

PROSTITUTION AND THE LEGALIZATION/ DECRIMINALIZATION DEBATE

COTY R. MILLER

NURIA HALTIWANGER

I.	NATURE AND ELEMENTS OF OFFENSE	210
A.	SEXUAL CONTACT.	210
B.	COMPENSATION	211
II.	SOLICITATION	212
A.	INTENT	213
B.	PATRONIZING A PROSTITUTE.	214
III.	PIMPING AND PANDERING	215
A.	PIMPING.	216
B.	PANDERING	217
1.	Generally	217
2.	Regarding Minors	218
IV.	DEFENSES TO THE CHARGE OF PROSTITUTION	220
A.	VALID DEFENSES	220
1.	Lack of Knowledge.	220
2.	Entrapment.	220
3.	Ignorance of Age	221
4.	Marriage.	221
B.	INVALID DEFENSES	222
1.	Impossibility.	222
2.	Reliance on Outdated Version of Statute.	222
3.	Privacy Rights	222
4.	Payment by Third Party.	223
5.	Sex of the Parties	223
6.	Gainful Employment.	223
V.	THE FEDERAL GOVERNMENT AND PROSTITUTION.	224
VI.	REALITIES OF PROSTITUTION	225
A.	RACIAL INEQUALITIES	225
B.	EQUAL PROTECTION ISSUES AND GENDER INEQUALITY	226
1.	Inequality in the Laws Themselves.	226
2.	Inequality in the Enforcement of the Laws and Questions of Equal Protection	227
VII.	DICHOTOMOUS FEMINIST PERSPECTIVES	229
A.	PROSTITUTION AS LEGITIMATE WORK AND A SOURCE OF INDEPENDENCE FOR WOMEN	230

1. Economic Independence	230
2. Sexual Freedom	230
B. PROSTITUTION AS VIOLENCE AGAINST WOMEN	231
VIII. THE UNUSUAL STATE OF NEVADA AND ITS LEGALIZATION SCHEME . .	233
A. BRIEF HISTORY	233
B. NEVADA'S CURRENT STATUTORY SCHEME.	235
1. Preservation of Morals	236
2. Health and Safety Concerns.	237
C. THE NEVADA MODEL WITHIN THE FEMINIST DEBATE	240

INTRODUCTION

Known as the world's "oldest profession," prostitution continues to be one of the only unskilled jobs where women on average can earn more than men.¹ Even with its long history, this profession has for many centuries been condemned as both immoral and criminal. With the sole exception of Nevada,² every state has enacted statutory prohibitions against prostitution.³ The statutes and accompany-

1. Alexandra Bongard Stemler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. & PUB. POL'Y 189, 197 (1995).

2. NEV. REV. STAT. 201.354(1) (WESTLAW through 2002 18th Spec. Sess.) ("It is unlawful for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution."). However, prostitution is illegal in some Nevada counties, including Clark, Washoe, Lincoln, and Douglas, and in the state capital, Carson City. See *infra* Part VIII.B. Additionally, Nevada prohibits engaging in or soliciting for prostitution if the prostitute has tested positive for Human Immunodeficiency Virus (see *infra* Part II.A.; Part VIII.B.2) and the pandering of prostitutes (see *infra* Part III).

3. See ALA. CODE 1975 § 13-A-12-121 (WESTLAW through 2003 Org. Sess.); ALASKA STAT. § 11.66.100 (Michie, WESTLAW through 2003 1st Reg. Sess.); ARIZ. REV. STAT. ANN. § 13-3214 (West, WESTLAW through Dec. 2, 2003); ARK. CODE ANN. § 5-70-102 (Michie, WESTLAW through 2003 Reg. Sess.); CAL. PENAL CODE § 647(b) (West, WESTLAW through Ch. 647 2003-04 Reg. Sess. 1st Extra. Sess. through 2d Extra. Sess.; Ch. 13 of 1st Ex. Sess. urgency leg.; & Ch.1 of 2d Ex. Sess. & October 7, 2003 election); COLO. REV. STAT. ANN. § 18-7-201 (West, WESTLAW through 2003 1st Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-82 (West, WESTLAW through 2003 Jan. Reg. Sess. & June 30 Spec. Sess., & Sept. 8 Spec. Sess.); DEL. CODE ANN. tit. 11 § 1342 (WESTLAW through 2003 1st Reg. Sess.); D.C. CODE ANN. § 22-2701 (WESTLAW through Dec. 2, 2003); FLA. STAT. ANN. § 796.07 (West, WESTLAW through 2003 1st Reg. Sess. and Spec. "A" Sess.); GA. CODE ANN. § 16-6-9 (WESTLAW through 2003 Reg. Sess.); HAW. REV. STAT. ANN. § 712-1200 (Michie, WESTLAW through 2002 Reg. Sess. of the 21st Leg.); IDAHO CODE § 18-5613 (Michie, WESTLAW through 2003 Sess.); 720 ILL. COMP. STAT. ANN. 5/11-14 (West, WESTLAW through P.A. 93-450 2003 Reg. Sess.); IND. CODE ANN. § 35-45-4-2 (West, WESTLAW through 2003 1st Reg. Sess.); IOWA CODE ANN. § 725.1 (West, WESTLAW through Ch. 35 of 2003 Reg. Sess.); KAN. STAT. ANN. § 21-3512 (WESTLAW through 2002 Reg. Sess.); KY. REV. STAT. ANN. § 529.020 (Banks-Baldwin, WESTLAW through 2003 Reg. Sess.); LA. REV. STAT. ANN. 14:82 (West, WESTLAW through 2002 1st Extra. Sess. & Reg. Sess.); ME. REV. STAT. ANN. 17-A, § 853-A (West, WESTLAW through 2003 1st Sp. Sess.); MD. CODE ANN., CRIMINAL § 11-306 (WESTLAW through 2003 Reg. Sess.); MASS. GEN. LAWS ANN. 272, § 53 (West, WESTLAW through 2003 1st Sess.); MICH. COMP. LAWS ANN. § 750.449a (West, WESTLAW through 2003 Reg. Sess.); MINN. STAT. ANN. § 609.322 (West, WESTLAW through 2003 Reg. Sess.); MISS. CODE ANN. § 97-29-49 (WESTLAW through 2003 Reg. Sess.); MO. ANN. STAT. § 567.020 (West, WESTLAW through 2003 1st Reg. Sess. & 2d Extra. Sess.); MONT. CODE ANN. § 45-5-601 (WESTLAW through 2003 Reg. Sess.);

