

Prostitution: A Feminist Analysis

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I. INTRODUCTION

In dealing with sexual issues, American law must face the difficult conflict between public morality and individual rights. This conflict pits those favoring the use of law to enforce traditional concepts of morality—the “conservative moralist” view¹—against those who would permit individuals the greatest possible freedom to determine their own behavior, limiting law’s intervention in moral questions—the “liberal individualist” position.²

A new generation of feminists has redefined the problem, challenging both conservative moralist and liberal individualist approaches to sexual issues. These feminists often define themselves as “radical” to distinguish their beliefs in particular from liberal feminism. While all feminists by definition concern themselves with differential treatment of the sexes, liberal feminists utilize liberal concepts of equality in their struggle to increase

opportunities for women. They accept, at least for pragmatic purposes, the existing framework of legal thought as value-neutral. Radical feminists, on the other hand, question the very bases of law and society. For them, sex and gender, rather than economics or politics or any other issue, provide the key to understanding the social order. Male power is expressed and perpetrated through society’s treatment of sex. This power is embodied in supposedly neutral objectivity, which in reality perpetuates the male outlook on the world, making this outlook the standard by which anything different is judged. Thus the solution for women is not to attempt equality within this value system—an impossibility—but to develop an alternate outlook on the world and to posit an alternate set of values and approaches.³

Thus feminist scholars introduce an entirely new element into the perennial conflict between morality and individuality, public and private,

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1. One of the best-known proponents of the conservative moralist view was Britain’s Lord Devlin. Writing in opposition to the positions on homosexuality and prostitution taken in the Wolfenden Report, see *infra*, note 8, Devlin defined morality as a fundamental agreement on concepts of good and evil that unites a society; the absence of which can cause the society’s disintegration. LORD DEVLIN, *THE ENFORCEMENT OF MORALS* 15, 22-25 (1965) [hereinafter DEVLIN]. According to Devlin, Western morality is based on Christian ethics, which have been accepted by society as a whole and are therefore binding on everyone. There exists a type of moral “social contract” that citizens agree to abide by if they wish to remain part of the society. For Devlin, violations of this shared public morality were as dangerous to the social fabric as was treason to the political system. *Id.* Devlin’s understanding of public morality bears particular relevance to this article because he wrote in direct response to the legalization of private acts of prostitution.

2. See generally J.S. MILL, *ON LIBERTY* 141-87 (G. Himmelfarb, ed. 1979) [hereinafter J.S. MILL]; Richards,

Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution: An Attempt at a Philosophical Assessment, 127 U. PA. L. REV. 1195 (1979) [hereinafter Richards]; Ericsson, *Charges Against Prostitution*, 90 ETHICS 335 (1980) [hereinafter Ericsson]. The Supreme Court has recently shown a willingness, where sex is involved, to grant traditional moral values precedence over individual rights. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (allowing states to criminalize sodomy).

3. For more detailed discussions of radical and liberal feminism, see generally MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) [hereinafter MacKinnon, *Agenda*]; MacKinnon, *Feminism, Marxism, Methods, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter MacKinnon, *Jurisprudence*]; Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Pateman, *Women and Consent*, 8 POL. THEORY 149 (1980); Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914 (1987) [hereinafter Finley]. I will use the term “feminist” throughout this article to denote the radical feminist perspective, without meaning to deny or downplay other points of view.

conservative and liberal. Feminist thinking casts sexual issues in a new light, providing new theoretical insights and practical approaches to old problems.

This paper applies these feminist insights to a

legal analysis of perhaps the oldest sexual issue, prostitution.⁴ It describes the conservative moralist and the liberal individualist approaches to prostitution before focussing on a feminist analysis of those approaches and of prostitution itself.⁵

4. Prostitution, in its simplest form, is the sale of sexual acts. "Most social scientists define prostitution as sexual intercourse characterized by barter, promiscuity, and emotional indifference." P. GOLDSTEIN, *PROSTITUTION AND DRUGS* 27 (1979) [hereinafter P. GOLDSTEIN]; see J. DECKER, *PROSTITUTION: REGULATION AND CONTROL* 8-9 (1979) [hereinafter J. DECKER]. But see P. BIEMANN, *WIR SIND FRAUEN WIE ANDEREN AUCH (WE ARE WOMEN TOO)* 129-30 (1980) [hereinafter P. BIEMANN] (prostitute's partial criticism of this description). Prostitution, however, encompasses much more than a simple definition reveals. Complex dynamics exist among prostitutes, as well as between prostitutes and their clients, and between prostitutes and pimps. See generally R. SYMANSKI, *THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES* (1981) [hereinafter R. SYMANSKI]; J. DECKER, *supra*; H. REYNOLDS, *THE ECONOMICS OF PROSTITUTION* (1986) [hereinafter H. REYNOLDS]; E. MCLEOD, *WOMEN WORKING: PROSTITUTION NOW* (1982) [hereinafter E. MCLEOD]; A. CARMEN & H. MOODY, *WORKING WOMEN* (1985) [hereinafter A. CARMEN & H. MOODY]; S. BARROWS, *MAYFLOWER MADAM* (1986) [hereinafter S. BARROWS]; Alexander, *Prostitution: A Difficult Issue for Feminists*, in *SEX WORK* 189 (F. Delacoste & D. Alexander eds. 1987) [hereinafter Alexander].

Estimates of the number of prostitutes in the United States have ranged between 230,000 and 350,000. R. SYMANSKI, *supra*, at 9; J. DECKER, *supra*, at 12. Prostitute organizer Priscilla Alexander has estimated that as many as 13% of American women are or have been prostitutes (either full or part-time). Griffin, *Wives, Hookers, and the Law*, *STUDENT LAW.*, Jan. 1982, at 20 [hereinafter Griffin].

A rough class system exists among prostitutes. Streetwalkers, the lowest prostitute class, make up 10-20 per cent of all prostitutes. Alexander, *supra*, at 189; J. DECKER, *supra*, at 106-07. They tend to be poorer women who cannot afford to rent a hotel room or other private space; they are often less educated, and, in the United States, are more often minority women. They are also the most likely to have pimps. However, Alexander estimates that "about 40% of street prostitutes work independently." Alexander, *supra*, at 189. Streetwalkers make up 85-90 per cent of all prostitutes who are arrested.

Brothel prostitutes and those who work in hotels, massage parlors and other off-street settings constitute another rough class. Call girls, who operate discreetly and privately, occupy the highest class and comprise perhaps the majority of all prostitutes. They are often well-educated women from middle-class backgrounds and tend to earn the most money. They also exercise the most control over their lives. Another group of prostitutes is comprised of women who work only part-time. Alexander, *supra*, at 189-191. For descriptions of the various types of prostitutes, see P. GOLDSTEIN, *supra*, at 34-38; H. REYNOLDS, *supra*, at 14-16; Alexander, *supra*, at 189; R. SYMANSKI, *supra*, at xiii.

A subject upon which this paper does not focus, but which is an important issue in prostitution, is the connection between prostitutes and drugs. Drug abuse often leads women into prostitution in order to pay for their habit; conversely, the tensions and strains of prostitution can also lead to drug abuse.

According to one study, addicts become prostitutes more quickly than prostitutes become addicts, although among call girls the tendency is reversed. P. GOLDSTEIN, *supra*, at 145. Alexander cites one study that found that 48% of addicted prostitutes had been addicts before becoming prostitutes. Alexander, *supra*, at 202. In an impressionistic study of New York prostitutes, members of New York's Judson Church found few streetwalkers using heroin. A. CARMEN & H. MOODY, *supra*, at 39. The madam of a high-class call girl operation in New York discovered the same thing during brief contact with streetwalkers in jail. S. BARROWS, *supra*, at 233. For a sociological study of the connection between drugs and prostitution, see generally P. GOLDSTEIN, *supra*.

This paper also does not encompass child prostitution—a separate subject, given the particularly vulnerable nature of children and their undeveloped sexuality. See G. SERENY, *THE INVISIBLE CHILDREN* (1984) (comprehensive discussion of child prostitution in the U.S., England, and Germany); see also Hersch, *Coming of Age on City Streets*, in *PSYCHOLOGY TODAY* Jan. 1988, at 28-37 (discussing problems of runaway children in New York City in particular, including prostitution, drugs and AIDS). The paper also does not consider homosexual prostitution, which is less widespread than the heterosexual variety and raises somewhat different issues. See, e.g., Decker, *Prostitution as a Public Health Issue*, in *AIDS AND THE LAW* 84-85 (H. Dalton & S. Burris ed. 1987) [hereinafter Decker, *Prostitution as a Public Health Issue*].

5. Prostitution has received less attention from radical feminists, whose central issue has been pornography. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED* 146-162 (1987) [hereinafter C. MACKINNON, *FEMINISM UNMODIFIED*]. This may be the result of the unique problem prostitution poses for feminism. See *infra* pp. 56-57; see also B. HOBSON, *UNEASY VIRTUE* 222 (1987) [hereinafter B. HOBSON]. Yet many of the issues most important to feminists are embodied in prostitution. The sex act, central to radical feminist analyses, is also the central fact of prostitution. Most of the questions that concern feminists surround that act: power relations between the sexes, the place of sex in society, the sexual double standard, economic coercion, the meaning of family and marriage. Because prostitution is "the real thing," not merely a depiction of sex, it highlights these issues to a greater extent than does pornography. Likewise, however, prostitution forces feminists to confront the problems of radical feminist analysis, such as the false consciousness issue, more forcefully than does pornography. See *infra* pp. 65-66 & note 95.

For one article that discusses some of the questions prostitution raises, see Boyle & Noonan, *Prostitution and Pornography: Beyond Formal Equality*, 10 *DALHOUSIE L.J.* 225 (1986) (pointing out that gender-neutral prostitution laws do not address more fundamental questions of economic exploitation and maintenance of the public/private distinction). The authors, although clearly aware of the dilemma prostitution creates for feminists, *id.* at n.86 (quoting E. SCHUR, *LABELING WOMEN DEVIANT: GENDER, STIGMA AND SOCIAL CONTROL* 171-177 (1984) [hereinafter E. SCHUR]), do not discuss this dilemma in great depth. However, this dilemma has been acknowledged and discussed by prostitutes themselves. See Alexander, *supra* note 4, at 184.

It examines the way in which statutory and case law in the United States continue to reflect a conservative moralist discomfort with prostitution, despite having assumed a veneer of liberalism that to some extent camouflages, though by no means reduces, the conservative moralist basis of the law. In considering more liberal treatments of prostitution, specifically using Nevada and West Germany as examples, this article then attempts to criticize such treatment and to offer an alternative based on the new feminist perspective.

II. EXISTING APPROACHES TO PROSTITUTION

A. THE "CONSERVATIVE MORAL" APPROACH

A moral view of prostitution as evil lies at the root of modern prohibitions of prostitution. This view persists despite the recent loosening of legal sanctions on various forms of sexual behavior. The sexual revolution of the 1960's and 70's, although it produced some revisions in prostitution laws, did not alter the legal attitude towards prostitution as profoundly as it affected adultery,

fornication, birth control, abortion and other sex-related practices.⁶

A graphic form of the conservative moralist view appeared not long ago when the Federation of New York State Judges opposed proposals to legalize prostitution, announcing that prostitution "insults human dignity" and is "destructive of morality."⁷ Three decades earlier, in England, the famed Wolfenden Report on the reform of laws regarding homosexuality and prostitution labeled prostitution "an evil of which any society which claims to be civilized should seek to rid itself."⁸

This view of prostitution derives from Christian teaching regarding family and sex. In the ancient world, before the advent of Christianity, prostitution was practiced and accepted in many cultures.⁹ Women, in these societies, served two sex-related purposes: reproduction and sexual release. They could be bought for both purposes—as wives, in the arranged economic transaction that was marriage,¹⁰ or as prostitutes. The prostitute provided an outlet for male sexuality beyond that provided by the wife.¹¹

6. See, e.g., Richards, *supra* note 2, at 1202 n.31.

7. Wise, *State Judge's Group Assails Proposed Legal Prostitution*, N.Y.L.J., May 12, 1986, at 1, col. 4 [hereinafter Wise].

8. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT, para. 226 (1957) [hereinafter THE WOLFENDEN REPORT]. This statement appeared even though the Wolfenden Report concluded that enforcing morality was not the law's function. The report instead established a liberal public/private distinction that permitted the private but prohibited the public practice of behavior that society might consider immoral. The act of prostitution accordingly remained legal, but its public manifestations—e.g., advertisement, solicitation—were outlawed. This dichotomous treatment in fact made the permitted act itself all but impossible. DEVLIN, *supra* note 1, at 8-9, 12; Smart, *Law and the Control of Women's Sexuality: The Case of the 1950's*, in CONTROLLING WOMEN—THE NORMAL AND THE DEVIANT 46-57 (B. Hutter & G. Williams eds. 1981) [hereinafter Smart].

