

1996

ESSAY

SEX FOR MONEY AND THE MORNING AFTER:
LISTENING TO WOMEN AND THE FEMINIST VOICE
IN PROSTITUTION DISCOURSE

*Alexandra Bongard Stremler**

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This paper provides a background on traditional and feminist legal thought on prostitution. Rather than focusing on the question of prostitution's legal status, this article attempts to introduce feminist insight and reason into the discussion of prostitution, focusing on the *why*, rather than the *what to do* in prostitution analysis. Feminist jurisprudence prioritizes female concerns about prostitution, and this differentiates it from traditional legal analysis.¹

Traditional legal thinkers often ignore the feminist perspective in their analyses of prostitution. Specifically, Kenneth Shuster, in his article entitled, *On the "Oldest Profession": A Proposal in Favor of Legalized But Regulated Prostitution*, virtually excludes the feminist perspective.² It is baffling that a writer could present an overview and analysis of a predominantly female activity without including the feminist voice. The word feminism never

* J.D., 1992, University of Florida; A.B., 1989, Duke University. I extend my sincere thanks to friends and colleagues, Victor Bongard III, Ann Wells, Nancy Dowd, Elizabeth McCulloch, Laura Coates, Angela Izzo-Peppe, Dafna Kapshud and Jeff Wade for their comments on various drafts of this paper. I also wish to thank Ellison Bentley for the inspiration and conversations which led to this paper. Finally, much love and thanks to my husband, Alex Stremler, and family, Sharon, Victor, Eric and Vic Bongard.

1. Belinda Cooper, *Prostitution: A Feminist Analysis*. 11 WOMEN'S RTS. L. REP. 99 (1989).

2. Kenneth Shuster, *On the "Oldest Profession": A Proposal in Favor of Legalized But Regulated Prostitution*, 5 U. FLA. J.L. & PUB. POL'Y 1 (1992).

appears in the text of his article.³ Perhaps the inclusion of the feminist position into his traditional analysis introduces too many difficult questions not normally addressed. Prostitutes are women, in most cases, or men who cater to the sexual desires of men, in most instances. Even though prostitution is a gendered activity, Shuster, like other traditional legal thinkers, denies the female aspect of prostitution, referring to it as a "private, victimless, consensual [activity]."⁴ He has more discussion on the history of women in prostitution than on their current concerns.⁵ Even though he limits his discussion to female prostitutes, he refers to the women who debate the issue merely as opponents and critics of prostitution.⁶ With this summary dismissal of feminist legal thought, he undermines his own conclusions by ignoring a very important element of prostitution analysis.

I. FEMINISM AND THE LAW

Feminist jurisprudence is a recent school of legal thought, precipitated by the dramatic influx of women into the legal profession during the 1970s and 1980s.⁷ This increased female presence in the law introduced women's perspectives, applying feminist theory and personal experience, into scholarship and practice.

In 1982, psychologist Carol Gilligan developed a new feminist perspective in her ground-breaking book, *In a Different Voice*.⁸ She described the female voice as unique, because it bases decisionmaking on experience and relationships rather than predetermined choices and individual rights.⁹ While men choose from limited alternatives, women choose from a broad range of alternatives framed by experience.¹⁰ Since women perceive life from a distinct viewpoint, male logic, typically accepted as universal, often fails to provide reasonable solutions to feminist thinkers.¹¹

3. Shuster, however, does cite works by feminist writers and offers a brief explanation of feminism in the footnotes. *See id.* at 5 n.6, 27, 30-33.

4. *Id.* at 17.

5. *Id.* at 3 n.10. While his historical overview addresses prostitution and society, prostitution and religion, prostitution and morality, and prostitution and men, Shuster fails to address prostitution and *women*. *See generally id.* at 3-4.

6. *Id.* at 5-6. Shuster passes over feminists' arguments against legalization as "either purely outcome-determinative (they focus solely on particular pitfalls to women from prostitution, without articulating that those pitfalls inhere in most areas of life), or they misstate the nature of the respective problem." *Id.* at 6-7.

7. Martha W. Barnett, *Women Practicing Law: Changes in Attitudes, Changes in Platitudes*, 42 FLA. L. REV. 209, 211 (1990) (discussing the impact of women entering the legal profession on the practice of law).

8. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

9. *Id.* at 21-23.