ing case law reflect a commitment to moral conservatism⁴ to varying degrees and through a variety of methods. The statutory justification for the regulation of prostitution falls within the police powers of a state.⁵ One state has held that the statutes criminalizing prostitution have a rational basis, since the State may reasonably conclude that allowing the public marketing of sex would produce a greater strain on the institution of marriage, that innocent citizens would be affronted by unwanted solicitation, that a higher incidence of diseases would occur and that criminal manipulation would continue to surround activity of prostitution if prostitution were legalized.⁶

Defined generally as the giving or receiving the body for sexual intercourse for hire,⁷ the scope of prostitution was initially limited to women at common law.⁸ Now, individuals of both sexes may be prosecuted for prostitution,⁹ as well as for soliciting, patronizing, pimping and pandering. Many states have enacted statutes that stipulate that the sex of the individual is no defense to the charge of prostitution.¹⁰

This article attempts to explicate the current status of the law on prostitution

NEB. REV. STAT. § 28-801 (WESTLAW through 2003 1st Reg. Sess.); N.H. REV. STAT. ANN. § 645:2 (WESTLAW through 2002 Sess.); N.J. STAT. ANN. § 2C:34-1 (West, WESTLAW through 2002 2d Ann. Sess.); N.M. STAT. ANN. § 30-9-2 (Michie, WESTLAW through 2003 1st Reg. Sess.); N.Y. PENAL LAW § 230.00 (McKinney, WESTLAW through 2003 Leg. Sess.); N.C. GEN. STAT. § 14-204 (WESTLAW through 2003 Reg. Sess.); N.D. CENT. CODE § 12.1-29-03 (WESTLAW through 2003 Gen. & Spec. Sess.); OHIO REV. CODE ANN. § 2907.25 (West, WESTLAW through Dec. 2, 2003); OKLA. STAT. ANN. tit. 21 § 1029 (West, WESTLAW through 2003 2d Reg. Sess.); OR. REV. STAT. § 167.007 (WESTLAW through 2001 Reg. Sess.); 18 PA. CONS. STAT. ANN. § 5902 (West, WESTLAW through Act 2003-25); R.I. GEN. LAWS § 11-34-1 (WESTLAW through Jan. 2002 Sess.); S.C. CODE ANN. § 16-15-90 (Law. Co-op., WESTLAW through 2003 Reg. Sess.); S.D. CODIFIED LAWS § 22-23-1 (Michie, WESTLAW through 2003 Reg. Sess.); TENN. CODE ANN. § 39-13-513 (WESTLAW through 2003 1st Reg. Sess.); TEX. PENAL CODE ANN. § 43.02 (Vernon, WESTLAW through 2003 3d Called Sess.); UTAH CODE ANN. § 76-10-1302 (WESTLAW through 2003 1st Sp. Sess.); VT. STAT. ANN. tit. 13, § 2632 (WESTLAW through 2003 Sess.); VA. CODE ANN. § 18.2-346 (Michie, WESTLAW through 2003 Reg. Sess.); WASH. REV. CODE ANN. § 9A.88.030 (West, WESTLAW through 2003 Reg. Leg.); W. VA. CODE § 61-8-5 (WESTLAW through 2003 2d Extra. Sess.); WIS. STAT. ANN. § 944.30 (West, WESTLAW through 2003 Act 55); WYO. STAT. ANN. 1977 § 6-4-101 (Michie, WESTLAW through 2003 Reg. Sess.).

4. See generally Stemler, *supra* note 1, at 192 (“Social morality, rather than concern for women’s safety, has deemed prostitution illegal . . . [c]onservative 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.”) (citing Belinda Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN’S RTS. L. REP. 99 (1989)).