9. Lawrence Stone describes the pre-Christian attitude towards sex as "tolerant hedonism," at least for men. Stone, *Sex in the West*, THE NEW REPUBLIC, July 8, 1985, at 25, 31-32 [hereinafter Stone]. In Greece and Rome, prostitution was commonplace. Greek cities even developed an elaborate prostitute hierarchy, somewhat similar to the prostitute class system existing today, although far more rigid. The highest class of Greek prostitutes, the hetirae, were intelligent and often powerful women, with more freedom than their married counterparts. Yet despite casual acceptance of the institution of prostitution, prostitutes even then were a stigmatized social group. See *id.*; J. DECKER, *supra* note 4, at 32-38; H. EVANS, HARLOTS, WHORES, AND HOOKERS: A HISTORY OF PROSTITUTION 34-49 (1979) [hereinafter H. EVANS].

10. As Stone points out, marriage was traditionally a

business arrangement, generally practiced among the upper classes alone. Stone, *supra* note 9, at 32. Only as the Church's influence increased did the institution of marriage spread to the lower classes as well.

11. Prostitution has often been justified with the argument that the male sex drive is stronger than the female drive and that, therefore, the male requires a sexual "outlet." A central question for any discussion of prostitution, however, is whether this underlying assumption about the male sex drive is in fact true, and to what degree cultural rather than biological factors motivate the exchange of sex for money. See 3 F. HENRIQUES, PROSTITUTION AND SOCIETY: MODERN SEXUALITY 210 (1968) [hereinafter F. HENRIQUES] (strength of popular belief in male sexual difference); see also E. MCLEOD, *supra* note 4, at 65-67 (some prostitutes and clients believe male sexual urge is particularly strong, while others dispute biological justification).

The biological view anchors the greater male drive in the fact that women are able to bear fewer children than men are able to create. Men find themselves in constant competition for control of the "limiting reproductive resource," the female. Because men therefore benefit from promiscuity, as far as reproduction is concerned, they seek more partners. Females, who must invest more energy in a single offspring and are thus less available, instead discriminate, and seek males who can provide "goods"—superior genetic material, as well as protection and other assistance in reproduction. This creates an imbalance in sexual supply and demand. See, e.g., R. SYMANSKI, *supra* note 4, at 250-53.

Even such biological underpinnings, however, are accompanied by social and cultural supports. For example, male control of resources—a social, not a biological fact—leads eventually to the exchange of sex by women for goods rather than for reproductive assistance. R. SYMANSKI, *supra*, at 243-50.

The Christian Church responded early to prevailing casual attitudes towards sex in the pre-Christian world by borrowing from the asceticism of certain pagan philosophers, rejecting sexual pleasure as a vice and endorsing chastity as a virtue. This ascetism modified over time into the doctrine that sex existed only for procreation, and should be confined to marriage.¹²

During the Middle Ages, a new perception arose in reaction to the arranged and economic character of marriage: the concept of romantic love. This involved passionate, though generally platonic, love of a woman other than one's wife.¹³ For the first time, a spiritual aspect, divorced from the physical or economic, entered the societal definition of the relationship between man and woman.

Influenced by the Church's emphasis on sex within the family, romantic love shifted its focus to the spouse, bringing the spiritual dimension to marriage. Love thus joined sex in its inextricable connection with the family.¹⁴ Accompanying these developments was the idea that men and women should freely consent to their union, along with a new belief in the sexual fidelity of both partners to a marriage.¹⁵

Despite its teachings, however, the Church at first reluctantly tolerated prostitution, which never ceased to flourish, as a necessary evil that protected the family. Like their pagan ancestors, Church leaders accepted the need for an outlet for male sexuality that the wife could not satisfy.¹⁶ By the Reformation, however, the Church had ceased to tolerate prostitution;¹⁷ sex, henceforth, was to be confined solely to the family.

Neither the procreative view of sex, nor the romantic view later annexed to it, eliminated prostitution. Nonetheless, the Church's condemnation of prostitution appears to have had two effects. First, it underscored the ancient separation between the functions of female sexuality for men—reproduction and sexual release. This dichotomous view of the female's purpose has cast women as either wives—"pure" and not desiring sex—or prostitutes: the so-called "whore/madonna" dichotomy. The "whore" satisfies supposedly-uncontrollable male lust; the "madonna" preserves the private realm of family and love.¹⁸ Both roles stem from the same objectifying, functional view of female sexuality. Yet the Church ultimately succeeded in evolving religious doctrine that glorified the "madonna" while increasingly stigmatizing the prostitute.¹⁹

The second effect of church teachings was to enhance this stigma by fostering a sense of guilt in the prostitute's male clients. Men were now expected to be faithful to their wives; the perceived need for sexual outlets was an unfortunate weakness in the eyes of the Church. While this guilt did not prove strong enough to eliminate male demand for prostitutes, it quite probably motivated men to increase the blame heaped upon prostitutes in order to alleviate their own guilt.²⁰

As a result, depending upon the political and social situation of the time, prostitution has been either outlawed or heavily regulated.²¹ The cyclical nature of this treatment is striking, with periods of toleration succeeded by periods of harsh repression. Repression generally coincides with extremely moralistic movements—the Reforma-

Feminists however challenge the biological argument that stresses the "primacy of the male sex urge." They emphasize instead the cultural factors that have encouraged male but discouraged female sexuality. See, e.g., E. MCLEOD, *supra* note 4, at 67; C. SMART, *WOMEN, CRIME, & CRIMINOLOGY* 89 (1977) [hereinafter C. SMART]; see also S. HITE, *THE HITE REPORT ON MALE SEXUALITY* 331-37, 477-80 (1981) (discussion of male sexuality with emphasis on cultural influences).

12. Stone, *supra* note 9, at 32.

13. Richards, *supra* note 2, at 1211, 1242 nn.85, 248-53.

14. See Stone, *supra* note 9, at 33-34; Richards, *supra* note 2, at 1211-12, 1242-43.

15. Stone, *supra* note 9, at 32.

16. See Richards, *supra* note 2, at 1211; J. DECKER, *supra* note 4, at 40.

17. Richards, *supra* note 2, at 1211-12.

18. See, e.g., C. FEINMAN, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM* 1-2 (1980); J. KAHLMANN & H. LANZERATH, *WEIBLICHE PROSTITUTION IN HAMBURG* 26 (1981)

[hereinafter J. KAHLMANN & H. LANZERATH] (describing early twentieth century theory of origins of prostitution whereby woman's nature rested by birth between two opposing poles: (honorable) "absolute mother" and (contemptible) "absolute whore").

19. The distinction between the "good" and "bad" woman adopted and promoted by Christianity was particularly well-suited to a class-based feudal social order, in which rigid distinctions between classes were determined by an individual's function in society rather than by personal characteristics. See J. DECKER, *supra* note 4, at 27-57 (presenting a historical overview of the regulation of prostitution). The distinction is less suited to a liberal society that values individuality and rejects immutable classifications. In this sense, the distinction between the prostitute and the "good" woman seems anachronistic.

20. See, e.g., H. EVANS, *supra* note 9, at 52-53.

21. See Stone, *supra* note 9, at 33-34; J. DECKER, *supra* note 4, at 42-57, 74-78 (for descriptions of the treatment of prostitution in various historical periods).

tion of the sixteenth century and the social purity movement of the early twentieth century are examples—and with the spread of venereal disease.²² Almost always the prostitute, rather than the client, was made to bear the brunt of repression.²³ In the nineteenth century, prostitution experienced particularly hypocritical treatment in the Anglo-Saxon world; though publicly condemned, it was implicitly or explicitly tolerated,

legally and socially.²⁴

The double standard, rooted in an ancient sexual dichotomy and idealized by the Church, persists today. It is reflected in the disparate legal attitudes towards marriage and prostitution.²⁵ United States law, particularly prostitution law, clearly accords marriage a special, protected status,²⁶ even though the distinction between marital

22. Prostitutes have been most harshly persecuted, and prostitution most strictly outlawed, during times when venereal disease has been particularly rampant. Brandt, *Historical Perspective*, in AIDS AND THE LAW, *supra* note 4, at 39-41; Decker, *Prostitution as a Public Health Issue*, *supra* note 4, at 81. VD is still associated, in both the popular and legal minds, with prostitution. See, e.g., Wise, *supra* note 7; Cherry v. Koch, 129 Misc. 2d 346, 357, 491 N.Y.S.2d 934, 944 (N.Y. Sup. Ct. 1985) (listing VD as one of the "attendant evils" of prostitution, despite widespread evidence that the association today is tenuous.) J. DECKER, *supra* note 4, at 356-59; R. SYMANSKI, *supra* note 4, at 48-50; Griffin, *supra* note 4, at 38. Prostitutes generally require that their customers wear condoms, for the prostitutes' own safety and because a reputation for transmitting disease may result in lost business. Griffin, *supra* note 4, at 38; Alexander, *supra* note 4, at 203-04; E. MCLEOD, *supra* note 4, at 40, 55-56.

The current spread of AIDS has added another element to the popular connection of prostitutes with sexually-transmitted diseases. Measures have been suggested which would test and regulate prostitutes. See generally Decker, *Prostitution as a Public Health Issue*, *supra* note 4, at 85-88. However, recent studies have corroborated prostitutes' claims that the connection between heterosexual prostitution and the spread of AIDS is limited; where it exists, it apparently is more drug-than sex-related. See *AIDS in Prostitutes Not Widespread*, N.Y. Times, Sept. 21, 1988, at 1, col. 2. So far, AIDS does not seem to be creating an anti-prostitute witchhunt.

A related question is whether fear of AIDS will lead to a reduced demand for prostitutes. This, however, seems unlikely. Though sexual habits may have changed to some extent due to AIDS, fear of disease apparently has not had a substantial effect on sexual behavior in the heterosexual community. Many tend to assume "it won't happen to me." See, e.g., *The Year of Loving Dangerously*, NEWSWEEK ON CAMPUS, Apr. 1987, at 12-21 (despite increased awareness of AIDS on college campuses, many college students have not changed their sexual behavior). But see *A Red Light District Loses its Allure*, N.Y. Times, May 14, 1988, at 4, col. 1 (report that fear of AIDS has led to major drop in brothel business in Hamburg red-light district). At least a minimum level of demand is likely to remain. The effect may be instead that men will more readily accept the use of condoms when with prostitutes. But see *In Frankfurt, A Trade that AIDS is Boosting*, Int'l Herald Tribune, Jan. 4, 1988, at 1 (as female German prostitutes begin to require customers to use condoms, the business of less demanding male prostitutes expands). The assumption that demand for prostitutes will persist despite any dangers present is supported by the fact that the widespread existence of VD, even when it was incurable and affected a huge percentage of the population, never eliminated prostitution, even when coupled with laws against it. See J. DECKER, *supra* note 4, at 46-49, 77-78; H. EVANS, *supra* note 9, at 64, 144, 190; J. KAHLMANN & H. LANZARETH, *supra* note 18, at 9-10.

23. But see Stone, *supra* note 9, at 33 (discussing periods in

which both prostitute and client might be subject to punishment, although client could buy his way out of penalty).

24. This was especially true in Victorian England, where sexual attitudes were marked by a paradoxical juxtaposition of sexual repression and sexual license. Prostitution flourished, though it was not openly accepted. J. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY 1-9, 70-71 (1980); Stone, *supra* note 9, at 34. Its widespread existence and tolerant treatment have been attributed to the emphasis placed on late marriage for men, which led to a perceived need for other sexual outlets. See F. HENRIQUES, *supra* note 11, at 201-220; Stone, *supra* note 9, at 33.

The ambivalent male attitude towards prostitutes, caught in a conflict between desire and guilt, was reflected in prostitutes' social treatment. In Victorian England, a successful mistress/prostitute could acquire social status, but would remain a pariah in "respectable" society. F. HENRIQUES, *supra* note 11, at 228. Stigmatizing prostitutes in this way probably operated to glorify the "chaste woman" in men's eyes. *Id.* at 217-18. See J. BARNHART, THE FAIR BUT FRAIL—PROSTITUTION IN SAN FRANCISCO, 1849-1900 84 (1986) [hereinafter J. BARNHART]. Barnhart describes how, in gold-rush-era San Francisco, prostitutes were treated with respect as long as they were the only women available. When wives and other more "respectable" women began to arrive, the attitude towards prostitutes changed considerably.

25. Some states are explicit that their anti-prostitution laws do not apply to married persons. See, e.g., ILL. REV. STAT. ch. 38 para. 11-18 (1973); COLO. REV. STAT. § 18-7-201 (1986). See also *City of Portland v. Miller*, 62 Or. App. 145, 147, 659 P.2d 980, 981 (1983) (citing Portland, Oregon city ordinance). More often, judge-made law makes clear the distinction—in the judge's mind—between prostitution and marriage. See, e.g., *Cherry v. Koch*, 129 Misc. 2d 346, 354-55, 491 N.Y.S.2d 934, 945 (N.Y. Sup. Ct. 1985) (marital exception exists for prostitution, because as "fundamental right[,] . . . an expanded zone of privacy attaches to the marital relationship," creating rational basis for discrimination between married and unmarried people); *State v. Mueller*, 66 Haw. 616, 671 P.2d 1351 (1983) (zone of privacy may exist outside of marriage, but only for personal decisions related to family, children and related issues, not to prostitution).