10. *Id.*

11. *Id.*

Throughout the 1980s, feminist legal scholars expanded Gilligan's "difference theory" to include a vast diversity of women's experiences.¹² The emergence of feminist jurisprudence brought the reality of women lives into legal discourse for the first time.¹³ Rejecting the notion of a single, grand theory of law, feminist jurisprudence embraces many perspectives.¹⁴

Shuster follows traditional legal thought, categorizing feminist legal theory into four separate schools of thought.¹⁵ Attempting to place feminist jurisprudence into established political categories, Shuster describes feminist jurisprudence as, "Liberal," "Marxist," "Socialist" or "Radical."¹⁶ Feminist jurisprudence makes personal issues political, and in terms of complexity, far exceeds Shuster's neatly-outlined ideologies. For feminists, inclusion of different perspectives based on race,¹⁷ politics,¹⁸ sexual orientation¹⁹ and life experience broadens their legal perspective. While feminist legal scholars address issues affecting women, feminist jurisprudence extends into virtually every area of law.²⁰

Despite the growth of feminist legal commentary, the traditional legal community often ignores this rich body of literature. This lack of feminist perspective occurs not only in the prostitution debate,²¹ but also in judicial opinion and legislation in most other areas of law. Traditional legal commentators view the law objectively; feminist legal commentators view the law subjectively, assimilating expertise in areas traditionally outside of legal

12. Gary Minda, *The Jurisprudential Movement of the 1980s*, 50 OHIO ST. L.J. 599, 622-32 (1989).

13. See, e.g., Christine Boyle, *Teaching Law as if Women Really Mattered or What About the Washrooms*, 2 CANADIAN J. WOMEN & L. 96 (1986).

14. Leslie Bender, *From Gender Difference to Feminist Solidarity: Using an Ethic of Care in Law*, 15 VT. L. REV. 1, 13 (1990).

15. Shuster, *supra* note 2, at 5 n.30 (citing LISA TUTTLE, ENCYCLOPEDIA OF FEMINISM 182-83, 197-98, 267-68, 306-07 (1986)).

16. *Id.*

17. See, e.g., Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (race and feminist theory).

18. See, e.g., Deborah Rhode, *Moral Character: The Personal and the Political*, 20 LOY. U. CHI. L.J. 1 (1988) (politics and feminist theory).

19. See, e.g., Ruthann Robson, *Lavender Bruises: Intra-lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990) (lesbian and feminist theory).

20. See, e.g., Mary Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169 (a feminist perspective of economic conditions); Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (a feminist perspective on contracts); Vicki Gottlick, *The Tax Reform Act of 1986: Does it Go Far Enough to Achieve Pension Equality for Women?*, 4 WIS. WOMEN'S L.J. 1 (1988) (a feminist perspective on the tax code).

21. "For some scholars and practitioners, law and economics, critical legal, and feminism are naïve, wrongheaded, threatening, and even dangerous movements." Minda, *supra* note 12, at 601. See generally Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989).

discussion.²² The law embraces traditional male opinion as universal, while marginalizing feminist jurisprudence.²³

II. TRADITIONAL LEGAL THOUGHT AND PROSTITUTION

The nature and legal status of prostitution creates unique problems for lawmakers and policy makers. United States' law generally criminalizes the solicitation of sexual services.²⁴ Courts apply traditional constitutional and criminal analysis to prostitution case law.²⁵ States regulate and prohibit prostitution through legislation based on health, safety, economics, ancillary crime prevention and community morality.²⁶ Traditional legal arguments on the legal status of prostitution can be used both to refute and defend statutes based on these criteria.

Social morality, rather than concern for women's safety, has deemed prostitution illegal. Commentator Belinda Cooper calls this position the "conservative moral approach."²⁷ Conservative moralists argue that virtuous women need protection from the innate sexual urges of men, and that society needs protection from the whores who engage in commercial sex.²⁸ They blame the spread of sexually transmitted disease, drug use, crime and child pornography on the existence of prostitution.²⁹ By eradicating prostitution, conservative moralists attempt to rid society of ancillary crime and other problems.³⁰ Ingrained cultural beliefs about sexuality and the role of women justify convictions of prostitutes under the conservative moral analysis.³¹ Conservative moralists classify all women as either loving mothers or deviant whores; within this context, they define all women.³²

While case law often reflects the conservative moral approach, decisions and commentary contain traditional arguments favoring the decriminalization

22. See Ann Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139 (1990).

23. For an overview of feminist legal thought see Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 32 (1990) (discussing the inherent bias in the "objective" and "neutral" standards in the law).