5. *People ex. rel. Thrasher v. Smith*, 114 N.E. 31, 32 (Ill. 1916) (“The act (restraining appellants from maintaining, using, or permitting the use of premises for prostitution) was an exercise of the police power of the state, passed in the interest of the public welfare, for the preservation of good order and public morals.”).

6. *State v. Hicks*, 360 A.2d 150, 152-53 (Del. Super. Ct. 1976).

7. See, e.g., N.M. STAT. ANN. § 30-9-2 (Michie, WESTLAW through 2003 1st Reg. Sess.).

8. *State v. Clark*, 43 N.W. 273, 273 (Iowa 1889) (“[I]f a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act, or any device, she is a prostitute.”).

9. See, e.g., *Plas v. State*, 598 P.2d 966, 968 (Alaska 1979) (clause of prostitution statute prohibiting certain conduct “by a female” was invalid as in violation of equal protection because the statute “invidiously discriminat[ed] against females” by not criminalizing behavior capable by males).

10. See *infra* Part IV.

and illustrate the various and often subtle differences in the law among states. Part I of this article discusses the nature and elements of the offense of prostitution by focusing on sexual contact and compensation. Part II treats the issue of solicitation, which implicates both the prostitute and the patron. Part III discusses third-party conduct related to prostitution: pimping and pandering, with a focused emphasis on minors. Part IV addresses several valid and invalid defenses that are commonly raised to a charge of prostitution or its related offenses. While the statutes and cases of the state have developed the most comprehensive body of law on prostitution, exploring the federal perspective on prostitution is useful as a reference guide to the government's approach to regulating interstate conduct. Part V examines this issue.

While the law on prostitution has not achieved precise uniformity among the states, the vast body of prohibitions reinforces the idea that the widespread legalization and regulation of prostitution is unlikely to occur in the near future. However, it is useful to examine the legalization/decriminalization debate presently taking place in this country and elsewhere around the world. Part VI addresses the present realities of prostitution, in particular, the gender and racial inequalities and unequal protection and enforcement of the law. Part VII examines the dichotomous stance of feminist legal scholars concerning the decriminalization and legalization. Finally, Part VIII considers the unique example of the State of Nevada, and the legalization of prostitution within licensed houses.

I. NATURE AND ELEMENTS OF OFFENSE

A. SEXUAL CONTACT

The requisite degree of touching necessary to constitute prostitution differs among states. While the actual contact of the sexual organs of a man and woman must occur in some jurisdictions,¹¹ other states have extended the scope of prostitution to include fellatio,¹² the manual arousal of a sexual organ,¹³ the simulation of sexual intercourse¹⁴ or the touching of a woman's breasts.¹⁵ At least one court has held that actual touching need not be proven in order for the crime

11. See, e.g., *State v. Richardson*, 300 S.E.2d 379, 380-81 (N.C. 1983) (statute unequivocally defining prostitution as an act of sexual intercourse, and nothing else, did not encompass masturbation for hire).

12. See, e.g., *State v. Zeta Chi Fraternity*, 696 A.2d 530, 536 (N.H. 1977) ("Sexual penetration, as defined [by statute], does not require proof of actual penetration when act of fellatio is involved.").

13. See, e.g., *DLS, Inc. v. City of Chattanooga*, 894 F. Supp. 1140, 1146 (E.D. Tenn. 1995) ("Contact titillation at adult cabarets is tantamount to prostitution."); *State v. Wright*, 561 A.2d 659 (N.J. Super. Ct. App. Div. 1989) (statute prohibiting "sexual activity" could reasonably be understood to include manual arousal of a sexual organ).

14. *State v. Richie*, 960 P.2d 1227, 1238 (Haw. 1998) ("[T]ouching the sexual or intimate parts of another person, for a fee, constitutes 'prostitution,' even if the touching occurs through clothing.").

15. *State v. Oanes*, 543 N.W.2d 658, 661 (Minn. Ct. App. 1996) ([W]oman's breasts are "intimate parts" within prostitution statute's definition of sexual contact, which includes "intentional touching by an individual of a prostitute's intimate parts.").

of prostitution to occur.¹⁶

However, many courts require the level of sexual activity to extend to a certain point before the conduct will be considered prostitution. Most jurisdictions require the touching of genitals in order for a violation to occur.¹⁷ Yet some jurisdictions refuse to extend the prostitution statute to include masturbation,¹⁸ including self-masturbation for hire without any physical contact between performer and viewer¹⁹ or to include sado-masochistic acts such as foot-licking, spanking, domination and submission.²⁰ In Utah, an amended version of the prostitution statute was struck down as unconstitutionally vague by referring to “sexual activity,” in part, as “apparent or actual sexual stimulation or gratification” because the language of the statute would render some performances in dance or theater as prostitution.²¹

B. COMPENSATION

The compensatory element of the offense of prostitution often trumps sexual conduct to form the basis upon which the crime depends. In fact, some states do not require sexual activity to actually take place if proof of an agreement to accept financial profit from the activity exists.²² Most statutes do require some form of sexual conduct,²³ even if that activity occurs in a long-term relationship,²⁴ but ultimately, the crime of prostitution rests on monetary compensation.²⁵ Some jurisdictions stipulate that money need not change hands if a

16. *Commonwealth v. DeStefanis*, 658 A.2d 416, 420 (Pa. Super. Ct. 1995) (“[I]t is the mere offer of sexual activity that is important for purposes of prostitution; no actual touching need be proven.”) (citing *Commonwealth v. Danko*, 421 A.2d 1165, 1171 (Pa. Super. Ct. 1980)).