26. The characterization of marriage as either a contract or a status reflects separate views of marriage. Traditionally, marriage was a straightforward contract in which the man "bought" from her parents the woman's reproductive ability as well as her sexual availability. The Church attempted to redefine marriage as a sanctified status, a single unit created with Church approval and accompanied by religiously-prescribed rights and duties. This has evolved to the current system of state approval of marriage and prescription of associated rights and duties, although marriage is now protected from state intervention by the right of privacy. Recent legal recognition of a modified contract view of marriage, in which two independent individuals join in a

and non-marital relationships represents an ideal state more than the reality of marriage.²⁷ Occasionally this is recognized, and the special status of marriage has begun to erode in places. Contraception, adultery, and fornication are no longer illegal in most states, while marital rape has been made illegal in some states, indicating that the connections between sex and procreation, and sex and the family, are no longer consistent assumptions even in law.²⁸ Where prostitution is concerned, however, the law continues to promote

the traditional dichotomous view of female sexuality.

The traditional conservative deference to "public morality," understood as the shared moral beliefs of the political community,²⁹ is however in conflict with the use of law to express moral disapprobation of prostitution. Polls indicate that perhaps a majority of Americans disagree with the laws on prostitution as they now stand.³⁰ Yet prostitution is still prohibited in

contractual relationship with defined economic aspects, has been encouraged in part by the awareness that the status view of marriage contributed to the powerlessness of women. By upholding the illusion of marriage as a unified whole, the status view permitted *de facto* domination by the husband to continue, while shielding the unit from outside interference that might have protected the wife. See L. WEITZMAN, *THE MARRIAGE CONTRACT—SPOUSES, LOVERS AND THE LAW* 227-290 (1981).

The status view of marriage is fundamental to the present legal attitude towards prostitution, and explains its paradoxes. The "marital exception" for prostitution, like the "marital exception" for rape, see D. FINKELHOR & K. YLLO, *LICENSE TO RAPE* 1-2 (1985) [hereinafter D. FINKELHOR & K. YLLO], has the unintended effect of sanctioning behavior within marriage that is totally inconsistent with any sort of sacred, spiritual ideal. On the other hand, in cases involving the recognition of ante-nuptial agreements, judges generally refuse to accept as valid anything resembling a contract for sexual services, differentiating these from contracts involving housework and other marital activities. See, e.g., *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. App. 1980); *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 139 Cal. Rptr. 815 (1976). Consistent with the marital exceptions, the law upholds the illusion that sex within marriage is unique because of the special nature of the marital relationship, thus ignoring the reality of sexual domination that characterizes so many marriages. See generally D. FINKELHOR & K. YLLO, *supra*.

27. Although marriage is still legally defined and treated as a special, unusually inviolable, even sanctified status, the reality of marriage continues to conflict with that definition. For working class women, marriage remains a largely economic and procreative institution. See generally L. RUBIN, *WORLDS OF PAIN: LIFE IN THE WORKING CLASS FAMILY* (1976). The divorce rate, and the high incidence of marital violence that has begun to gain public attention, provide further evidence—not limited by class—of the distance between the ideal and the reality. See, e.g., M. PAGELOW, *WOMAN BATTERING: VICTIMS AND THEIR EXPERIENCES* 19-27 (1981); L. BOWKER, *BEATING WIFE-BEATING* 1-17 (1983); R. GELLES, *FAMILY VIOLENCE* 106-149 (1979).

Prostitutes themselves call attention to the similarity between what they do for a living and the experience of most married women. See E. SCHUR, *supra* note 5, at 165-66; A. CARMEN & H. MOODY, *supra* note 4, at 8. They have, in fact, become aware of similarities between themselves and other women that go deeper than the exchange of sexual favors for material rewards. Prostitutes and "squares" have met to discuss their shared experience, as women, of male violence and general economic hardship. Griffin, *supra* note 4, at 18-20. See E. MCLEOD, *supra* note 4, at 55; P. BIERMANN, *supra* note 4, at 14-21.

While marriage may share some of the characteristics

popularly believed to be confined to non-marital relationships, prostitution may satisfy, for the client, spiritual and emotional needs traditionally considered the province of marriage. E. MCLEOD, *supra* note 4, at 59-60. Men go to prostitutes for a variety of reasons, many of which are more psychological than sexual. See, e.g., M. STEIN, *LOVERS, FRIENDS, SLAVES . . . THE NINE MALE SEXUAL TYPES* (1974) [hereinafter M. STEIN] (study of call girls' relationships with clients). Not only those who study prostitutes, but the prostitutes and clients themselves, emphasize the psychological role played by the prostitute.

28. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (upholding right of single persons to obtain birth control); *Doe v. Duling*, 603 F. Supp. 960 (E.D. Va. 1985) (anti-fornication statute violates right to privacy); see also Parnas, *Legislative Reform of Prostitution Laws: Keeping Commercial Sex Out of Sight and Out of Mind*, 21 SANTA CLARA L. REV. 669, 672 (1981) [hereinafter Parnas].

29. See, e.g., Lord Devlin, *supra* note 1, at 4, 9-10.

30. Symanski cites a 1971 poll in which 50% of the 15,000 people polled thought legalized prostitution was a good idea, and a 1973 poll in which only 46% of the respondents thought prostitution did "more harm than good." R. SYMANSKI, *supra* note 4, at 6. A 1980 survey found 43% favoring decriminalization of everything except pimping, while 75% thought there was a better way of dealing with prostitution than the current system (Symanski points out, however, the important qualifying fact that men tend to be less critical of prostitution than women). See E. MCLEOD, *supra* note 4, at 112 (discussing an attempt by U.S. police to change prostitution laws). The absence of citizens' complaints against prostitutes, forcing police to use decoys instead to arrest prostitutes, further indicates a lack of substantial public concern with prosecuting prostitutes. See Griffin, *supra* note 4, at 37.

These results indicate that public morality, as understood by conservatives, does not condemn prostitution, or at least does not believe in using the law to enforce its condemnation. Thus either the continued existence of laws against prostitution is simply out of step with the evolving morality of society, or courts and legislatures are interpreting (and enforcing) the moral order as somehow transcending the public consensus, resembling a sort of natural law "absolute."

One explanation for the continued existence of anti-prostitution laws sees in these a primarily symbolic function: they aim "less to eliminate prostitution than to define a moral community. By making prostitution illegal, the community can assert its commitment to moral values and derogate those who fall outside the pale." Boles & Tatro, *Legal and Extra-Legal Methods of Controlling Female Prostitution: A Cross-Cultural Comparison*, 2 INT'L J. COMP. & APP. CRIM. JUST. 71 (1978). At the same time, "prostitution is not considered a major social problem by most people." *Id.* at 80. This only confirms the

every state except Nevada.³¹

Attempts to change the law through courts and legislatures invariably trigger reactions based in conservative moral outrage. Reactions to attempts to change the law are often couched in terms that, though outwardly reasonable, merely serve to camouflage their essentially conservative-moralist bases. For example, judges typically condemn prostitution for its associations with crime and venereal disease.³² Yet the incidence of

venereal disease among prostitutes is low compared with other social groups,³³ and the crime associated with prostitution often exists precisely because of its illegality.³⁴

Another aspect of the conservative-moralist view is the common paternalistic argument labeling the prostitute's lifestyle "degrading."³⁵ Such paternalistic concern for the prostitute's well-being has engendered attempts to "reform" prostitutes.³⁶ Where more traditional morality rele-

impression that those responsible for making and enforcing law may in fact be reaching for some ideal of morality lying beyond public consensus.

The lack of a strong moral opposition to prostitution does not, however, determine the public attitude towards prostitutes. Condemnation of women who work as prostitutes continues even when the institution of prostitution is accepted. This condemnation may well be a consequence of prostitution's official illegality. A government stamp of unlawfulness permits people to look down on prostitutes as lawbreakers. See, e.g., A. CARMEN & H. MOODY, *supra* note 4, at 43, 50-61; Alexander, *supra* note 4, at 201-02; Lockett, *What Happens When You Are Arrested*, in *SEX WORK* *supra* note 4, at 39 (describing often cruel treatment of prostitutes by police). Also, the lack of self-respect suffered by prostitutes as a result of viewing themselves as criminals may lead to drug abuse and crime, leading in turn to greater degradation in the eyes of others. By comparison, in areas in Nevada which permit prostitution, the population appears to accept prostitutes without censure. J. DECKER, *supra* note 4, at 174, 204.

However, drawing this connection between illegality and condemnation provides only a partial explanation of negative attitudes towards prostitutes. The actual experience of German prostitutes indicates that even where prostitution is legal, the public has difficulty according prostitutes the same respect as other workers. See *Die Angst der Hure* (Prostitutes' Fears), in *BERUF: HURE* (Profession: Whore) 78-92 (1988) (German prostitutes describe people's reactions to their profession and themselves, and discuss their fear of revealing what they do to friends and fellow workers); *Alles Ansichtssache: Drei Sichtweisen zur Prostitution* (It's All a Question of Viewpoint: Three Attitudes Towards Prostitution), in *BERUF: HURE*, *supra*, at 17-20 (ironic description of the various reactions to prostitution on the part of feminists, ranging from exaggeratedly positive to condescending and paternalistic). Negative attitudes towards prostitutes most likely grow out of deep-seated value judgments about "correct" female behavior, judgments that are independent of attitudes towards the institution of prostitution and do not disappear simply because laws change.

31. In addition to making it a crime to perform or offer to perform sexual acts in exchange for consideration, states have also made illegal the public manifestations of prostitution, such as soliciting, renting rooms to prostitutes, and advertising for prostitution. Also, pimping (or the actions involved in pimping, such as arranging a sexual transaction and living off the earnings of a prostitute) is universally illegal. See, e.g., J. DECKER, *supra* note 4, at 81-92; COYOTE, STATE STATUTES PROHIBITING PROSTITUTION AND RELATED OFFENSES (available from National Task Force on Prostitution, P.O. Box 26354, San Francisco, CA 94126) (1986) (state-by-state listing of statutes affecting prostitution, with brief analysis). In a number of states, the prostitute's client may also face penalties,

though these are often less harsh than those faced by the prostitute. Griffin, *supra* note 4, at 21. For some representative provisions, see ILL. REV. STAT. ch. 38, §§ 11-14 to 11-19 (Smith-Hurd Supp. 1988); MINN. STAT. ANN. §§ 609.321-609.323, 609.33, 617.33 (West 1987); TEX. CIV. PRAC. & REM. CODE ANN. §§ 125.001, 125.021 (Vernon 1989); TEX. PENAL CODE ANN. §§ 43.01-43.05; N.Y. PENAL CODE §§ 230.00, 230.02, 230.20, 230.25, 230.30, 230.40, 240.37 (McKinney 1980); N.Y. PUB. HEALTH LAW § 2320, 2300 (McKinney 1974 and Supp. 1984-5); CAL. PENAL CODE §§ 266-266j, 267, 309, 315-16, 318, 647-647c (West 1988 & Supp. 1989).

For a description of the system in Nevada, see *infra*, notes 77-80 and accompanying text.

32. Wise, *supra* note 7, at 2, col. 4; *Cherry v. Koch*, 129 Misc. 2d 346, 491 N.Y.S.2d 934, 944 (Sup. Ct. 1985); *People v. Mason*, 642 P.2d 8, 12 (Colo. 1982) (the state has right to curb prostitution because of "health hazards posed by this activity as well as the high incidence of other criminal conduct associated with it . . ."); *Fluker v. State*, 248 Ga. 29, 282 S.E.2d 112 (1981) (state interest in preventing health risks to women permits gender-based anti-prostitution statute).

33. See *supra* note 22 and accompanying text.

34. See R. SYMANSKI, *supra* note 4, at 50-58; Griffin, *supra* note 4, at 38; J. DECKER, *supra* note 4, at 330-34. Because prostitution is already labelled criminal, a prostitute has less to lose by committing an additional criminal act. Further, the client who is robbed is not likely to call the police unless he is willing to face possible prosecution or, more commonly, embarrassment. Finally, it is prostitutes themselves who are most often the victims of crime; they can count on no police protection and are looked down upon by their clients because of their criminal status. See, e.g., A. CARMEN & H. MOODY, *supra* note 4, at 43; R. SYMANSKI, *supra* note 4, at 52-53; Alexander, *supra* note 4, at 201-02; *The Right to Protection from Rape*, in *SEX WORK*, *supra* note 4, at 145-46; *Interview with Barbara*, in *SEX WORK*, *supra* note 4, at 167-70 [hereinafter *Interview with Barbara*] (describing crime against prostitutes and police response). In European countries that have legalized prostitution, the crime rate among prostitutes is far lower. See Yondorf, *Prostitution as a Legal Activity: The West German Experience*, 5 POL'Y ANALYSIS 417, 423-24 (1979) [hereinafter Yondorf].

35. See Wise, *supra* note 7, at 2, col. 5 ("we do not help prostitutes by encouraging them to live lives marked by violence, disease, addiction and a self-debasement beyond description"); *Cherry v. Koch*, 491 N.Y.S.2d at 944; *State v. Mueller*, 66 Haw. 616, 628-29, 671 P.2d 1351, 1359-60 (1983); see also Smart, *Legal Subjects and Sexual Objects: Ideology, Law and Female Sexuality* in *WOMEN-IN-LAW* 53-55 (J. Brophy & C. Smart ed. 1985) [hereinafter Smart, *Legal Subjects*] (remarks of British Member of Parliament and of magistrates on the subject of prostitution).