24. All states except Nevada have statutory prohibitions on prostitution. See, e.g., FLA. STAT. § 796.07(2) (1991).

25. See, e.g., FLA. STAT. ch. 796 (1992).

26. *Id.*

27. Cooper, *supra* note 1, at 101.

28. *Id.* at 102.

29. *Id.* at 103.

30. *Id.* at 105.

31. *Id.* at 101.

32. Dana Priest, *Violent Fantasies Common Among Serial Killers: Experts Link Attacks on Women to Events Seen in Television Shows, Movies and Childhood*, WASH. POST, June 13, 1990, at D7; see Cooper, *supra* note 1, at 102.

of prostitution.³³ This school of thought favors legalization based on rights of self-determination. Shuster, for example, recommends a model statute for legal but regulated prostitution.³⁴ Because liberal jurists rely on the individual's freedom of choice, Belinda Cooper refers to this school as the "liberal individual approach."³⁵ Arguments from liberal individualists also include: freedom of contract,³⁶ equal protection³⁷ and the right to privacy and autonomy.³⁸

Traditional liberal arguments for legalization of prostitution compare prostitutes to wage laborers. Using a contractual analysis, prostitutes merely perform a service for payment.³⁹ Some liberal individualists argue that there is an inherent male need for sex which creates a demand that women engaged in prostitution could, and should, be entitled to fulfill.⁴⁰ They explain that legalizing and regulating this trade would not only protect prostitutes from exploitation but also provide legal economic opportunities.⁴¹

In their arguments for individual rights, Shuster and the liberal individualists ignore the economic and social pressures which lead women into prostitution. Liberal individualists assume that prostitutes choose their vocation unconstrained by circumstance. They fail to acknowledge the absence of real equality between women and men before the law. While their arguments seem egalitarian, the liberal individualist response fails to protect women from the underlying inequities perpetuated by prostitution. Shuster contends that although women may initially be pressured into prostitution, they remain in it by choice.⁴²

Another liberal individualist argument involves equal protection violations against women prosecuted for solicitation.⁴³ Those citing equal protection address discrimination in statutes both facially and as applied to individual women.⁴⁴ Although many states have altered their prostitution

33. Cooper, *supra* note 1, at 100.

34. See Shuster, *supra* note 2, at 27-31 app. (for text of Shuster's model statute).

35. Cooper, *supra* note 1, at 109.

36. Sibyl Schwarzenbach, *Contractarians and Feminists Debate Prostitution*, 18 REV. L. & SOC. CHANGE 103 (Mar. 1990).

37. *Id.* at 106.

38. See *id.* at 111; see also Cooper, *supra* note 1, at 109.

39. Cooper, *supra* note 1, at 109.

40. Schwarzenbach, *supra* note 36, at 119 (citing Lars Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 ETHICS 360 (1980)).

41. Cooper, *supra* note 1, at 109. Like Shuster, these thinkers are quick to point out that men also participate in prostitution. However, most prostitutes are women. Shuster, *supra* note 2, at 2 n.6.

42. Shuster, *supra* note 2, at 12 n.80.

43. Cooper, *supra* note 1, at 107.

44. See SYDNEY BIDDLE BARROWS, *THE MAYFLOWER MADAM* 259 (1986); Belinda Cheney, *Prostitution — A Feminist Jurisprudential Perspective*, 18 VICTORIA U. OF WELLINGTON L. REV. 251 (1988).

statutes to criminalize both the solicitation and procurement of commercial sex,⁴⁵ women continue to bear the burden of enforcement, prosecution and sentencing.⁴⁶ In the publicized "Mayflower Madam" case, a New York attorney chose to defend a prostitution operation on the basis that women are disparately treated within the legal system.⁴⁷ Criminal defense attorney Mark Denbeaux defended the Madam, Sidney Biddle Barrows, because of the systematic harassment by the state directed solely at the women defendants as opposed to their male clients.⁴⁸ On the eve of the trial, Denbeaux said he would read aloud names from a client book at jury selection, which included many prominent members of the New York legal community.⁴⁹ After this unconventional legal tactic, the attorney for the state agreed to fines and conditional discharge for Barrows. In this case, traditional legal alternatives failed women involved in prostitution.⁵⁰ The case illustrates the inequity of the judicial system, and the extreme steps required for women in order to obtain justice.⁵¹ Since the case never reached trial, it has no precedential value. Nevertheless, it does demonstrate a small step toward equal justice for women involved in prostitution prosecution.