17. *State v. McKee*, 442 A.2d 440, 443 (R.I. 1982) (massage that included genital manipulation was prostitution); *State v. Tomlinson*, 446 N.W.2d 740, 741 (Neb. 1989) (the exchange of money for a massage that included genital manipulation constitutes prostitution); *State v. Boyd*, 925 S.W.2d 237, 243-44 (Tenn. Crim. App. 1996) (no sexual contact for purposes of prostitution statute unless touching of genitals occurred).

18. *State v. Mayfield*, 900 P.2d 358, 361 (N.M. Ct. App. 1995) (definition of masturbation, which included ‘erotic stimulation of genital organs by sexual fantasies,’ impermissibly extended scope of criminal conduct proscribed by statute that prohibits promoting prostitution).

19. *Commonwealth v. Bleigh*, 586 A.2d 450, 453 (Pa. Super. Ct. 1991) (sexual activity requires the physical interaction of two or more people).

20. *People v. Georgia*, 621 N.Y.S.2d 779, 781 (N.Y.Crim. Ct. 1994) (sexual conduct includes acts of masturbation, homosexuality, sexual intercourse or physical contact of the person’s clothed or unclothed genitals, buttocks or a woman’s breast, but cannot be read to include sado-masochistic acts).

21. *Guinther v. Wilkinson*, 679 F. Supp. 1066, 1070 (D. Utah 1988).

22. *State v. Sampson*, 387 A.2d 213, 216 (Me. 1978) (statute criminalizes mere agreement to accept a pecuniary benefit from the proceeds of prostitution, regardless of whether the agreement is actually performed).

23. *Commonwealth v. Johnson*, 670 A.2d 666, 669 (Pa. Super. Ct. 1996) (“In order for there to be prostitution, there must not only be sexual activity [such as] manual stimulation, but payment of money as well.”).

24. *Patten v. Raddatz*, 895 P.2d 633, 637 (Mont. 1995) (long-term agreement between the patron and the prostitute did not mitigate the “sex-for-money” nature of the relationship).

25. *State v. Baxley*, 633 So.2d 142, 145 (La. 1994) (mere discussion or solicitation without financial aspect cannot constitute attempt to engage in conduct prohibited by statute); *State v. Kittilstad*, 585

discussion of payment has taken place.²⁶ Additionally, the “fee” need not be in the form of money,²⁷ and can even be in the form of a discretionary tip paid in exchange for a sexual massage.²⁸ However, at least one state has held that prostitution can be committed before any discussion of payment or any exchange or money for sexual service, as long as the State can prove that the act was performed “for hire.”²⁹

II. SOLICITATION

Conduct considered prostitution includes the performance of sexual acts for a fee and the public solicitation of the performance.³⁰ The offense of solicitation encompasses the enticement of another to engage in sexual activity for hire, whether the patron or the prostitute initiates the act.³¹ To “solicit” means to entice, lure, urge or ask.³² The offense of solicitation does not require the act of prostitution to actually follow,³³ and even the quotation of prices for various sexual acts can constitute solicitation.³⁴ Solicitation is included within the prostitution statutes as an additional deterrent in order to control the proliferation of prostitutes in some areas.³⁵

Fifteen states have specific statutory stipulations against the solicitation of a person for the purpose of prostitution.³⁶ Thus, in many states the specific statutes

N.W.2d 925, 928 (Wis. Ct. App. 1998) (as long as someone compensates another for engaging in nonmarital sex, the elements of prostitution are met).

26. *People v. Emig*, 470 N.W.2d 504, 505 (Mich. Ct. App. 1991) (defendant could be convicted of violating anti-prostitution ordinance by agreeing to pay money to undercover police officer to perform fellatio on defendant, even if no specific fee was mentioned; it was sufficient if defendant told officer that they would determine her fee at a later time).

27. *Muse v. United States*, 522 A.2d 888, 891 (D.C. 1987) (gold necklace offered in exchange for sexual acts).

28. *Pak v. State*, 424 S.E.2d 292, 293 (Ga. Ct. App. 1992).

29. *Kim v. State*, 496 S.E.2d 272, 273 (Ga. Ct. App. 1998) (“[Masturbation for hire] does not require proof that money actually changed hands or that defendant was paid exact amount of money.”).

30. *McNeil v. State*, 739 A.2d 80, 82-83 (Md. 1999).

31. *State v. Swann*, 753 N.E.2d 984, 986 (Ohio Ct. App. 2001) (“In a soliciting case, the crime is in the asking. Although [the woman charged] agreed to the solicitation, the specific crime with which she was charged does not prohibit acceptance, only entreaty.”).

32. *Id.* at 985.

33. *City of Yakima v. Emmons*, 609 P.2d 973, 976 (Wash. Ct. App. 1980) (mere act of offering in sexual intercourse for a consideration is a violation of the law; no overt act is required to complete the offense).