36. See *infra*, note 88.

gates prostitutes to a despised class of sinful women, paternalism creates an image of the prostitute as a helpless victim of circumstance, in need of a rescuer to return her to the "path of righteousness." A type of paternalism is apparent in the Freudian-influenced view of prostitution as a psychological disorder amenable to cure.³⁷

Although paternalism supposedly concerns itself with harm to the individual rather than more abstract harm to society,³⁸ it fails to recognize that individual prostitutes can and do make choices and decisions within the parameters of their limited circumstances.³⁹ Paternalistic critics ignore the social and economic conditions that may make the harms seen in prostitution preferable to the alternatives;⁴⁰ moreover, they ignore the fact that such harms may lie as much in the social stigmatization of prostitution as in the activity itself.⁴¹ The harm they see is based in an absolute, conservative standard of morality divorced from context.

A further basis for court support of anti-prostitution laws has been a purported state interest in preventing the commercialization of sex.⁴² This is a more modern version of the traditional moral condemnation of prostitution, and one par-

ticularly appropriate to a capitalist society. According to this argument, sex joins a list of things⁴³ that simply should not be sold. This type of categorization is generally based on the irrevocability of the sale, once made. Unlike the sale of a limb or of one's freedom, however, the sale of sex does not permanently deprive the seller of anything; another justification must be found for placing sex in this category. The justification appears to be marriage's supposed spiritual quality. But this belief in the special nature of sex, held by conservative moralists, arises out of a Christian view of sex and love not shared by everyone in society. To prohibit prostitution on the grounds that commercialized sex is wrong once again institutes an absolute, religiously-based morality as law.⁴⁴

In allowing states to prohibit prostitution based on the preceding arguments, courts perpetrate the same false assumptions that states used to justify anti-prostitution legislation in the first place. The failure to appraise these assumptions more searchingly, to investigate their legitimacy or reasonableness, indicates a fundamental bias against prostitution arising out of a conservative definition of morality.⁴⁵ Conservative moralists

37. J. KAHLMAN & H. LANZERATH, *supra* note 18, at 27-29. Homosexuality has been treated analogously, and some writers have attempted to relate the two. Both behaviors have been labeled "deviant." See, e.g., E. MCLEOD, *supra* note 4, at 95; C. SMART, *supra* note 11, at 80-86; Smart, *Legal Subjects*, *supra* note 35, at 59-60; J. DECKER, *supra* note 4, at 77.

38. Lord Devlin differentiates paternalism from the concern for society that is at the heart of his opposition to separating law and morality. DEVLIN, *supra* note 1, at 103-04. However, like the attitudes that condemn prostitution as a social evil, paternalism denies to the individual the right to decide what is best for him or her. Here too, "public morality" provides the standard against which behavior is judged.

39. This is not to imply that prostitution is never coerced through obvious force (as opposed to the more subtle and widespread coercion discussed *infra*). However, the existence of organized prostitutes' groups and the testimony of prostitutes themselves provides evidence that the majority of the women entered the profession voluntarily, or at least believe that they did. Alexander, *supra* note 5, at 200, estimates that 10% of American prostitutes have been coerced into prostitution. Forced prostitution (sexual slavery) is apparently less widespread, at least in the United States, than has been believed (excluding child prostitution). J. DECKER, *supra* note 4, at 69-71. The social purity movement, described *infra* note 88, used the public's horror at the thought of massive forced sexual slavery as a rallying point, but apparently vastly exaggerated its scope. J. BARNHART, *supra* note 24, at 69-70. For a less sanguine view, however, see BARRY, *FEMALE SEXUAL SLAVERY* (1979), although her study focuses more on the international aspects of forced prostitution.

40. Reformers of the late 19th and early 20th century were

sometimes frustrated at the fact that prostitutes preferred their relatively high-paid, independent status to the so-called legitimate jobs available to women at the time. Minow, *Forming Under Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 888; F. HENRIQUES, *supra* note 11, at 49.

41. See *supra* note 30 and accompanying text; see also J. DECKER, *supra* note 4, at 300-25 (includes discussion of attitudes towards prostitutes).

42. *State v. Foster*, 356 N.W.2d 548, 550 (Iowa 1984); *State v. Chandonnet*, 124 N.H. 778, 780, 474 A.2d 578, 579 (1984); *State v. Burgess*, 669 S.W.2d 637, 640 (Mo. App. 1984) (Gaertner, P.J., dissenting).

43. That list includes, for example, organs, limbs, wombs, oneself or other people as slaves. See, e.g., West, *Submission, Choice, and Ethics. A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1449-50 (1986); R. TONG, *WOMEN, SEX, & THE LAW* 43 (1984) [hereinafter R. TONG].

44. In this case, however, it is the basis for the belief, rather than the belief itself, that is most problematic. A feminist analysis, too, would reject the separation of sex from the person which makes the sale of sex possible, and would argue that sex is different from other "services." See *infra* note 112 and accompanying text. Because they ground their beliefs differently, however, feminists draw different practical conclusions than conservatives.

45. Though they provide the various apparently rational justifications for upholding anti-prostitution laws discussed above, courts betray the essentially moral bases of their decisions in the words they choose: states have an interest in protecting "order and morality," *State v. Mueller*, 66 Haw. 616, 629, 671 P.2d 1351, 1359 (1983) (court recognizes that the

see in prostitution an abstract "harm to society" that exists despite the lack of evidence of concrete harm. Their barometer is not actual injury to individuals, but a feared harm to the moral bases of society, defined in terms of "public morality."⁴⁶

The conservative moral opposition to prostitution that underlies its prohibition thus lacks a solid foundation. This prohibition, together with the often inaccurate rationales provided for it, makes two statements that are unrealistic in our society. First, it says that the difference between marital and non-marital relationships is greater than it is in fact, and that the marital relationship is superior and the non-marital relationship is wrong. Second, it says that women can be divided into superior and inferior classes that are defined according to the type of relationship they have with men. Both statements rest on the assumption that law ought to enforce public morality, and further assume a shared, religiously-based public morality that includes the beliefs about harm to society discussed above. From the liberal viewpoint, the major flaw in this approach lies in using law to enforce public morality at all, rather than concentrating on quantifiable harm to individuals. From a feminist viewpoint, more important are the underlying moral beliefs themselves, encompassing the traditional objectified and functional view of women—a view that would likely persist even without legal enforcement.

The least overtly moralistic basis supplied for

anti-prostitution legislation is the "public nuisance" justification,⁴⁷ according to which unchecked prostitution creates an unwelcome public disturbance and invades the privacy of others. If, however, this were truly the reason for prostitution laws, there could be no justification for prohibiting the private provision of sex for consideration; only those public aspects that actually cause a nuisance could be forbidden.⁴⁸ This would represent a liberal approach, similar for example to that enunciated (though not entirely followed) in the Wolfenden Report in England and the legal arrangements in many European countries.⁴⁹

Although American law recognizes the public nuisance aspect, its focus remains the sexual act itself.⁵⁰ However, because of their greater visibility, streetwalkers—the most "public" of prostitutes—bear the brunt of anti-prostitution laws, although they comprise a minority of all prostitutes. In order to reach prostitution, states unanimously outlaw street solicitation or "loitering for purposes of prostitution," often with laws that sweep quite broadly, and employ police decoys to entrap prostitutes.⁵¹

In recent years, prostitution statutes have repeatedly been attacked in court on constitutional grounds. Constitutional challenges to a state's right to prohibit prostitution, however, have failed completely. Courts fail to recognize the involvement of any fundamental right or suspect

majority of the population regards prostitution as "immoral and degrading . . . self-destructive for the prostitute"), and "the morals of their citizens," *Cherry v. Koch*, 129 Misc. 2d 346, 359, 491 N.Y.S.2d 934, 944 (Sup. Ct. 1985) (quoting *Hoke v. United States*, 227 U.S. 308, 321 (1913)); prostitution is a "social evil," *State v. Evans*, 73 N.C. App. 214, 219, 326 S.E.2d 303, 307 (1985).

46. Lord Devlin said as much in his argument against the Wolfenden Report, when he compared condoning behavior that transgressed "public morality" with condoning treason. Both, in his view, exercised corrosive effects—one on the social and one on the political body of the state. Lord Devlin admitted that this public morality was based in Christianity. See *supra* note 1 and accompanying text.

47. See, e.g., *People v. Blair*, 114 Ill. App. 3d 655, 657, 449 N.E.2d 172, 173 (1983); *People v. Uplinger*, 113 Misc. 2d 176, 178, 449 N.Y.S.2d 916, 920 (Sup. Ct. 1982); *People v. Smith*, 44 N.Y.2d 613, 618, 378 N.E.2d 1032, 1034, 407 N.Y.S.2d 462, 464 (1978) (loitering for prostitution is "disruptive of the public peace, in that certain persons engaged in such conduct in public places harass and interfere with the use and enjoyment by other persons of such public places . . .").

48. It would then, of course, become necessary to define "nuisance." One would have to question whether the public aspects of prostitution, such as solicitation and advertising, can really be considered *per se* nuisances, as they are presently

defined by law. It is difficult to differentiate these activities, performed by prostitutes, from the same activities performed by other types of businesspeople that do not legally constitute *per se* nuisances. One could also argue that prostitutes' activities constitute less of a nuisance than the public harassment by men that women experience daily on the streets of any city.

49. See *supra* note 9 and accompanying text; see *infra* text accompanying notes 67-69.

50. In the words of one judge, prohibitions on activities such as solicitation exist "because of the difficulty of catching prostitutes actually performing the sex act. . . ." *Cherry v. Koch*, 129 Misc. 2d 346, 353, 491 N.Y.S.2d 934, 941 (Sup. Ct. 1985). It is the act of prostitution itself that U.S. law aims to abolish. See *Commonwealth v. Potts*, 314 Pa. Super. 256, 272, 460 A.2d 1127, 1135 (1983) (the law prohibits offers to sell sex as well as the sale itself because "[i]f an offer [to sell sex] standing alone were not prohibited conduct, the police could not be complainants in prostitution cases unless they first actually performed acts of intercourse with the persons they were arresting . . .," which would create "marital dissatisfaction" and public criticism (quoting *People v. Johnson*, 60 Ill. App. 3d 183, 188, 376 N.E.2d 381, 385 (1978))).

51. For a more detailed discussion of existing prostitution law and its flaws, see Alexander, *supra* note 4, at 194-98; R. SYMANSKI, *supra* note 4, at 83-98; J. DECKER, *supra* note 4, at 79-111.

class that would require the state to show more than merely a rational relationship to a legitimate state interest before prohibiting prostitution. Recent cases have denied a privacy right for commercial sex,⁵² a free speech right to solicit for prostitution,⁵³ and equal protection claims based on differential treatment of married and unmarried persons.⁵⁴ The courts have also rejected vagueness and overbreadth challenges to prostitution laws.⁵⁵ Only the most egregiously unfair aspects of the laws have changed, in part through the influence of litigation: prostitution statutes are now gender-neutral, applying to prostitutes of both sexes. Further, in many states the client, as well as the prostitute, can be punished.⁵⁶

A further judicial advance in the law has

been recognition of unfair application of facially acceptable statutes. Particular problems include a much greater rate of arrest of prostitutes than of clients in states where patronizing is illegal⁵⁷ and the exercise of unbridled discretion by police in determining whom to arrest as a prostitute.⁵⁸

Advances in legislative and judicial thinking that punish solicitation by johns as well as prostitutes and strive to protect women from arbitrary police action undoubtedly spring from the rising liberal and feminist consciousness of the past few decades. They nevertheless fall short of questioning the law's fundamental conservative condemnation of prostitution. Nowhere do they imply that prostitution might be acceptable, even moral, behavior.

52. See, e.g., *State v. Kelly*, 379 N.W.2d 649, 651 (Minn. Ct. App. 1986); *Cherry v. Koch*, 129 Misc. 2d 346, 353-55, 491 N.Y.S.2d 934, 941-43 (Sup. Ct. 1985); *State v. Mueller*, 66 Haw. 616, 671 P.2d 1351 (1983).

53. See, e.g., *State v. Neal*, 500 So. 2d 374, 377-78 (La. 1987); *Wood v. United States*, 498 A.2d 1140, 1142-44 (D.C. 1985); *Young Sun Lee v. State*, 681 S.W.2d 656, 662 (Tex. 1984).

54. See cases cited *supra* note 25.

55. See, e.g., *State v. Kelly*, 379 N.W.2d 649, 651-52 (Minn. Ct. App. 1986); *State v. Evans*, 73 N.C. App. 214, 217-18, 326 S.E.2d 303, 306-07 (1985) (statute aimed at loitering for prostitution not overbroad because it includes an intent element, rather than proscribing a mere status); *State v. Johnson*, 108 Wis. 2d 703, 708-11, 324 N.W.2d 447, 449-51 (1982); *People v. Smith*, 44 N.Y.2d 613, 378 N.E.2d 103, 407 N.Y.S.2d 462 (1978).