The Barrows case exemplifies why prostitution statutes need to be reconsidered and redirected. Selective enforcement places disproportionate blame on women.⁵² Equal protection arguments for decriminalization of prostitution focus on privacy and civil rights for all of those engaged in the practice.⁵³ The means to a solution remain controversial.⁵⁴ Some favor stricter enforcement against procurers of commercial sex, that is, equalizing the application of existing law.⁵⁵ Others question whether evenhanded enforcement could realistically be expected given present entrenched stereotypes.⁵⁶ Shuster's explains this inequality of enforcement:

One reason for discriminatory law enforcement against female

45. See, e.g., FLA. STAT. ch. 796 (1992).

46. Cooper, *supra* note 1, at 107.

47. BARROWS, *supra* note 44, at 256.

48. *Id.*

49. *Id.* at 257-58.

50. Many writers of feminist jurisprudence question whether women ever were considered in current prostitution law. Cheney, *supra* note 44, at 252.

51. See generally BARROWS, *supra* note 44.

52. Cheney, *supra* note 44, at 251.

53. Cooper, *supra* note 1, at 108.

54. *Id.*

55. Jody Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 78 (1989-90).

56. *Id.* at 78-79 (citing Nevada as a model of legal prostitution even though Nevada still victimizes women through restrictive licensing practices and abuse of police power).

prostitutes is that they are considered expendable; few persons, other than perhaps their pimps, will miss them if they are incarcerated. To imprison, or otherwise stigmatize, the average male patron, on the other hand, usually involves disrupting a man's "respectable" employment, standing in the community, and even his marriage.⁵⁷

In his statement, Shuster clearly articulates an underlying premise of many legal concerns.

Publicity frequently accompanies the prosecution of prostitutes with high-profile clients. Although the male client's status fuels press coverage, my observation is that the media usually protects the identities of the men involved in the latest sex scandal. For example, in the summer of 1993, prosecutors hounded Heidi Fleiss, alleged Madam to the stars, yet the identities of her clients remained anonymous.⁵⁸ While Heidi Fleiss and Sidney Biddle Barrows have become household names, it remains unlikely that the public will ever know the names of the men in their records.

Although high-profile prostitution cases bring the discussion into mainstream America, public concern rarely extends to prostitutes and their struggle to survive while living in poverty. Sex, glamour and fame generate material for tabloid news, not questions of legal justice and reform for women in prostitution. Reality for most prostitutes is not the glitz of the high-class hooker. Their reality is danger, crime and despair. "In these recesses you'll find no sequins, no lipstick, few small-town girls duped by pimps in Caddies. Just home-grown women like Starla with their tennis shoes, their unexceptional histories and an unshakable urge to be high."⁵⁹ These women, trapped by poverty and prostitution, find virtually no support from the system, and many consider themselves to be the throwaways of our society.⁶⁰ For some feminists opposed to prostitution, these women epitomize the victims of prostitution.⁶¹

57. See Shuster, *supra* note 2, at 10 n.65.

58. *Hollywood Woman Charged*, N.Y. TIMES, Aug. 7, 1993, at C1.

59. Katherine Boo, *Unpretty Woman; No Spandex. No Pimp. No Redemption. The Crack Highs and Life Lows of a D.C. Hooker.*, WASH. POST, Aug. 22, 1993, at C1 (explaining that many prostitutes turn to drugs as an escape, thus, substance abuse is often a result, rather than a cause, of prostitution).

60. Prostitution activism is an unpopular activity. While some feminist commentators have addressed the issue, few have become involved in advocacy. Because of the lack of public support, reformed prostitutes have begun to help themselves. Evelina Giobbe founded and directs WHISPER, a prostitution activist group, which advocates on behalf of women harmed by prostitution. See Margaret Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 47-48 n.3 (1992). Prostitutes also have organized to advocate for decriminalization, rights and equality within the system. Prostitution rights groups have an agenda which includes arguments similar to those of liberal feminists. See Freeman, *supra* note 55, at 75.