34. *Andrews v. State*, 293 N.E.2d 799, 800 (Ind. Ct. App. 1973) (evidence that the defendant told an undercover police officer how much she charged for sexual intercourse, asked him if he had a car and told him the place was up to him was sufficient evidence to support a conviction for offering to commit an act of sexual intercourse for hire).

35. See *In re Monaghan*, 690 A.2d 476, 478 (D.C. 1997).

36. See CAL. PENAL CODE § 647 (West, WESTLAW through 2003-4 Reg. Sess., 1st Extra. Sess. through 2d Extra. Sess.); COLO. REV. STAT. ANN. § 18-7-202 (West, WESTLAW through 2003 1st Reg. Sess.); CONN. GEN. STAT. ANN. §53a-82(a) (West, WESTLAW through 2003 Jan. Reg. Sess., June 30 Spec. Sess., and Sept. 8 Spec. Sess.); FLA. STAT. ANN. § 796.07 (West, WESTLAW through 2003 Reg. Sess. & “A” Sess.); 720 ILL. COMP. STAT. ANN. 5/11-15 (West, WESTLAW through 2003 Reg. Sess.); LA.

prohibit the solicitation of customers for prostitution. The presence of a separate solicitation statute demonstrates the different aspects of the offense of prostitution and many states' desire to be overly inclusive rather than risk permissiveness in the field of prostitution law. Some states additionally prohibit the solicitation of child prostitution.³⁷ Other states include the solicitation of prostitution within the general statute.³⁸ In some jurisdictions, a statute that prohibits solicitation to induce another to commit any crime includes prostitution.³⁹

In the District of Columbia, prostitution itself is not a crime—only the solicitation of prostitution is illegal.⁴⁰ What the D.C. law brands as criminal is not the status of being a prostitute, but the act of offering to engage in some sort of sexual conduct for a fee.⁴¹ The law may not be used to circumvent a charge of prostitution—it merely frames the law around an act rather than reputation.⁴² The rationale for this distinction stems from *Robinson v. California*⁴³ and *Ricks v. D.C.*,⁴⁴ two cases that emphasize the magnitude of a criminal act and in doing so, work to set the District of Columbia, which highlights the offer of prostitution above any other element, apart from all other jurisdictions.

A. INTENT

States are split on whether the element of intent is essential for the offense of solicitation of prostitution. Texas is one state that does not consider intent as an element of solicitation.⁴⁵ While many other states do consider intent as a crucial

REV. STAT. ANN. § 14:83 (West, WESTLAW through 2002 1st Extra. Sess. & Reg. Sess.); MICH. COMP. LAWS ANN. § 750.448 (West, WESTLAW through 2003 Reg. Sess.); MINN. STAT. ANN. § 609.322 (West, WESTLAW through 2003 1st Sp. Sess.); MO. ANN. STAT. § 567.010 (West, WESTLAW through 2003 1st Reg. & 2d Extra. Sess.); OHIO REV. CODE ANN. § 2907.24 (West, WESTLAW through Dec. 2, 2003); TEX. PENAL CODE ANN. § 43.02(a)(2) (Vernon, WESTLAW through 2003 3d Called Sess.); UTAH CODE ANN. § 76-10-1313 (WESTLAW through 2003 1st Spec. Sess.); VT. STAT. ANN. tit. 13, § 2632(a)(6) (WESTLAW through 2003 Sess.); WIS. STAT. ANN. § 944.32 (West, WESTLAW through 2003 Act 55); WYO. STAT. ANN. § 6-4-102 (Michie, WESTLAW through 2003 Reg. Sess.).

37. COLO. REV. STAT. ANN. § 18-7-402 (West, WESTLAW through 2003 1st Reg. Sess.).

38. See, e.g., OKLA. STAT. ANN. tit 21, § 1029(A)(2) (West, WESTLAW through 2003 2d Reg. Sess.).

39. See ALA. CODE 1975 § 13A-14-1 (WESTLAW through 2003 Org. Sess.); ARIZ. REV. STAT. ANN. § 5-7-106(a)(2) (West, WESTLAW through 2003 Reg. Sess.).

40. *Welch v. United States*, 807 A.2d 596, 601 (D.C. 2002).

41. *Ford v. United States*, 533 A.2d 617, 626 (D.C. 1987).

42. In contrast, Virginia penalizes the status of being a prostitute. See VA. CODE ANN. § 18.2-346 (Michie, WESTLAW through 2003 Reg. Sess.). *But cf.* *Commonwealth v. King*, 372 N.E.2d 196, 203 (Mass. 1977) (if the prostitution statute were construed as punishing the status of being a prostitute, it would be rendered unconstitutional).

43. 370 U.S. 660, 667 (1962) (statute which makes the 'status' of narcotic addiction a criminal offense violates the constitutional ban on cruel and unusual punishment).

44. 414 F.2d 1097, 1110 (D.C. 1968) ("A citizen cannot be punished merely for being a suspicious person.").