56. See, e.g., *State v. Burgess*, 669 S.W.2d 637, 641 (Mo. Ct. App. 1984) (Gaertner, P.J., dissenting) (Missouri prostitution statute applies to clients as well because it is unjust to prosecute only prostitutes when their clients are "equally guilty"); *People v. Blair*, 114 Ill. App. 3d 655, 657, 449 N.E.2d 172, 173 (1983) (Illinois statute forbidding "soliciting for a prostitute" covers soliciting of prostitutes by men, because the crucial public policy behind the statute is to prevent the "public nuisance aspect of open solicitation"). Often, however, the penalties for clients are statutorily less harsh, and clients may be spared punishment if they testify against prostitutes. Lockett, *Leaving the Streets*, in *SEX WORK*, *supra* note 4, at 96; *Interview with Barbara*, in *SEX WORK*, *supra* note 4, at 166-67.

At least one court considered it perfectly legitimate for a state to sanction only the prostitute because the state was permitted to punish a seller of services without sanctioning the customers. *State v. Evans*, 73 N.C. App. 214, 219, 326 S.E.2d 303, 307 (1985) ("[i]t is the organized and repeated provision of such services, not their use by unorganized and casual individuals, that constitutes the most readily eradicable social evil"). Another, taking a paternalistic view of prostitution as particularly dangerous for women, refused to invalidate a gender-based pandering statute. *Fluker v. State*, 248 Ga. 290, 292, 282 S.E.2d 112, 114 (1981).

57. R. SYMANSKI, *supra* note 4, at 88-89.

58. In 1986, a New York criminal court judge criticized the application of New York's loitering-for-purposes-of-prostitution law, N.Y. PENAL LAW § 240.37 (McKinney 1982).

She cited a great deal of evidence that the police had used arbitrary arrest tactics, ignoring the specific requirements of the law. Fox, *'Defective' Prostitution Cases Charged to Police, Prosecutors*, N.Y. L.J., Jan. 23, 1986, at 1, col. 3. For example, women were arrested under this law for wearing "revealing attire"; when these complaints were dismissed, women were taken into custody for possessing condoms. *Id.* at 1, col. 4. As evidence of the judicial blindness where prostitution is concerned, this same law had earlier been upheld at least twice in court, most recently in *People v. Uplinger*, 113 Misc. 2d 876, 880, 449 N.Y.S.2d 916, 920 (Sup. Ct. 1982), when the court stated, "the unyielding requirements of probable cause to arrest and of proof beyond a reasonable doubt to convict are . . . fully applicable" and provided sufficient due process. *Id.*

Other courts have expressed concern about the possible abuse of discretion under loitering-for-prostitution statutes. See, e.g., *City of Portland v. Miller*, 62 Or. App. 145, 147, 149, 659 P.2d 980, 981, 983 (1983) (court reverses charge for insufficient evidence without reaching constitutional issues, but warns that "it is not a violation of the law merely to look like a prostitute might"); *Christian v. City of Kansas City*, 710 S.W.2d 11, 13 (Mo. Ct. App. 1986) (discussing statute that describes loitering for prostitution partly as repeatedly stopping cars and beckoning to passersby, court states that it "cannot permit the city to leave the task of differentiating between 'casual street encounters' from [sic] 'obvious' acts reflecting the state of mind needed for solicitation to the law enforcement officers and the courts"). Writers who have spent time with prostitutes and prostitutes themselves attest to the frequency of "sweeps" in which anyone within a certain area, whether a prostitute or not, can be picked up. See, e.g., R. SYMANSKI, *supra* note 4, at 90-91, 96; A. CARMEN & H. MOODY, *supra* note 4, at 50-51 (personal experience of church workers caught in such a sweep). As the New York criminal court judge noted, Fox, *supra*, at 2, col. 6, most such loitering arrests result in guilty pleas—most likely because loitering is only a misdemeanor and mounting a defense takes far more time, energy, and information than a guilty plea. See *Interview with Barbara* in *SEX WORK*, *supra* note 4, at 173 (prostitute discouraged by defense attorney from taking case to trial). Additionally, the likelihood of damages for false arrest remains slim in any case. A. CARMEN & H. MOODY, *supra* note 4, at 50-61 (a church worker falsely arrested for prostitution describes her experience).

B. THE LIBERAL INDIVIDUALIST APPROACH

The liberal individualist approach to prostitution does just that. The approach is based in a belief that human beings achieve dignity through autonomy—that is, the right and freedom to choose among options. Thus, where sexual behavior is concerned, persons of either sex must be permitted to use their bodies as they see fit, so long as they do not hurt others and so long as both (or all) parties consent. Choice, including the right to choose how to use one's body, is fundamental to the autonomy of the person.⁵⁹

Prostitution, in this view, involves sale of a service, no different from the services of a doctor, lawyer, or carpenter, and no less separate from the person providing the service.⁶⁰ Sex and love are separable, rather than indivisible as in the romantic tradition. Liberals argue that law should renounce hypocrisy and double standards and should permit both sexes the right to consensual sexual behavior as long as such behavior does not hurt others.

A purely liberal feminist argument points out that laws outlawing prostitution disproportionately harm women and that prostitution is one of the few occupations in which women can achieve a measure of economic power and social independence. Therefore, permitting prostitution is a step towards empowering women and raising the level of women's self-respect, as well as equalizing opportunities so as to broaden their opportunity for choice.⁶¹

Some proponents of a liberal approach to prostitution tolerate prostitution as a choice that is personal and therefore legitimate, although they do not embrace it as a "good" choice; others

see virtues in prostitution. The former argue that prostitution can never be fully eliminated, and therefore the only practical solution is to accept it. The latter go further, championing complete sexual freedom, including the freedom to sell sex, as an important form of autonomy. They suggest that, were such freedom a reality, women would desire male prostitutes as well.⁶²

A further argument supporting prostitution involves the beneficial function prostitution serves for men. Prostitutes often act as therapists and companions in addition to being sexual partners. They can be someone for lonely men to talk to about their problems, and can act as an outlet for male sexual needs and fantasies that might otherwise be released through aggression, perhaps rape.⁶³ While prostitutes themselves sometimes say they enjoy their work,⁶⁴ this is rarely cited as an argument for permitting prostitution.⁶⁵ Liberal advocates of legalized prostitution add to their other arguments a convincing cost/benefit analysis that emphasizes the huge amounts of money spent on the futile attempt to control prostitution.⁶⁶

Under liberal theory, suggestions for legal change are based on the view that laws should control or regulate only where the activity actually causes harm—in the form, for example, of a nuisance—to others. Otherwise, prostitution should be either decriminalized, leaving women free to arrange their affairs as they see fit, or legalized, giving the state a hand in creating the arrangements. Variants of the liberal approach have been instituted in Europe and in one American state, Nevada.

In the English legal system (that most similar to the United States' system), theoretical liber-

59. See generally J.S. MILL, *supra* note 2 (Mill does not specifically refer to use of one's body, but to actions and behavior in general).

60. Ericsson, *supra* note 2, at 341-42; Richards, *supra* note 2, at 1255-60; Scibelli, *Empowering Prostitutes: A Proposal for International Legal Reform*, 10 HARV. WOMEN'S L.J. 117, 142 (1987) [hereinafter Scibelli].

61. See, e.g., R. SYMANSKI, *supra* note 4, at 63; Scibelli, *supra* note 60, at 136-37, 142.

62. See, e.g., Ericsson, *supra* note 2, at 335, 360. For more discussion and a feminist critique of this belief, see *infra* notes 108-113 and accompanying text.

63. See, e.g., M. STEIN, *supra* note 27; E. MCLEOD, *supra* note 4, at 83-84; J. DECKER, *supra* note 4, at 454-55; J. KAHLMANN & H. LANZARETH, *supra* note 18, at 51-52.

64. This is mainly heard from call girls, who enjoy the best working conditions of all prostitutes. See S. BARROWS, *supra* note 4, at 133.

65. Clients of prostitutes, however, often display a desire to believe that the women enjoy the experience. E. MCLEOD, *supra* note 4, at 37; S. BARROWS, *supra* note 4, at 69. It is revealing that one liberal writer, discussing prostitution, supported his argument for decriminalization with the statement "there is no evidence that prostitution itself is necessarily an unpleasant experience for the prostitutes. . . ." Richards, *supra* note 2, at 1266. As evidence for this statement, he quoted the words of *patrons* of prostitutes!

66. See Note, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS L.J. 769 (1987); see also Parnas, *supra* note 28, at 679; R. SYMANSKI, *supra* note 4 at 16-18 (for a thorough analysis that purports to take no ideological position, but reaches the essentially liberal conclusion that the benefits do not justify the costs).

alism has not been carried out in practice. The Wolfenden Report proposed a liberal philosophical view of morality and law based on a public/private distinction in sexual matters. The individual had the right to determine his or her private behavior, even if it controverted public morality, so long as the behavior did not harm any other member of the community. The law did not exist to regulate morality. With regard to homosexuality, the report represented a major liberalization, but it had just the opposite effect on prostitution. Although the private act of prostitution remained legal, nearly every activity related to it counted as "public" and could be prohibited.⁶⁷ The need to prove harm to other members of the community was often ignored as theory was put into practice.⁶⁸ Despite its negative results in the English context, the Wolfenden Report's conclusion that private sexual behavior might be determined through one's own personal morality, rather than by society under some standard of public morality, represented a departure from the conservative moral approach to prostitution and homosexuality, and a step in the direction of a liberal theoretical approach to these matters.

Other European countries have taken the liberal approach farther.⁶⁹ West Germany provides an example of a system which has attempted to apply the approach consistently. There, prostitu-

tion is legal. The prostitute is protected by constitutional rights to free choice of profession and the "free development of one's personality," but is subjected to a variety of regulations.⁷⁰ These include required registration in connection with weekly or biweekly health examinations.⁷¹ State governments may forbid prostitution in certain areas. Many have instituted zoning systems that concentrate prostitutes in one or a few specific areas. In Berlin, prostitution activities are purposely decentralized rather than zoned.

The legal arrangements concentrate mainly on regulating public manifestations of prostitution (particularly to protect young people's "moral development," for example by forbidding solicitation in front of schools) and controlling venereal disease. The law also aims to protect prostitutes from exploitation; encouraging a woman to become a prostitute or to continue in prostitution is forbidden, exploitative pimping (though not simply living off a prostitute's earnings) is criminalized, and brothels are generally illegal because they limit the prostitute's freedom.⁷²

Prostitution is not, however, treated like any other profession. Though prostitutes are legally required to pay taxes, they do not receive the social benefits granted other workers, such as health insurance and pension.⁷³ Further, the sale of sex is considered an immoral contract; such contracts

67. See *supra* note 8 and accompanying text.

68. For a feminist discussion of the state of British prostitution law, see Smart, *supra* note 8; C. SMART, *supra* note 11; McLeod, *Man Made Laws for Men? The Street Prostitutes' Campaign*, in *CONTROLLING WOMEN: THE NORMAL & THE DEVIANT*, *supra* note 8, at 61-76. Smart describes the persistent belief that prostitution is immoral, leading to harsh treatment of street solicitation. See Edwards, *Prostitution: Ponces & Punters, Policing & Persecution*, 135 *NEW L.J.* 928 (1985).

69. M. BARGON, *PROSTITUTION & ZUHÄLTEREI* 272-283 (1982), describes the legal order in various Western European countries, in which "public nuisance" is, with few exceptions, the standard under which prostitution is regulated. These laws are not necessarily liberally interpreted, however, which points to the vulnerability of prostitutes even under a relatively liberal legal order and their dependence on interpretations of the law and evaluations of their activities by the (generally male) authorities. For closer analysis of the actual situation in several European countries, see B. HOBSON, *supra* note 5, at 222-223 (Scandinavian approach and feminist response) and Scibelli, *supra* note 59, at 149-50 (French approach).

70. See Grundgesetz (Basic Law), W. Germany, art. 2 & art. 12; StGB (German criminal code) paras. 180a, 181a, 183a, 184a; OWiG (German law on non-criminal offenses) paras. 119, 120; EGStGB (introductory section to German criminal code) para. 297; and the Gesetz zur Bekämpfung der Geschlechtskrankheiten (1974) (Law for the Prevention of

Sexual Diseases) for laws relating to prostitution. See generally Yondorf, *supra* note 34; J. KAHLMANN & H. LANZERATH, *supra* note 18, at 39-48 (1981); P. BIERMANN, *supra* note 4, at 129-139.

71. Because prostitutes must register with the local Health Office, a government authority, the danger exists that their personal data could become available to other government offices. This is a point of great concern to prostitutes, who worry for example that, even should they cease working as prostitutes, their pasts will continue to show up in the files and create prejudice against them. See, e.g., *AIDS—was haben Prostituierte damit zu tun?* (AIDS—What do Prostitutes have to do with it?), in *BERUF: HURE*, *supra* note 30, at 146. Germans are in general more concerned with the protection of personal data than Americans, for a number of reasons: the duty of all citizens to register with the authorities and carry personal identification, the greater degree of government bureaucratization and the greater dependence of Germans on this bureaucracy, and the memory of the Nazi past, when personal data were employed to facilitate persecution.

72. See J. KAHLMANN & H. LANZERATH, *supra* note 18, at 41-42, 44-45. However, renting rooms to prostitutes is not illegal. This has led to the creation of "Eros Centers" in cities where prostitution is restricted to specific areas, for example in Hamburg. These are buildings in which prostitutes rent rooms for short periods of time, sometimes at exorbitant rates.