61. Freeman, *supra* note 55, at 75.

III. FEMINIST JURISPRUDENCE AND PROSTITUTION

Prostitution presents a complex problem for feminists. Feminist legal scholars who discuss prostitution account for the perspectives of women and prostitutes.⁶² They represent a broad spectrum of opinion, both favoring and opposing prostitution.⁶³ While feminist scholars welcome this diversity, prostitution divides them along several lines.⁶⁴

In the view of feminists favoring the legalization of prostitution, women are empowered by prostitution.⁶⁵ They argue that prostitution can provide women with economic freedom and control in the power struggle between women and men.⁶⁶ Whereas, feminists opposed to legalization believe that women are victimized by prostitution.⁶⁷ They argue that since prostitutes generally play the role of the dominated sexual partner, the expression of male power through paid subservience creates the ultimate form of subordination and danger.⁶⁸

Feminists who would permit prostitution with regulation or protection have been accused of perpetuating the patriarchal devaluation of women.⁶⁹ They often side with traditional liberals.⁷⁰ Feminists who oppose prostitution often find themselves aligned with political and religious conservatives.⁷¹ These groups rarely align on other issues affecting women. In fact, this alignment of liberal feminists with individualists, and radical feminists with conservative moralists, threatens feminist solidarity on other issues affecting women, such as sexual discrimination, domestic violence and abortion.⁷²

While liberal-individualist and conservative-moral responses lack adequate remedies for the harm created by prostitution, feminist thought has

62. See generally Cooper, *supra* note 1; Cheney, *supra* note 44, at 239.

63. See Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (explaining the valuation of diversity in opinion among feminist and other outsider jurists).

64. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 5 (1987) (a feminist perspective opposed to prostitution and pornography); see also *Miller v. California*, 413 U.S. 15 (1973) (a traditional juridical perspective).

65. See, e.g., Freeman, *supra* note 55, at 75; Cooper, *supra* note 1 (recommending decriminalization of prostitution and advocating for prostitution with women in charge of the industry).

66. Freeman, *supra* note 55; Cooper, *supra* note 1, at 117.

67. See, e.g., MACKINNON, *supra* note 64.

68. *Id.* at 61.

69. Cooper, *supra* note 1, at 113.

70. See, e.g., *id.* at 117.

71. See generally MACKINNON, *supra* note 64.

72. SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 239-59 (1991) (discussing women leaders in the conservative "new right").

fared no better. Feminists also argue a range of alternatives from prohibition to legalization, but their concerns are different from those of liberal individualists or conservative moralists. For example, feminists favoring decriminalization of prostitution stress women's self-employment, rather than freedom of contract or individual rights to privacy.⁷³ Feminists opposing decriminalization stress prostitution's objectification of women's bodies and sexuality, instead of the need to regulate community moral standards.⁷⁴ Whether for or against legalization of prostitution, feminist analysis considers both its harm and benefit to women.⁷⁵

Few feminists favor complete legalization of prostitution, as they believe government approval would further entrench society's stereotypes of women.⁷⁶ Even liberal individualists, who do support decriminalization, often advocate government regulation of prostitution.⁷⁷ For example, Shuster advocates the regulation of prostitution for the protection of children and others traditionally deemed worthy.⁷⁸ The liberal individualist view assumes that women choose prostitution from among a range of available career options, and therefore, such women are not in need of protection. The underlying assumption is that women should be available to men for their sexual gratification.⁷⁹

Feminists favoring decriminalization and regulation of prostitution do so on the grounds that it would protect the women involved from coercion and violence.⁸⁰ They view decriminalization in the broader context of necessary social changes. They argue that the social stigma associated with prostitution might be reduced with recognition in society of the realities which force some women into prostitution.⁸¹ Also, they propose pay equity for work traditionally done by women⁸² and meaningful job training to ensure that women who choose to become prostitutes do so freely not because they have been forced to by economic necessity.

Some feminist writers find transitional answers for women's safety and self-determination in the decriminalization of prostitution. Prostitution is one of only a few unskilled jobs where women on average earn more than men.⁸³ The opportunity for economic independence attracts women to

73. Cheney, *supra* note 44, at 248; Freeman, *supra* note 55, at 107, 109.

74. MACKINNON, *supra* note 64, at 171.

75. See generally Cooper, *supra* note 1.

76. Cheney, *supra* note 44, at 245.

77. Schwarzenbach, *supra* note 36, at 123.

78. Shuster, *supra* note 2, at 15 n.108.

79. Cheney, *supra* note 44, at 245.

80. *Id.* at 247.

81. *Id.* at 240-42.