45. *Frieling v. State*, 67 S.W.3d 462, 471 (Tex. App. 2002) ("The intent that must accompany future sexual contact need not accompany the offer or agreement to engage in sexual conduct.") (quoting *Cardenas v. State*, 640 S.W.2d 291, 292 (Tex. Crim. App. 1982)).

element of the offense,⁴⁶ a court may hold that the state, in prosecuting a solicitation offense, need not prove that the defendant actually intended to engage in sexual conduct for a fee.⁴⁷ In *Portland v. Miller*,⁴⁸ the court held that intent was a required element of the statute, and evidence that the defendant “hung around” in the manner of working prostitutes, without more, does not establish the requisite intent under the prostitution statute. The court reasoned “it is not a violation of law to look like a prostitute might.”⁴⁹ Additionally, a court may only consider the prostitute’s intent⁵⁰ or only the patron’s intent⁵¹ to determine whether an offer or agreement was made.

B. PATRONIZING A PROSTITUTE

Only recently have prostitution statutes been used to punish individuals who patronize prostitutes.⁵² Some states use one anti-solicitation statute for both

46. *State v. Allen*, 424 A.2d 651, 655 (Conn. Super. Ct. 1980) (“[G]eneral intent to do the prescribed act of one’s own volition is an element of [offering or agreeing to engage in sexual conduct for a fee].”).

47. *Glegola v. State*, 871 P.2d 950, 952 (Nev. 1994) (“Solicitation for prostitution is a general intent crime. [Thus], a person commits the crime of solicitation for prostitution if person offers, agrees, or arranges to provide sexual conduct for a fee.”). Note that Nevada criminalizes the solicitation of prostitution only when the solicitation occurs outside a licensed brothel or when the prostitute has tested positive by the state board of health for Human Immunodeficiency Virus. NEV. REV. STAT. 201.354 (WESTLAW through 2002 18th Spec. Sess.); NEV. REV. STAT. 201.358 (WESTLAW through 2002 18th Spec. Sess). However, the court in *Glegola* noted that “nearly all states have adopted prostitution or solicitation for prostitution statutes which define the offense as a general intent crime rather than a specific intent crime.” *Id.* Consequently, although Nevada’s statutes do not prohibit generally the solicitation of prostitution, the Nevada legislature adopted the “almost universal definition of solicitation” that does not obligate the state to prove that the defendant intended to actually engage in sexual conduct for a fee. *Id.*

48. 659 P.2d 980, 983 (Or. Ct. App. 1983).

49. *Id.*

50. *State v. Schwartz*, 935 P.2d 891, 897 (Ariz. Ct. App. 1996) (“[O]ffense of enticement requires proof that defendant knowingly entices another into a house of prostitution for the purpose of prostitution . . . enticement does not require that victim engage in what the enticer intends.”); *State v. Oanes*, 543 N.W.2d 658, 662 (Minn. Ct. App. 1996) (“The statute looks to intent of the prostitute to determine whether an offer or agreement was made, thus suggesting that the client’s subjective intent is not relevant.”); *State v. Ellis*, 853 S.W.2d 440, 444 (Mo. Ct. App.) (prostitution statute does not require proof of mutual understanding by person being solicited or approached and applies when the patron gives or agrees to give money in return for sex).

51. *United States v. Rashkovski*, 301 F.3d 1133, 1137 (9th Cir. 2002) (intent of defendant who coerced women to travel to the United States relevant to establish criminal liability, not the intent of the women); *Parrott v. Municipality of Anchorage*, 69 P.3d 1, 4 (Alaska Ct. App. 2003) (language intended to punish prospective customers of prostitutes as well as the prostitutes).

52. ARK. CODE ANN. § 5-70-103 (Michie, WESTLAW through 2003 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-205 (West, WESTLAW through 1st 2003 Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-83 (West, WESTLAW through 2003 Jan. Reg. Sess., June Spec. Sess. & Sept. 8 Spec. Sess.); IDAHO CODE § 18-5614 (Michie, WESTLAW through 2003 1st Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/11-18 (West, WESTLAW through 2003 Reg. Sess.); IND. CODE ANN. § 35-45-4-3 (West, WESTLAW through 2003 1st Reg. Sess.); KAN. STAT. ANN. § 21-3515 (West, WESTLAW through 2002 Reg. Sess.); ME. REV. STAT. ANN. 17-A, § 853-B (West, WESTLAW through 2003 1st Spec. Sess.); MICH. COMP. LAWS ANN. § 750.449a (West, WESTLAW through 2003 Reg. Sess.); MO. ANN. STAT. § 567.030 (West, WESTLAW through 2003 1st Reg. and 2d Extra. Sess.); N.M. STAT. ANN. § 30-9-3 (Michie, WESTLAW through

prostitutes and customers,⁵³ while other states have a separate statute aimed at those who patronize prostitutes. Some states have enacted statutes against patronizing a minor prostitute.⁵⁴ Additionally, the anti-patronizing statute may be violated when a person solicits another individual for sex for a fee, regardless of whether or not the person solicited is actually a prostitute.⁵⁵ Several policy rationales have led to the criminalization of patronizing a prostitute, including an increased focus on reducing prostitution rates and reducing gender discrepancies in the law to ensure that females are not disproportionately prosecuted under the prostitution statutes.⁵⁶ However, some jurisdictions do not prosecute the customers of a prostitute.⁵⁷