73. *Id.* at 91; P. BIERMANN, *supra* note 4, at 138-39 (describing the contradictory regulations that define

cannot be enforced in Germany. Finally, advertising for prostitution is forbidden.⁷⁴

On the surface, this system of regulation is quite liberal, and it does grant the German prostitute a more secure legal status than her American counterpart. Yet the fundamental attitude toward prostitution upon which these laws are based remains conservative, and more specifically, paternalistic. The emphasis is on rehabilitation or reformation.⁷⁵ The prostitute remains an object to be worked upon, instead of being recognized as a mature person capable of intelligent choice. Thus German courts have determined that a brothel owner is guilty of promoting prostitution (a criminal act) if the conditions provided are too pleasant, because this could encourage prostitutes to remain in the profession.⁷⁶ Because the courts do not probe the individual reasons for women entering or remaining in the profession, the decisions indicate that the legal protection is an abstract one, a protection from the perceived evil of prostitution. Prostitution may be legal, but only grudgingly so; it must be made as uncomfortable as possible for the prostitute to discourage her from continuing. In essence, the apparently liberal treatment of prostitution in Germany has not eliminated the traditional moral distaste for the profession and the inferior status of those women who practice it.

Nevada permits localities to decide for themselves whether or not to forbid, tolerate or even

legalize prostitution. Prostitution is not permitted in larger cities. Counties that legalize or tolerate prostitution use formal or informal regulations to control prostitution activity and keep order. Prostitution occurs in brothels, which must be licensed, and regulations often greatly restrict the prostitute's freedom. In return for the money and protection they receive, the women must work long shifts during which they may not leave the vicinity of the brothel; they may not walk in certain parts of the town at specified times or in the company of men; if they are fired or quit, they must leave the town immediately.⁷⁷ Individual prostitutes are licensed and must undergo regular health checks. Prostitution causes few problems in those areas—mainly smaller towns—where it is permitted, and it is tolerated by the public.⁷⁸

While Nevada brothels provide a safe environment for the prostitute, the system does not represent the liberal ideal of freedom and sexual equality. It simply sanctions the concept of readily available sexual satisfaction for men by women. The many regulations demean and depersonalize the prostitute during the time she works in the brothel.⁷⁹ This type of legalized prostitution exists not for the sake of the woman selling her service, but for the man buying it.⁸⁰

Having considered the problems inherent in a system of official legalization administered largely by and for men, feminists who deal with

prostitution as a business for purposes of taxation, but not for purposes of insurance); Yondorf, *supra* note 34, at 425-26.

74. See BGB (W. German Civil Code) para. 138; see also *Prostitution & Recht* (Prostitution and the Law), in BERUF: HURE, *supra* note 30, at 195-206 (position paper by West German prostitutes regarding possible changes in prostitution laws).

75. See, e.g., *Die Angst der Hure* (Prostitutes' Fears), in BERUF: HURE, *supra* note 30, at 88-90 (describing prostitutes' experiences with social workers).

76. BGH (German Federal Supreme Court), Judgment of Sept. 17, 1985, NJW 86, 596; BayObLG (Bavarian Supreme Court), Judgment of Dec. 18, 1984, NJW 85, 1566; OLG Koln, Judgment of Dec. 5, 1978, NJW 79, 728.

77. See H. REYNOLDS, *supra* note 4, at 86-94; R. SYMANSKI, *supra* note 4, at 116-19.

78. H. REYNOLDS, *supra* note 4, at 98. Brothels bring in revenue through license fees and taxes, and often contribute to charities. A recent move to eliminate Nevada's brothels was opposed in the rural areas in which they are located. *A Move to Ban Bordellos*, NEWSWEEK, June 13, 1988, at 34.

79. H. REYNOLDS, *supra* note 4, at 94. Reynolds notes that some of the rules set by towns and by brothel madams may be violative of civil rights. Madams are careful to enforce the rules, since they may be closed down for infractions. In some

places, especially where prostitution is tolerated rather than legalized, town officials have great discretion in enforcing regulations.

80. Griffin, *supra* note 4, at 39. The German system grants the prostitute greater independence and is less demeaning than the Nevada approach. However, it remains a system organized, not for the actual benefit of the prostitute, but for her good as perceived by the state. Additionally, though not to the same extent as the Nevada system, German prostitution is organized largely with the male consumer in mind. See, e.g., the justifications for legalized prostitution listed in J. KAHLMANN & H. LANZERATH, *supra* note 18 at 51-52, all of which involve the benefits of prostitution to men. German prostitutes also point out that the system encourages male irresponsibility. The system of health examinations allows customers to believe that the women are "safe" and that they need not be concerned with sexual diseases; German men are thus more reluctant than men in other countries to use condoms when with prostitutes. *Das Prostituierten-Projekt Hydra: Eine Dokumentation von 1979-1988* (The Prostitutes' Project Hydra: A Documentation from 1977-1988), in BERUF: HURE, *supra* note 30, at 172-73. The customer is in no way encouraged to consider the possibility that he might transmit a disease to the prostitute; her safety is not an issue.

prostitution issues generally prefer the alternative of decriminalized prostitution, which would leave the prostitute free to ply her trade as she sees fit.⁸¹

III. THE FEMINIST APPROACH

Prostitution poses a particularly thorny issue for feminists.⁸² On the one hand, feminists see sex as a fundamental factor in the interaction between men and women. In this view, heterosexual sex always involves the exercise of male power over women.⁸³ By institutionalizing male sexual dominance, prostitution perpetuates the male definition of women as available sex, which in turn en-

ures their continued subjugation for that purpose. In this sense prostitution is much like pornography.⁸⁴

On the other hand, prostitution affords women—especially those from economically deprived backgrounds—the opportunity to earn a living, support themselves, and exercise some control over their own sexuality.⁸⁵ In this sense, prostitution is significantly different from pornography,⁸⁶ and it is not necessarily inconsistent for feminists to support remedies against certain types of pornography while also supporting legalized prostitution.⁸⁷

81. E. McLEOD, *supra* note 4, at 120; Boyle & Noonan, *supra* note 5, at 245-46; Griffin, *supra* note 4, at 39; Alexander, *supra* note 4, at 209-10; Kanter, *Prohibit or Regulate? 23 OSGOODE HALL L.J.* 171, 175 (1985) (concerning prostitution in Canada).

82. For a brief comparison of radical and liberal feminism, and an explanation of the term "feminist" as used in this article, see *supra* note 3 and accompanying text.

83. Pateman, *Defending Prostitution*, 93 *ETHICS* 561, 564 (1983) [hereinafter Pateman] ("it is not possible to separate sex from power").

84. "Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality." C. MacKINNON, *FEMINISM UNMODIFIED*, *supra* note 5, at 148. See *id.* at 148-150. In this view, pornography is not fantasy, but rather reflects the *reality* of sexual relations in a male-dominated society. "[P]ornography is more act-like than thought-like." *Id.* at 154. Since prostitution involves acts themselves, and not merely depictions, it is even more amenable to this analysis. Also, to the extent that MacKinnon's criticism of pornography is concerned with its effect on attitudes towards women, and its reflection of attitudes that already exist, rather than individual harm to women, pornography and prostitution are very similar.

85. Prostitutes themselves often experience their job as empowering. See *infra* note 109 and accompanying text.

86. This is not the only way in which prostitution differs from pornography. Prostitution does not always involve overt acts of male dominance over women. Prostitutes report that many of their clients, particularly those with power in "real" life, seek masochistic or passive experiences. E. McLEOD, *supra* note 4, at 67-72. Also, many clients look to prostitutes for psychological comfort or therapy. See, e.g., Carter, *A Most Useful Tool*, in *SEX WORK*, *supra* note 4, at 163-64. Although women continue to be defined and placed in particular roles according to how they benefit men, these aspects of prostitution make it different in function and effect from pornography.

Prostitution can be distinguished from pornography in other ways as well. Pornography consists of depictions of women that degrade them and that, presumably, both reflect a fundamental social image of women, and foster the type of treatment of women that is depicted. Though it has not been conclusively proven, it is probable that pornography increases the likelihood of male acts of violence against women. C. MacKINNON, *FEMINISM UNMODIFIED*, *supra* note 5, at 187-89, 147 n.9. On the other hand, prostitution, involving sexual acts rather than mere stimulation, may afford a release and thus even *prevent* such violence. There are some who point to a correlation between prostitution and a decreased incidence of

rape. See Posner, *An Economic Theory of Criminal Law*, 85 *COLUM. L. REV.* 1193, 1199 (1985) (suggestion that prostitution is a "rape substitute"); E. McLEOD, *supra* note 4, at 72 (clients and prostitutes perceive prostitution as channeling male sexual aggression away from rape); A. CARMEN & H. MOODY, *supra* note 4, at 85-88 (prostitutes see themselves as preventing rapes). But see H. REYNOLDS, *supra* note 4, at 101 (rape statistics in Nevada contradict view of prostitution as a rape preventive). Finally, on a very basic level, because prostitution involves face-to-face interaction, it allows each party to very directly "get" something from the other—the man, sex; the woman, money. As a result, both actors possess a certain power. Pornography, on the other hand, is one-sided; only the male viewer gets something from the experience, without having to give in return. Thus pornography can never have the empowering quality of prostitution; the man will always feel more powerful than the woman. Pornography is pure use, from the man's perspective, even if the woman is paid by a third party; prostitution by definition involves exchange.

These distinctions are enough to require a somewhat different feminist analysis of prostitution than of pornography. The significance of prostitution lies in more subtle definitions of male dominance.

87. The main basis for liberal feminist opposition to outlawing pornography is the First Amendment free speech argument. Proponents of this argument have condemned the radical feminist attack on liberalism (often in the context of an attack on pornography) by Catherine MacKinnon and others as dangerous, even totalitarian. See, e.g., Mullarkey, *Hard Cop, Soft Cop*, 244 *THE NATION* 720 (1987) (vitriolic review of books by MacKinnon and Andrea Dworkin, attacking them as "thought police"). For discussion of this reaction, see *infra* note 90 and accompanying text.

Prostitutes themselves have opposed suggestions for prohibitions of certain types of pornography, see COYOTE NATIONAL TASK FORCE ON PROSTITUTION POLICIES (1986) (available from National Task Force on Prostitution, P.O. Box 26354, San Francisco, CA 94126), although this may result from a failure to perceive the theoretical and practical distinction between prostitution and violent or degrading pornography.

It is, however, reflective of the particular priorities of a liberal society that the right of free speech is protected and defended, while the right (of a prostitute, for example) to earn a living, an economic right, is not. Solicitation by Jehovah's Witnesses, demonstrations by Nazis in front of concentration camp survivors, and, of course, pornographic materials are protected no matter how immoral they may seem to some viewers or listeners. On the other hand, solicitation and other activities by

Yet pornography and prostitution do create similar problems for feminists. Feminist discomfort with the institution of prostitution creates the same problem faced by feminists in dealing with pornography: the danger that their opposition to prostitution will be confused with, and perhaps coopted by, the conservative moralist stance outlined earlier. Indeed, in the late nineteenth and early twentieth centuries such cooptation in fact occurred, in the guise of the social purity movement.⁸⁸

While a modern feminist analysis of prostitution necessarily includes condemnation of the institution, the reasons for this disapproval are more clearly distinct from conservative moralism than the reasons advanced by the social purity activists. The feminist analysis, applied to each of the liberal defenses of consensual, commercial sex, does not lead to the conservative conclusion that prostitution should be outlawed, even on a gender-neutral basis. This feminist view does not see in prostitution an abstract "harm" based on its failure to conform to religiously-grounded be-

liefs about sex and the family; nor does it stigmatize prostitutes as either evil women or helpless victims. Neither, however, does it deny the existence of any harm in the institution of prostitution and adopt the neutral or even positive attitude of liberals towards the issue. Instead the analysis changes the framework in which society should view prostitution, in part by addressing the definition of harm itself.

In general, a feminist approach to the legal treatment of sexual issues, driven by "moral outrage,"⁸⁹ rejects both conservative morality and its views of sex and of women, and the liberal attempt to keep law essentially value-neutral. A feminist solution would use law, in sexual matters at least, to promote a particular view of morality, one which is based in "female" values.⁹⁰

Feminists agree with liberals that prostitution should not be prohibited.⁹¹ They point to the well-documented economic inequality of women, and the fact that selling sexual services is one of the few readily-available ways in which women, particularly poorer, less educated women,⁹² can

prostitutes aimed at making a living receive no constitutional protection. See cases cited *supra* notes 52-55 challenging the constitutionality of anti-prostitution laws).

88. Prostitution in the nineteenth century was extraordinarily widespread and legally tolerated. In both England and the United States, early feminists became outraged by the sexual double standard that punished and reviled the prostitute while shielding the client. A movement to eliminate this double standard came into being, centered around repeal of the Contagious Diseases Act in England, which forced prostitutes to undergo health examinations and quarantines. Originally the movement was motivated largely by women with some understanding of and concern about the social inequalities that led to the existence of prostitution. However, their approach remained conservatively moralistic and paternalistic; they sought to rehabilitate prostitutes and to punish male clients, but in the end failed to grapple with the social problems leading poor women into prostitution. The movement soon ceased to be a feminist movement and turned into one of conservative moralism. The social purity movement was easily coopted because its basic premise remained traditionally moralistic, despite its feminist element. On this early feminist movement, see generally J. WALKOWITZ, *supra* note 24; Minow, *supra* note 40.