82. See, e.g., Cooper, *supra* note 1; Cheney, *supra* note 44; Schwarzenbach, *supra* note 36.

83. See MACKINNON, *supra* note 64, at 24-25.

prostitution. Shuster reports that between twelve to twenty percent of all women engage in prostitution at some point in their lives.⁸⁴ Feminist commentators suggest that the figure is closer to twelve percent.⁸⁵ Divorce and child-support delinquency contribute to the economic burdens suffered by many women.⁸⁶ Whatever the causes that force women into prostitution, feminists explain that most women *remain* because of job flexibility and high pay.⁸⁷

Unlike the feminist view discussed above, Shuster fails to take into account the importance of the economic realities of women in any analysis of prostitution. In an effort to discount this importance, Shuster describes the societal devaluation of work done by women as complaints by prostitutes that their clients make more money than they do.⁸⁸ This male-centered view trivializes the real problem of pay inequity between men and women to a squabble between disgruntled whores and their patrons. It analyzes prostitution in a vacuum rather than in society.

Shuster also addresses the relationship between prostitution and violence against women from the same simplistic perspective, acknowledging that violence against women exists, but contending that “[s]ince in American culture, women as a class are frequently mistreated, even if prostitution remains illegal, women will continue to be victimized in their other relationships.”⁸⁹ He adopts the traditional attitude of what has been will be and uses circular reasoning to reach his position.⁹⁰ His analysis does not explore the possibility of safer and more reasonable choices for women. Even though prostitution and violence against women center around women, Shuster focuses his attention on the needs of the male clients.⁹¹ He states that “[legalized prostitution might] promote marital harmony by providing an approved emotional and sexual outlet to the hostile spouse.”⁹² His position is carried to its most *illogical* conclusion in the following:

84. Shuster, *supra* note 2, at 9.

85. See, e.g., MACKINNON, *supra* note 64, at 25 (noting that 13% of all women participate in prostitution).

86. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323-56 (1985). Weitzman reports that 73% of women and children involved in divorce experience a *decline* in their standard of living. *Id.* at xii. In contrast, 42% of men involved in divorce experience a *rise* in their standard of living. *Id.* at ix, xii, 323. Weitzman notes that failure to pay child support commonly accompanies divorce, contributing to the decline in the economic status of these women. *Id.* at 285-87.

87. Cheney, *supra* note 44, at 242.

88. Shuster, *supra* note 2, at 9.

89. *Id.* at 7.

90. *Id.*

91. *Id.*

92. *Id.*

The argument that prostitution should remain illegal because it promotes abuse carried to its logical extreme requires that because there are rapists, love should be illegal; because child abuse exists, people should not rear children; and because husbands beat wives, marriage should be disallowed.⁹³

In the United States, perceptions of women are often defined by pornography and prostitution.⁹⁴ While many find prostitution merely offensive, others attribute the rise in acts of violence against women to it.⁹⁵ Many crime reports link these activities to the increasing violence against women in our society.

New York, 1993 — Acting on information from Joel Rifkin, a confessed serial killer, police today dug up the badly decomposed body of a woman next to a highway in Southampton on eastern Long Island and found another in a shallow grave near John F. Kennedy International Airport. . . . After the two arresting officers smelled and then found the decaying body of a woman in the back of the truck, Rifkin told police that he had slain 17 women — all prostitutes — over the last two years.⁹⁶

Safety for all women is a primary concern for feminists considering the prostitution dilemma.⁹⁷ Those favoring legalization look to regulation as a means of protecting prostitutes from illness and physical violence.⁹⁸ Currently, prostitutes do not receive legal protection for many reasons. Discrimination, fear of prosecution, and physical coercion limit access to justice.⁹⁹ Prostitution activist and law professor, Margaret Baldwin, discusses the distinction between prostitutes and “other women.”¹⁰⁰ Especially in cases of domestic violence, rape and sexual harassment, other women separate themselves from prostitutes. According to Baldwin, other

93. *Id.*

94. MACKINNON, *supra* note 64, at 148.

95. See Public Hearings, Indianapolis-Marion County City-County Council Ordinances, Nov. 24-25, 1984 [hereinafter, Ordinance], in Margaret Baldwin, COURSE MATERIALS FOR WOMEN IN THE LAW, Florida State University College of Law (1990).

96. Malcolm Gladwell, *Long Island Man Says He Killed 17; Police Find 2 Bodies After Questioning Him*, WASH. POST, June 30, 1993, at A3.

