This is *minimalist legalization*, not unregulated decriminalization. New South Wales delegates regulatory decisions to local city councils, and they vary tremendously in both their general orientation to commercial sex (pragmatic vs. moralistic) and in the kinds of restrictions (geographic and otherwise) they place on both businesses and independent operators, some of which are quite onerous. NSW is not an example of pure decriminalization as McNeill imagines.

McNeill uses the terms “heavy” and “loose” legalization; she gives a few examples of each but fails to define these terms. Thus, we have no way of evaluating any particular system, since she offers no criteria for distinguishing the good from the bad. But perhaps McNeill would consider this a fool’s errand anyway, since she seems to advocate radical, unfettered decriminalization. She writes: “even in looser legalization regimes, laws create perverse incentives and provide weapons the police inevitably use to harass sex workers.” These outcomes are neither “inevitable” nor “perverse,” as evidence from several legal regimes shows. Nevada’s extremely comprehensive regulatory system explains why legal brothels have persisted in the state for four decades without controversy. Several other jurisdictions have legalized at least one type of prostitution without “perverse” consequences. A government evaluation of legal brothels in Queensland, Australia, concluded that, “Legal brothels now operating in Queensland provide a sustainable model for a healthy, crime-free, and safe legal licensed brothel industry” and are a “state of the art model for the sex industry in Australia.”^[3] The report found that both legal brothels and sole operators (in-call or out-call) had little adverse impact on the local community. And one survey found that 70% of a sample of 205 legal brothel workers and independent escorts said they would “definitely choose” such work if they had it to do over again, and half of each group felt that their work was a “major source of satisfaction” in their lives.^[4]

Taken to its extreme, total decriminalization *sans* regulation would allow street prostitution in any neighborhood; would leave brothels, escort agencies, and massage parlors unmonitored and their owners unscreened for criminal ties; and would allow explicit advertising of sexual services virtually everywhere (internet, newspapers, billboards, television). Whatever one thinks of any of the *specific* regulations now being instituted in the newly legal marijuana regimes in Colorado and Washington, there is good reason why the framers of these ballot initiatives eschewed unrestricted decriminalization. The failure of Oregon’s more radical ballot measure in 2012 shows the danger of proposing something that is not pragmatic, and the same point applies to efforts to liberalize policies on sexual commerce. The public is much more likely to endorse proposals containing reasonable restrictions than a free-for-all approach.

Fortunately, a set of “best practices” has been proposed. In *Legalizing Prostitution*, I list about 30 practices that can be used to evaluate existing legal regimes and serve as guidance for states considering legalization in the future. Space limitations prevent a full discussion of these norms here, but I will offer a few that relate directly to McNeill’s essay. I agree with her that the rules should not be “heavy” if by that she means onerous, stigmatizing, arbitrary, or costly to comply with. There should be no “sin tax” imposed on sex operators that does not apply to other business operations. The overall objectives should be health, safety, workers’ rights, and minimum impact on the public:

- I assume McNeill would agree with me that minors should be prohibited from selling sex. This rule is universal among nations that have legalized prostitution.
- I agree with McNeill that sex workers should not be forced to register or be licensed by the authorities. Such attempts have failed everywhere they have been attempted, except in Nevada’s

exceptional rural brothels. As the National Organization for Women declared in its landmark 1973 decriminalization resolution, mandatory registration “will result in ongoing persecution of women who register because they do not wish to publicly proclaim themselves prostitutes.”^[5]

- Erotic businesses are different: Their owners should be subjected to rigorous background checks. Operators who pass the screening should be licensed, and these licenses should be subject to a periodic renewal process to maintain oversight of these businesses. The cost of the license should be low, as an incentive to operate within the legal sector rather than underground.
- Police are not necessarily malevolent, as McNeill assumes. They can play a constructive role in protecting sex workers’ safety and rights.^[6] In the Netherlands, special teams of police officers routinely inspect sex premises and question the workers and owners in a collegial manner. These units are governed by a code of conduct, reprinted in my book.
- Restrictions on advertising are needed, just as they are for alcohol and tobacco products. Given the sensitivity of prostitution for many people, it is best to keep it as discreet as possible. The same goes for the location of erotic businesses, which should be prohibited from locating near schools and playgrounds. Minimizing encroachment on the public reduces the chances of

backlash if sex businesses and advertisements are too visible.

- Safe-sex practices and routine health examinations should be encouraged, repeatedly, by the government, but not mandated because of both enforcement difficulties and privacy considerations. Many sex workers already practice safe sex and get regular health checks.
- Institutionalized discrimination against prostitutes and business operators should be illegal. An example is the refusal of banks in several European nations to lend money to owners of legal brothels and erotic clubs. Both workers and business owners should have the same rights as the participants in other types of commerce.
- Finally, we should increase penalties for anyone who engages in exploitation or abuse. Too often, law enforcement has turned a blind eye to instances of parasitical pimping, assault, robbery, and rape of sex workers. Robust punishment for these crimes will send a (hopefully deterrent) message to would-be predators that they will be held accountable.

A regulatory system built on these (and some additional) restrictions is far superior to either criminalization or unregulated decriminalization: it guarantees workers’ rights and can enhance their health and safety; it imposes vital oversight over business owners; and it will attract much more public support than a policy of simple, unrestricted decriminalization.

Notes

^[1] Ronald Weitzer (2012), *Legalizing Prostitution: From Illicit Vice to Lawful Business*, New York: NYU Press, p. 207.

^[2] On the Swedish system, see May-Len Skillbrei and Charlotta Holmstrom (2013), *Prostitution in the Nordic Region*, Burlington: Ashgate. On the politics of human trafficking, see Ronald Weitzer (2007) “The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade,” *Politics & Society*, 35: 447-475, and Ronald Weitzer (2011) “Sex Trafficking and the Sex

Industry: The Need for Evidence-Based Theory and Legislation,” *Journal of Criminal Law and Criminology*, 101: 1337-1370.

[3] Crime and Misconduct Commission (2004), *Regulating Prostitution: An Evaluation of the Prostitution Act 1999, Queensland*, Brisbane: Commission, p. 75.

[4] Charrlotte Woodward, Jane Fischer, Jake Najman, and Michael Dunne (2004), *Selling Sex in Queensland*, Brisbane, Australia: Prostitution Licensing Authority, p. 39.

[5] National Organization for Women (1973), *Resolution Calling for the Decriminalization of Prostitution*, Resolution 141. The resolution declares that NOW “opposes continued prohibitive laws regarding prostitution, believing them to be punitive” and “therefore favors removal of all laws relating to the act of prostitution.”

[6] Rebecca Pates (2012), “Liberal Laws Juxtaposed with Rigid Control: An Analysis of the Logics of Governing Sex Work in Germany,” *Sexuality Research and Social Policy*, 9: 212-222.

ALSO FROM THIS ISSUE

Lead Essay

- **Treating Sex Work as Work** by Maggie McNeill

Sex work is ubiquitous. Where a substantial demand exists, some people will inevitably try to meet that demand for a price. Retired call girl and madam Maggie McNeill reviews the various legal regimes that have been set up to regulate and/or prohibit sex work. She concludes that many approaches, particularly the most restrictive ones, increase the likelihood of harm to all participants. They tend to infantilize women and invest law enforcement with arbitrary and dangerous powers. She argues that the best approach is a regime of simple legalization, without licensing or heavy restrictions.