89. Finley, *supra* note 3, at 923 n.58.

90. In response to liberal arguments that imposing morality is dangerous and totalitarian, see, e.g., Mullarkey, *supra* note 87 feminists would argue that the liberal goal of keeping morality out of law is in any case illusory. To avoid "legislating morality" is to accept prevailing moral standards by default. If the current morality sanctions male sexual dominance over women, liberalism simply permits, albeit in hidden fashion, the continued prevalence of such conservative moral norms. Also, of course, liberalism's basic tenets—the overriding importance of the individual, for example—ensure certain moral outcomes and thus are not value-neutral. Finley, *supra* note 3, at 924

n.59. Feminists, on the other hand, realize and accept that law will always institutionalize some system of values; admitting this openly allows a more honest and rational process of deciding which system to adhere to, instead of pretending that no choice has been made and thus permitting the de facto persistence and dominance of traditional behavior.

Further, a "female" value system might look very different from past systems of morality that have sought to dominate—i.e., the types of systems against which liberalism reacts. Carol Gilligan claims to have found a fundamental difference between "male" and "female" approaches to ethical problems. C. GILLIGAN, IN A DIFFERENT VOICE (1982) [hereinafter C. GILLIGAN] (Gilligan takes pains to point out that neither approach is exclusive to either gender). Part of that difference lies precisely in the absence, in the "female" value system, of a clearcut division between right and wrong, and instead in a desire to solve problems to benefit all involved. If this is so, instituting female values would be instituting relativism as opposed to absolutism, and therefore could not by definition become totalitarian. The ultimate aim is not to create a system of "female dominance," but to benefit both men and women by reducing the element of dominance itself.

91. See, e.g., R. TONG, *supra* note 43, at 55; J. DECKER, *supra* note 4, at 320-21.

92. The reason most often given by prostitutes themselves for the work they do is the money. However, another reason cited—and one which relates specifically to the burdens placed on women in today's society—is children. Many prostitutes are also mothers, and require the flexible time schedule, in addition to the money, that prostitution provides. Few other jobs, especially among those available to less-educated women, provide the necessary flexibility. See E. MCLEOD, *supra* note 4, at 30; A. CARMEN & H. MOODY, *supra* note 4, at 55-56 (discussing number of prostitutes with children and convenience job provides).

support themselves.

The feminist opposition to outlawing prostitution is, however, very different from the liberal argument that all people have the right to choose freely how to live their lives. On the contrary, in the feminist view, economic and social inequality is a type of implicit coercion, under which "free choice" loses its meaning. In contrast to men, many women simply do not have access to decently paying, secure jobs or have not been socialized to aspire to them, and therefore in reality have few options among which to choose.⁹³ Such a perception is not unique to feminists; affirmative action in favor of minorities recognizes that free choice may lack substance when context is not considered, that historical deprivation of opportunity based on economic and social experiences needs to be recognized legally. However, feminists go a step further, asserting that "the state is male . . . [t]he law sees and treats women the way men see and treat women,"⁹⁴ so that the liberal state structure, with objectivity as its ideal, permanently institutionalizes oppression of women.⁹⁵ A structure based on "male pursuit of control over women's sexuality"⁹⁶ is fundamentally unequal, and cannot achieve true equality and freedom of choice for women, even if more obvious economic and social inequalities were to be legally acknowledged.⁹⁷

For feminists, prostitution is acceptable not because it involves the free choice of autonomous human beings, but because the harm to women in the existing society of outlawing prostitution is greater than the harm of decriminalizing it. The

ultimate goal, however, remains the institutionalization of a value system under which women would not be forced to choose between these alternate types of harm.⁹⁸

Liberals contend that private sexual behavior should be tolerated when all parties involved consent to it, but feminists respond by questioning to what extent a woman's consent actually constitutes a free choice. The question has been posed most cogently in the context of rape.⁹⁹ From a liberal standpoint, rape and prostitution are very different issues; prostitution involves a contract in which sexual services are exchanged for economic consideration and for which an explicit set of decisions on the part of both client and prostitute is required. Rape, by contrast, is the forcible, non-consensual taking of sex—unconscionable even if the rapist offers consideration for the act. This distinction makes sense if sex is seen as a neutral activity and prostitution as a transaction between equals.

For feminists, who do not view sex as a neutral activity, but as an exercise of power, prostitution and rape are less distinguishable. Both center on the meaning of choice and consent in situations that are inherently unequal, that is, sexual relations. Prostitution is an institution that comes into being for the same reason that individual rapes occur: the implicit and explicit attitude, pervasive throughout society, that permits men, consciously and unconsciously, to view women's sexuality as something that belongs to men as of right, something that may be bought or forcibly taken if it is not freely given.¹⁰⁰ Rape of "their"

93. See Finley, *supra* note 3, at 931-40.

94. MacKinnon, *Jurisprudence*, *supra* note 3, at 644.

95. Essentially, women are defined in male terms by a state structure that believes it is neutral. Women, in turn, believe this view of them and accept its objectivity, and internalize it themselves. Therefore, they cannot define themselves independently.

This view carries with it the danger of ascribing to women a "false consciousness," that is, assuming that women simply do not always know—cannot know—who they truly are, or what they really think. This can become a paternalistic attitude that those who have become aware of the truth have a better understanding of what is good for women. For an attempt to deal with the false consciousness issue, see MacKinnon, *Jurisprudence*, *supra* note 3, at n.5.

96. MacKinnon, *Agenda*, *supra* note 3, at 244.

97. See *supra* note 30 (example of situation in which attitudes towards, and treatment of, prostitutes remains the same despite more liberal legal arrangements).

98. See B. HOBSON, *supra* note 5, at 219.

99. See Estrich, *Rape*, 95 YALE L.J. 1087 (year) [hereinafter Estrich]; Pateman, *supra* note 83, at 564; S. BROWNMILLER,

AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975) [hereinafter S. BROWNMILLER].

100. See Estrich, *supra* note 99, at 1122, 1126; MacKinnon, *Agenda*, *supra* note 3, at 245. Some commentators believe that prostitution reduces the rate of rape, see Posner, *supra* note 86 (implying a "market" relationship between rape and the availability of consensual sex), though the actual connection has been disputed, see H. REYNOLDS, *supra* note 4, at 100-01.

An example of attitudes surrounding the availability of sex appears in situations involving the rape of prostitutes, as in *State v. Goodseal*, 186 Neb. 359, 183 N.W.2d 258 (1971). There, the defendant, a prostitute, shot a customer who refused to pay her but attempted to force her to have sex. In determining whether the prostitute's act constituted self defense, the court took into account the fact that she was a prostitute. Apparently, the court felt that the fact that the defendant normally sold sex could have mitigated the severity of the customer's attempted rape, limiting the defendant's right of self defense. The court thus suggested that female sexual availability could not be limited by the woman's choice, and blurred the boundary between prostitution and rape. See Griffin, *supra* note 4, at 18.

women, as Brownmiller points out, has traditionally elicited a reaction of outrage in men, not primarily because of concern for the woman, but because of anger at the use by others of their "property."¹⁰¹ Prostitution, even where it has been legalized, generally operates primarily for the convenience and advantage of the customer.¹⁰² In both cases, the woman's interests remain secondary. Finally, women do not rape men, and men rarely prostitute themselves for women, except in very different contexts.¹⁰³

Even in the "best" prostitution situations—high class call girl operations, for example, where men pay for female companionship, not merely sex,¹⁰⁴—the bottom line is objectification. Prostitutes exist to satisfy male desires without demanding responsibilities in return; this perpetuates an image of women that is, and has always been, obviously unequal. Although prostitutes may choose to whom they sell their sexual service, they do so within a context where women's sexuality is perceived as existing only for men.

The sexual double standard operates in both rape and prostitution to the detriment of women. Because "good" women—madonnas—are not supposed to want or like sex, they are expected to resist male overtures. Having internalized this idea, they often do, in fact, put up a token verbal resistance even when they desire sex, thus "justifying" the rape defense that the woman did not really mean her refusal and in fact consented to the rape.¹⁰⁵ Prostitutes, who offer sex openly (and have often as a result been cast as unusually lustful women),¹⁰⁶ are denied respect, harassed, and outlawed, while their male clients escape censure almost entirely. In both cases, women are punished for acting in accordance with roles essentially created for them by men.

Thus both rape and prostitution involve the use of sexual power by men in ways that victimize women but are tolerated by society. Simply legalizing prostitution, as in the liberal approach, does not change this situation. Without fundamental changes in values and power arrangements, legalization essentially places a government stamp of approval upon an institution that reflects and furthers society's repressive inequality of sexual power. On the other hand, forbidding prostitution does not solve the problem of sexual inequality, but rather strips the woman of the degree of control over her sexuality that prostitution—unlike rape—affords. For the individual prostitute, prohibiting prostitution is more oppressive than permitting it.

Liberals would solve the problem of inequality by making sex free to all, removing the taboos that, for example, prevent women from admitting that they enjoy sex.¹⁰⁷ They would include women in the biological imperative that, in the liberal view, makes sex a basic human necessity, on a par with eating and sleeping. Women as well as men would then be able to separate sex from affection, as males traditionally have done, and to enjoy such unencumbered sex. This approach—which made a virtue of uninhibited sexuality for both men and women—characterized the sexual revolution of the 60's. Rather than liberating women, however, sexual freedom simply provided men with more opportunities to objectify women.¹⁰⁸ The liberal response to conservative moralism failed to address the nature of sexuality itself and the harm to which it subjected women; it merely widened the field for that harm. Sex itself—with its inequalities of power—did not change.

The empowerment through sex experienced

Another example of the close connection between rape and prostitution is described vividly by Susan Brownmiller: in instances of wartime rape, soldiers sometimes give women money and food after raping them, as if payment makes the acts more acceptable. Brownmiller theorizes that paying women gives them, in the soldiers' minds, a share in the responsibility for their own rape. S. BROWN MILLER, *supra* note 99, at 76.

Further evidence of the relationship between rape and prostitution, from the point of view of the woman, is the fact that, as in the case of rape, women have difficulty determining whether their sexual activity counts as "legitimate" sex. Paul Goldstein, a sociologist attempting to define prostitution as a preliminary to considering its relationship with drugs, questioned prostitutes about their first prostitution experience. He found that many prostitutes in hindsight considered their first experience to be a date-type situation, which they had not, at the time, viewed as prostitution. P. GOLDSTEIN, *supra* note

4, at 23-27. Similarly, date-rape is often not recognized as rape by the women involved.

101. S. BROWN MILLER, *supra* note 99, at 38, 40; C. SMART, *supra* note 11, at 78.

102. For a discussion of legal prostitution in Nevada and Germany, see *supra* notes 70-80 and accompanying text.

103. D. WINN, PROSTITUTES 25-33, 61-70 (1974) (description of life of a gigolo); E. MCLEOD, *supra* note 4, at 61.

104. Sydney Barrows characterizes her business in these terms throughout her book. S. BARROWS, *supra* note 4.

105. Estrich, *supra* note 99, at 1121-1132.

106. See, e.g., C. SMART, *supra* note 11, at 79-80; J. KAHLMANN & H. LANZERATH, *supra* note 18, at 30.

107. See, e.g., Ericsson, *supra* note 2, at 350; J. DECKER, *supra* note 4, at 16-17.

108. A. DWORKIN, RIGHT-WING WOMEN 88-100 (1983); Smith, *Making Movies*, in SEX WORK, *supra* note 4, at 135-141.

by many prostitutes,¹⁰⁹ though a positive experience for individual women, is a two-edged sword. If prostitutes see and use sex as power, they are effectively accepting what until now has been, in the eyes of feminists, the male identification of sex with power. By copying this identification, women attempt to gain equality by taking on a "male" approach to the world, that is, by seeking equality within a value system based on, and created largely to ensure, the suppression of women.