97. See, e.g., Schwarzenbach, *supra* note 36, at 114; Cheney, *supra* note 44, at 253; Cooper, *supra* note 1, at 117.

98. Schwarzenbach, *supra* note 36, at 123.

99. Baldwin, *supra* note 60, at 68-75.

100. *Id.*

women may be victims of these crimes, but prostitutes may not.¹⁰¹ Yet, women from all walks of life suffer from the same types of violence and abuse.¹⁰²

Addressing the connection between prostitution and abuse, feminist scholar, Catharine MacKinnon, places prostitution on a continuum with pornography, sexual abuse and rape.¹⁰³ Citing frequent patterns of violence, MacKinnon explains that both sex and violence define power relationships between men and women.¹⁰⁴ Her feminist analysis addresses the economic reality of pimping, and the devastating exploitation of prostitutes by men.¹⁰⁵ Both economic and physical coercion lead women into prostitution and keep there.¹⁰⁶

IV. FEMINISM, PROSTITUTION, PORNOGRAPHY AND VIOLENCE AGAINST WOMEN

Although few opinions or articles link pornography and prostitution, nevertheless, they are connected by their gendered nature and by the harm they cause women. The same factors which force women into prostitution can also force them into the production of violent pornography. Pornography encourages the devaluation of women both in its production and sales. The victims of prostitution and pornography frequently overlap.¹⁰⁷ For feminists who connect prostitution and pornography with violence against women, prostitution, legal or illegal, can only be harmful to women. Sexual violence, regardless of gender or age, may be motivated by the actions of prostitution and the images of hard-core pornography.¹⁰⁸ Feminists opposed to these activities specifically emphasize the associated harm not only to women, but

101. *Id.*

102. *See generally* Ordinance, *supra* note 95.

103. *See generally* MACKINNON, *supra* note 64.

104. *Id.* at 61.

105. *Id.* at 24.

106. *Id.*; Cheney, *supra* note 44, at 240.

107. *See generally* MACKINNON, *supra* note 64. When the body of the key suspect in the Green River serial killings of 40 women, mostly prostitutes, was found, the *Los Angeles Times* described him as a man "who made a lot of money in producing and selling hard-core porn and snuff films." Richard A. Serrano, *Documents Profile One-Time Suspect in Serial Deaths*, L.A. TIMES, July 1, 1989, at C5.

108. Although Shuster notes that most abuse in prostitution is against women, his only specific reference connecting murder and prostitution involves the case of Aileen Wuornos, a female prostitute who was convicted of killing seven men. *See* Shuster, *supra* note 2, at 8 n.43. Typically, serial killers are white men (*e.g.*, Ted Bundy, Joel Rifkin, Danny Rollins) who kill women. The women are often prostitutes. Although Shuster makes the connection between violence and prostitution, he twists the analysis around in this isolated case. Shuster's choice to address violence, prostitution and women with this exceptional case reflects his lack of concern for prostitution's real victims.

also to society, in general.¹⁰⁹

Whether or not hard-core or violent pornography is the sole cause of violence against women, evidence shows that it correlates to tangible harm to women.¹¹⁰ In 1985, an FBI study of thirty-six serial murderers found that eighty-one percent of them said that "their biggest sexual interest was in reading pornography."¹¹¹ Pornography depicts a wide range of violence against women from sexual stereotyping to serial killing and sexual homicide.¹¹² Although not all pornography injures women, news accounts often confirm links between prostitution, pornography and violent crime against women.¹¹³

As with the issue of prostitution, pornography regulation divides feminist legal commentators.¹¹⁴ Analysis for or against regulation requires adherence to absolutes, and perspectives often represent extreme positions. For traditional jurists, this union of pornography and prostitution could add the economic, property, contract and feminist issues of prostitution to the already muddled arena of pornography.

Applying both the civil rights and equal protection analyses, the city of Indianapolis attempted to regulate pornography in 1984.¹¹⁵ Evidence presented at the hearing for the pornography ordinance demonstrated that women are actually harmed by pornography. Testimony included accounts of kidnapping, coercion, rape and prostitution.¹¹⁶ Transcripts from the hearing reveal value judgments about women's safety.¹¹⁷ At the hearings, victims, primarily women, described injury sustained during the production of and exposure to pornography,¹¹⁸ as well as, injuries from rape, kidnapping, prostitution and other sexual abuse.¹¹⁹

The widespread distribution of pornography endangers individuals

109. See generally Baldwin, *supra* note 60; MACKINNON, *supra* note 64.

110. The terms hard-core pornography and violent pornography are used interchangeably throughout this paper.

111. Jerry Kirk, *Ted Bundy Shows Us the Crystalizing Effect of Pornography*, L.A. TIMES, Feb. 8, 1989, at C1 (quoting the 1986 report of the Attorney General's Commission on Pornography).