III. PIMPING AND PANDERING

Often used interchangeably, the terms “pimping” and “pandering” refer to acts by third parties that promote the prostitution of others. Specifically, “pimping” refers to living off the earnings of a prostitute, either by receiving compensation or soliciting compensation,⁵⁸ while “pandering” describes the act of procuring a prostitute for a patron or compelling an individual to exchange sexual acts for a fee. Both pimping and pandering are prohibited by statutes,⁵⁹ which aim to

2003 1st Reg. Sess.); N.Y. PENAL LAW § 230.03-.06 (McKinney, WESTLAW through 2003 Leg. Sess.); OR. REV. STAT. § 167.007(1)(b) (WESTLAW through 2001 Reg. Sess.); 18 PA. CONS. STAT. ANN. § 5902(e) (West, WESTLAW through Act 2003-25); TENN. CODE ANN. § 39-13-514 (WESTLAW through 2003 1st Reg. Sess.); WIS. STAT. ANN. § 944.31 (West, WESTLAW through 2003 Act 55).

53. See *McNeil v. State*, 739 A.2d 80, 82-83 (Md. 1999) (statutory offense of soliciting for prostitution covers conduct not only of prostitute and his/her agents in soliciting potential customers, but also the conduct of potential customer in soliciting prostitute); see also MONT. CODE ANN. § 45-5-601(1) (WESTLAW through 2003 Reg. Sess. of the 58th Leg.).

54. See, e.g., COLO. REV. STAT. ANN. § 18-7-406 (West, WESTLAW through 2003 1st Reg. Sess.); N.C. GEN. STAT. § 14-190.19 (WESTLAW through 2003 Reg. Sess.); S.C. CODE ANN. § 16-15-425 (Law. Co-op., WESTLAW through 2003 Reg. Sess.).

55. See *People v. Bronski*, 351 N.Y.S.2d 73, 75 (Crim. Ct. 1973) (statute providing that a person is guilty of patronizing a prostitute is violated when one person selects another person to engage in sexual conduct with him in return for a fee and it is immaterial whether the person solicited is or is not a prostitute).

56. See *State v. McCollum*, 464 N.W.2d 44, 51-52 (Wis. Ct. App. 1990) (state violated Equal Protection by selectively prosecuting female offenders and not male customers under the prostitution statute).

57. See *State v. Chandonnet*, 474 A.2d 578, 579 (N.H. 1984) (statute proscribing prostitution and related conduct does not proscribe patronizing a prostitute or solicitation by a would-be patron).

58. See *People v. Smith*, 279 P.2d 33, 34-35 (Cal. 1955) (under statute making one who solicits or receives compensation for soliciting a prostitute guilty of “pimping,” the offense may be committed either by receiving compensation or by soliciting compensation for soliciting a prostitute, but not by merely soliciting a customer for a prostitute).

59. Many states have statutes that prohibit against living off the earnings of a prostitute. See, e.g., ARIZ. REV. STAT. ANN. § 13-3204 (West, WESTLAW through Dec. 2, 2003); CAL. PENAL CODE § 266h (West, WESTLAW through 2003-4 Reg. Sess., 1st Extra. Sess. through 2d Extra. Sess. of Spec. “A” Sess.); COLO. REV. STAT. ANN. § 18-7-206 (West, WESTLAW through 2003 1st Reg. Sess.); FLA. STAT. ANN. § 796.05 (West, WESTLAW through 2003 1st Reg. Sess.); IDAHO CODE § 18-5606 (Michie, WESTLAW through 2003 1st Reg. Sess.); MD. CODE ANN., CRIMINAL, § 11-304

regulate action taken by the agents of prostitutes, rather than the prostitutes themselves.⁶⁰

A. PIMPING

The essential elements of the crime of receiving earnings from prostitution are that the money or thing of value received must have been earned in prostitution and that it must have been received without legal consideration.⁶¹ However, if a prostitute pays a storekeeper for food or a physician for medical services with earnings derived from prostitution, the storekeeper or physician will not be held guilty for accepting the earnings without consideration, even if the party is aware of the prostitute's trade and source of earnings.⁶² The individual need not directly receive the earnings from the prostitute in order to sustain a conviction for pimping. It is enough that the individual receive the money from a third person,⁶³ or that the individual receive the money directly from the prostitute's customer.⁶⁴