The project created by feminism, however, is that of finding, developing, validating, and ultimately instituting a "women's voice," a value system grounded in women's experience. Whatever this value system may contain, it is certain that it would not include sex as power. Indeed, a "female" approach to sex may well, in some ways, resemble the romantic vision that conservative moralists have extolled and liberal theorists rejected. Carol Gilligan's description of the "female" voice suggests that responsibility towards others—"connectedness"—plays a strong part in the "female" value system.¹¹⁰ In this system, sex would not be separable from the person because such separation allows an abdication of responsibility towards the sexual partner.¹¹¹

Separating a person from his or her sexuality, a concept which lies at the heart of liberal arguments for legalized prostitution, would thus be

foreign to the ideal feminist value system, as they were to conservatives.¹¹² However, the reasons for feminist rejection of separable sex are different from the conservative moralists' focus on an abstract harm to society based in absolutist religious values. Instead, a feminist analysis rejects separability because it is a sexual morality that harms women. The harm is twofold. First, the "male" value system, with its separation of sex from the person and resulting abdication of responsibility, is directed against and harmful to women, the less-powerful partners to the sex act. As long as men hold the bulk of the economic and social power in society, while women get pregnant, men do not suffer from such irresponsibility as greatly as do women. Moreover, because women tend to value connectedness, a morality of separability also hurts them more in an emotional sense. Second, separability allows male society to continue to define women as sexual objects and their sexuality as belonging to men. The moment the *person* behind the woman's sexuality becomes visible, the moment women must be accepted as human beings towards whom responsibility is owing, such objectification would have to cease. Sex would stand on a different plane—a plane involving a caring human relationship.¹¹³

The feminist critique of prostitution is thus neither liberal nor moralist, but contains aspects

109. "Whereas most women see sex as nurturance, hookers see sex as power," a prostitute spokeswoman reports. Griffin, *supra* note 4, at 20 (quoting Margo St. James, prostitute organizer). This statement is borne out by the attitude of many prostitutes towards their clients. See, e.g., S. BARROWS, *supra* note 4, at 134. Many prostitutes are women who were sexually abused as children. This fact was once used to prove that prostitutes were victims to be pitied. Today, however, many prostitutes point out that women with histories of abuse often find prostitution, at least for a time, to be a way of empowering themselves against men and taking control of their own sexuality. See, e.g., Alexander, in *SEX WORK*, *supra* note 4, at 188. The sense of power may be expressed through contempt for or indifference to the client, as well as, in many cases, through pity. See, e.g., Marcus, *Hong Kong Massage*, in *SEX WORK*, *supra* note 4, at 43-49; Leigh, *The Continuing Saga of Scarlot Harlot VI*, in *SEX WORK*, *supra* note 4, at 106-07; P. GOLDSTEIN, *supra* note 4, at 31-33.

One must be careful, however, of ascribing a single, unified opinion to all prostitutes. Prostitutes organizations exist which maintain that prostitution can never be empowering. See Wynter, *Whisper: Women Hurt in Systems of Prostitution Engaged in Revolt*, in *SEX WORK*, *supra* note 4, at 266-70; see also B. HOBSON, *supra* note 5, at 221.

110. See, e.g., C. GILLIGAN, *supra* note 90, at 35, 38-39, 47-48.

111. Men often use prostitutes because they prefer such a relationship to the emotional commitment of an extra-marital

affair. See, e.g., E. MCLEOD, *supra* note 4, at 76. Yet the same men often hope for emotional commitment from the prostitute. *Id.* at 83-84. See also *supra* note 27 (on the emotional role of the prostitute). Thus, men retain, in the person of the prostitute, the image of a woman who gives all while demanding nothing permanent. See S. BARROWS, *supra* note 4, at 134.

112. See Pateman, *supra* note 83, at 562. Pateman argues that "the services of the prostitute are related in a more intimate manner to her body than those of other professionals" because "sexuality and the body are . . . integrally connected to conceptions of femininity and masculinity, and all these are constitutive of our individuality, our sense of self-identity . . . in prostitution, because of the relation between the commodity being marketed and the body, it is the body that is up for sale." *Id.*

113. The fact that men who visit prostitutes so often appear to desire a more lasting, or deeper, relationship suggests that for men as well, relationships without emotional responsibility are not entirely satisfying. Perhaps, however, it is the very security of knowing that the relationship has definite limits that allows them to desire more. Another possible explanation, of course, is that men "want it all": a superficial relationship where responsibilities are concerned, and at the same time the benefits of true devotion from the woman. The client's ego most likely also cannot accept the idea that he is unimportant to the prostitute.

of both. As in the liberal approach, a feminist analysis considers concrete harm to be a factor in judging prostitution. It then, however, proceeds to redefine "harm." This redefinition is itself moral. It grows out of another value system, the "female" value system, which differs from both conservative morality and supposedly value-neutral liberalism.

IV. POSSIBLE FEMINIST RESPONSES TO PROSTITUTION

Until "female" values find expression in our social, economic, and legal systems, practicality dictates doing whatever possible to empower women and, in the process, improve their lives and provide a measure of economic and social equality. Empowerment of women through the "male" value system may not be the ideal, but it can be one of many ways of working towards that ideal. Prostitutes may embody the ultimate in subjugation to men, but they can carry out their job in a manner that changes the way men view them. They can challenge the *image* of women that prostitution, like pornography, helps to perpetuate.¹¹⁴

Prostitution should therefore be decriminalized and placed under the control of women. This should not be done in paternalistic fashion. Lawmakers should take no steps without consulting prostitutes themselves, the only ones who can actually foresee and explain the possible problems with any legal arrangement.¹¹⁵ Although specific proposals for reform are premature before such consultations have actually occurred, some general suggestions may be made. Streetwalking should not be forbidden, nor should renting

rooms to prostitutes. Brothels should not be defined as *per se* public nuisances; instead, every aspect of prostitution should be subject to already existing laws involving public behavior—disturbing the peace, for example. Great care must be taken to avoid automatic prejudice against streetwalkers when enforcing such laws. Mere moral disapproval should never be a sufficient basis, without more, for proving harm.¹¹⁶ Further, like all citizens, prostitutes should be protected by the criminal laws against assault, battery, rape, and robbery. Such a legal arrangement would encourage the prostitute to behave responsibly and remove the moral stigma of criminality, while providing protection for private citizens who may be injured in concrete ways by prostitution or its surrounding manifestations.

Government regulation should be kept to a minimum; licensing, for example, always presents the danger of excess government intervention to the detriment of the prostitute. Zoning does not appear to be a desirable practice. In Germany, zoning has in some places led to ghettoization of prostitutes, and appears to facilitate control of prostitution by pimps.¹¹⁷ It also permits harassment by police of prostitutes working outside the zone. If government regulation of some sort becomes necessary—for example, to regulate brothel working conditions—they should be geared primarily towards easing the lives of the women involved, and only incidentally towards making prostitution more comfortable for clients.

The AIDS epidemic has added a factor to the prostitution issue that cannot be overlooked. At present, however, prostitutes do not seem to be either a high-risk group or an important factor in

114. A major aim of feminism is to take control of the images of women presented to society. Some feminists would likely argue that this is impossible so long as prostitutes continue to do what they do: provide accessible sex to men, a function that is inherently unequal. They would argue that a result of patriarchy has been that men completely define what women are, that sexual availability to men—as prostitutes, for example—is part of that definition, and that if women do not escape this definition of themselves, they remain subjugated. This view, however, leaves women with no realistic options for dealing with prostitution as it now exists. Perhaps breaking down part of the image, by allowing prostitutes to control their lives, will assist in changing the broader definition of women. At the very least, it will improve the lives of individual women.

115. Prostitutes' spokespersons in the United States have already analyzed their situation and published suggestions for legal change. See, e.g., Alexander, *supra* note 4, at 208-12; COYOTE, NATIONAL TASK FORCE ON PROSTITUTION, *supra*

note 87, at 305. For an analysis of various European approaches to prostitution and their possible consequences, see B. HOBSON, *supra* note 5, at 224-35.

116. For a negative analysis of the use of an expanded non-criminal public nuisance remedy to combat prostitution, see Cassels, *Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication*, 63 CAN. BAR REV. 764 (1985).

117. See, e.g., *Prostitution und Recht* (Prostitution and Law) in BERUF: HURE, *supra* note 30, at 197-98; *Das Milieu*, (The Scene) in BERUF: HURE, *supra* note 30, at 95-96. In Berlin, prostitution is not zoned, and the decentralization that results from this system may be the optimal solution. However, the National Task Force on Prostitution does not oppose zoning prostitution away from residential neighborhoods. COYOTE, NATIONAL TASK FORCE ON PROSTITUTION, *supra* note 87, at 5.

the spread of AIDS.¹¹⁸ Even if a stronger link were to be found between prostitutes and AIDS, keeping prostitution illegal or cracking down even harder will not solve the problem.¹¹⁹ Requiring AIDS tests for prostitutes is one possible alternative, but the German experience with required VD testing shows that many prostitutes simply work illegally—without the required license that indicates testing.¹²⁰ The best option appears to be education, especially—as is already happening¹²¹—by organized prostitute groups. Such education must be aimed at clients as well as prostitutes, and would be much easier to provide if prostitutes had nothing to fear from state authorities. A desirable regulation, assuming prostitution were legal, might resemble one passed in the German state of Bavaria requiring prostitutes to work only with condoms, or the Nevada regulation requiring patrons to use condoms. Although neither version lends itself to easy enforcement, at the very least it provides the prostitute with an argument against pimps or customers who insist on unprotected sex.¹²²

It is particularly important when considering AIDS and prostitution to separate the issue of prostitution from the much more serious problem of drug addicts who turn to prostitution to feed a habit. Such women are far more likely to engage in unprotected sex. Legal sanctions on prostitu-

tion have not and will not solve this problem; a responsible government would instead concentrate on expanding drug treatment programs and encouraging addicts to become involved in such treatment.

Finally, prostitutes should be provided opportunities to leave the profession if they so desire. Mere moral pressure from the state and its authorities will never “reform” prostitutes. Instead, prostitutes must be given the chance to train for desirable and decently paying jobs, and the financial means to survive a transitional period. They must also be assured that they will not face discrimination in employment due to their pasts as prostitutes. Once again, such a retraining program should be undertaken in cooperation with prostitutes’ organizations.¹²³

V. CONCLUSION

Even if prostitution is decriminalized and placed under the control of women, the image of women it presents is not likely to change very soon. The madam of one high-class call girl operation has described how she dealt largely in illusions, allowing clients to believe what was most gratifying to their egos. Despite her power, she did not and, to retain her business, apparently could not fight the desired image of subordina-

118. See *AIDS in Prostitutes not Widespread*, N.Y. Times, *supra* note 22, at 1.

119. See *supra* note 22 and accompanying text (discussion of treatment of prostitution in times of epidemic).

120. Yondorf, *supra* note 34, at 422. The German experience shows that those prostitutes who acknowledge what they do will work safely even without a testing requirement—and they are the only ones that required testing would affect. Those who do not normally register—particularly drug addicts—will continue to work illegally and perhaps be driven further underground. See *AIDS, Otto, und die Nutte* (AIDS, Johns, and Whores), in BERUF: HURE, *supra* note 30, at 139-40. Most German government officials appear to agree, and have opposed forced AIDS testing of suspected carriers or “high-risk” groups. See, e.g., *Gegen Meldepflicht Ausgesprochen*, Berlin Tagesspiegel, Nov. 7, 1986; *Keine Kur nach Gauweilers Rezepten*, Die Zeit, Oct. 2, 1987.

If required AIDS tests were to be adopted in the United States, and infected prostitutes required to give up their jobs, unemployment and medical coverage would have to be available to them (such coverage should be available to prostitutes in any case). If such support were available, it would be far easier to convince infected women to stop working voluntarily, without legal pressure. Such coverage could be financed through taxation of prostitutes’ income. Any such arrangements should evolve in discussion with prostitute groups and possibly prostitutes’ unions. Medical and employment support might best be administered by such

groups, to which prostitutes would more likely entrust their money.

121. See COYOTE, POLICY ON AIDS (1985); COYOTE, SEX IN THE AGE OF AIDS (1985) (both available from National Task Force on Prostitution, P.O. Box 26354, San Francisco, CA 94126; CAL-PEP, SAFE(R) SEX GUIDELINES 1988 (available from California Prostitutes Education Project, 333 Valencia St., San Francisco, CA 94103); Das Prostituierten Projekt Hydra: Eine Dokumentation von 1979-1988 (The Prostitute’s Project Hydra: A Documentation from 1979-1988), in BERUF: HURE, *supra* note 30, at 170-78.

122. See *Prostitution in Dertschland: Die Arbeitssituation in München* (Prostitution in Germany: The Work Station in Munich), in BERUF: HURE, *supra* note 30, at 229; *A Move to Ban Bordellos*, NEWSWEEK, June 13, 1988, at 31. The Bavarian method, however, has had the negative effect of once again placing full responsibility (and blame) on the women. Interview with Claudia Fischer, one of the five staff members of Berlin Prostitutes Project “Hydra” (Jan. 17, 1989).

123. In Berlin, the government and the city’s prostitute advice center have successfully instituted such a retraining program, and similar programs have been set up in other German cities. *Aussteigen aus der Prostitution* (Leaving Prostitution), in BERUF: HURE, *supra* note 30, at 149-151; “Die Freier nicht in Sicherheit wiegen,” Der Spiegel, Dec. 7, 1987, at 64. The government’s cooperation stemmed from its efforts to find non-repressive methods of dealing with the AIDS epidemic.

tion.¹²⁴ As long as prostitutes occupy the role of fulfillers of men's desires—whether those desires involve domination, “normal” sex, or mere companionship—inequality remains a hallmark of prostitution by definition. But for the sake of the many women who continue to turn to prostitution as at least a temporary road to economic security, feminists must support decriminalized

prostitution and must ensure that the terms of its legalization are drawn up at least in part by prostitutes themselves, and with their empowerment in mind. Hopefully, this empowerment will not only help women in the short run, but also begin to break down the male-created image of women that perpetuates gender inequality.

124. Nor did she wish to. She accepted her clients' desire for the image her employees portrayed. S. BARROWS, *supra* note 4.