112. MACKINNON, *supra* note 64, at 5. Commentators also have attributed a wide range of harm, from sexual discrimination to violence against women, to pornography. However, this paper specifically addresses the physical threat prostitution and violent pornography pose to women. Physical abuse and violence against women often seem to exist on a continuum. *Id.*

113. See, e.g., Gladwell, *supra* note 96.

114. Compare MACKINNON, *supra* note 64 with NADINE STROSSEN, *DEFENDING PORNOGRAPHY* (1994).

115. See Ordinance, *supra* note 95.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

seemingly uninvolved in this industry. Like prostitution's victims, pornography's victims extend beyond those directly participating in the enterprise. Despite evidence linking violent pornography and prostitution to violent crime, few states regulate the production of graphic violent pornographic material. Arguments for free speech protect pornography unless brutal rape or murder is actually involved. For example, "snuff" films¹²⁰ in which actors are actually killed can be the basis for a murder prosecution. The production of these films has been linked to several unsolved serial killings, involving both adult and underage prostitutes.¹²¹

V. CONCLUSION

The failure of Shuster to acknowledge the gendered nature of prostitution demonstrates the wide difference between traditional and feminist legal thought.¹²² If protecting citizens from injury is an important government objective, then feminist legal analysis must be examined in the search for solutions. Women are most often the victims of prostitution and violence. Most states simply criminalize prostitution. Feminist analysis focuses on the complex issue of women's role in this area.

Tragically for the victims of prostitution, little evidence of specific harm

120. "Snuff" films are violent pornographic productions that involve the actual murders of the actors/actresses. The murders are just a part of the show for the films' producers. Production of these films is criminal and has been linked to serial killings and the disappearance of prostitutes.

121. See Serrano, *supra* note 107, at C5 and accompanying text.

122. Pornography provides another example of the gender communication gap. While *Black's Law Dictionary* defines pornography as "[t]hat which is of or pertaining to obscene literature; obscene; licentious." BLACK'S LAW DICTIONARY 1161 (6th ed. 1990). Material must meet a three part test to be regulated as obscene. First, the work taken as a whole appeals to the "prurient interest" of "the average person, applying contemporary community standards"; second, the work "depicts in a patently offensive way sexual conduct"; and third, "the work taken as a whole lacks serious literary, artistic, political or scientific value." *Id.* (citing *Miller v. California*, 413 U.S. 15 (1973)). *Black's* defines obscene as "[o]bjectionable or offensive to accepted standards of decency," similarly adopting the definition articulated in *Miller*. *Id.* at 1076.

In contrast, *Webster's Third New International Dictionary* defines pornography as "1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement," and defines obscene as "disgusting to the senses [usually] because of some filthy, grotesque, or unnatural quality." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1767, 1557 (1986).

The divergent legal and common usage definitions of pornography and obscenity reveal the need to consider the gendered nature of activities. For pornography, legal standards that regulate obscenity fail to protect women from the gender violence in hard core pornography. Because obscenity standards regulate "filth" based on community morality, pornography which "cleanly" involves prostitution and violent rape may continue unregulated. The common origins of pornography and prostitution provide useful parallels for understanding feminist concerns about prostitution.

to women exists in judicial or legislative records. Feminists opposed to prostitution gather the evidence to protect women harmed by prostitution, but women's voices and experiences have been excluded from traditional legal commentators' debate on prostitution.¹²³ Although a range of traditional positions exist concerning the status of prostitution, they seem hollow and incomplete without consideration of those most affected, empowered and victimized by prostitution. With the feminist perspective, prostitution remains a complicated issue. Its inclusion in prostitution discourse must be the first step in any legal proposition on prostitution.

123. See Baldwin, *supra* note 60, at 78-79 n.105. Law professor and prostitution activist Margaret Baldwin noted the lack of legal scholarship on the subject and compiled a comprehensive bibliography of feminist writings since 1985 on prostitution. The listing, which included 13 articles, fits into a single footnote. *Id.* "The majority of feminists have not written anything about prostitution." Cheney, *supra* note 44, at 247.