(West, WESTLAW through 2003 Reg. Sess.); MICH. COMP. LAWS ANN. § 750.457 (West, WESTLAW through Reg. Sess.); W. VA. CODE § 61-8-8 (WESTLAW through 2003 2d Extra. Sess.). Additionally, most states have pandering statutes that prohibit procuring a prostitute for a third party. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3209 (West, WESTLAW through legislation effective Oct. 23, 2003); ARK. CODE ANN. § 5.70.104-6 (Michie, WESTLAW through 2003 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-203 (West, WESTLAW through 2003 1st Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-86 to 88 (West, WESTLAW through 2003 Jan. Reg. Sess., June Spec. Sess. & Sept. 8 Spec. Sess.); FLA. STAT. ANN. § 796.03 and .04 (West, WESTLAW through 2003 1st Reg. Sess. and 2003 Spec. "A" Sess.); IDAHO CODE § 18-5602 (Michie, WESTLAW through 2003 1st Reg. Sess.); IND. CODE ANN. § 35-45-4-4 (West, WESTLAW through 2003 1st Reg. Sess.); IOWA CODE ANN. § 725.3 (West, WESTLAW through 2003 Reg. Sess.); MD. CODE ANN., CRIMINAL § 11-303 (WESTLAW through 2003 Reg. Sess.); MICH. COMP. LAWS ANN. § 750.455 (West, WESTLAW through 2003 Reg. Sess.); NEV. REV. STAT. 201.300 (WESTLAW through 2002 18th Spec. Sess.); N.C. GEN. STAT. § 14-204 (WESTLAW through 2003 Reg. Sess.); N.D. CENT. CODE § 12.1-29-01 (WESTLAW through 2003 Gen. & Spec. Sess.); OHIO REV. CODE ANN. § 2907.21 and .22 (West, WESTLAW through Dec. 2, 2003); OKLA. STAT. ANN. tit. 21 § 1081 (West, WESTLAW through 2003 2d Reg. Sess.); TEX. PENAL CODE ANN. § 43.03 and .04 (Vernon, WESTLAW through 2003 3d Called Sess.). One state proscribes both pimping and pandering in one statute. VA. CODE ANN. § 18.2-356 (Michie, WESTLAW through 2003 Reg. Sess.)

60. *See State v. Basden*, 196 P.2d 308, 312 (Wash. 1948) (pimping and pandering statute aimed at limiting prostitution, but is directed against those who promote or profit from prostitution, rather than the prostitutes themselves).

61. *State v. Govan*, 123 N.W.2d 110, 113 (N.D. 1963).

62. *State v. Harris*, 396 S.W.2d 585, 588 (Mo. 1965) (exception is justified because it does not place a person in prostitution or encourage prostitution).

63. *People v. Coronado*, 203 P.2d 863, 864 (Cal. Ct. App. 1949) (evidence that the defendant knew that girl was a prostitute, that defendant took girl and third person in his automobile to labor camps so that girl could engage in prostitution, that girl paid money received from prostitution to third person, that third person gave part of the money to defendant, who knew the money had been earned by girl in prostitution, and that defendant used the money to replenish oil and gasoline in automobile was sufficient to sustain conviction of pimping).

64. *People v. Navarro*, 212 P. 403, 404 (Cal. Ct. App. 1922) (though accused did not receive any money from a prostitute, evidence that he stood at the door of her room and received the money from men who entered, without giving any of it to her, was sufficient to prove that he solicited and received compensation for soliciting for a prostitute).

Additionally, some states hold that an individual will only be charged with the crime of pimping if he or she receives ongoing support from the prostitute, and an isolated occurrence will not trigger the statute.⁶⁵ However, other states have held that an ongoing relationship between the defendant and the prostitute is not required.⁶⁶

Knowledge of the prostitute's action is required under various statutes. For example, in *Wooten v. Superior Court*,⁶⁷ a dancer touching a police officer's penis did not implicate the club managers of pimping when no evidence existed that the managers were aware of the dancer's offer. However, knowledge may not be an essential element in every state. In *State v. Akridge*,⁶⁸ the Washington Court of Appeals restated the holding of *State v. Zenner*⁶⁹ that knowledge is not an essential element of the crime of accepting the earnings of a prostitute.

Some states have specific statutes prohibiting the pimping of juveniles.⁷⁰ These statutes carry stricter consequences, such as prosecution for a felony, if the prostitute is under the age of eighteen.

B. PANDERING

1. Generally

Whether an individual may be charged with pandering may depend on the status of the woman or man who is enticed to become a prostitute. In *People v. Morey*,⁷¹ the Supreme Court of Michigan interpreted the plain language of the pandering statute, which contained the phrase "to become a prostitute." The Court determined that the phrase referred to a change in status, as a result of a woman developing into an individual who engages in sexual intercourse for money, rather than the procurement of a woman who was already a prostitute for

65. See *State v. Arnold*, 351 So. 2d 442, 448 (La. 1977) (proof that defendant on one occasion received money without any evidence of his purpose in accepting money, his past similar acts in accepting such money, or any other evidence which would go toward proving that defendant intended to receive and use money in question to support himself does not constitute "some evidence" that money was received as support or maintenance).

66. See *People v. Jackson*, 170 Cal. Rptr. 476, 477-78 (Cal. Ct. App. 1980) (evidence of single act of prostitution of young woman whom defendant had induced to become a prostitute was sufficient to sustain defendant's conviction for pimping; an ongoing relationship between defendant and the prostitute was not required).

67. 113 Cal. Rptr. 2d 195, 207 (Cal. Ct. App. 2001).

68. 472 P.2d 621, 622 (Wash. Ct. App. 1970).

69. 77 P. 191, 191 (Wash. 1904) ("Where the statutes are silent as to any scienter . . . it will not be necessary to allege and prove affirmatively that the defendant knew the relationship existing between him and the [participant].").

70. 720 ILL. COMP. STAT. ANN. 5/11-19.1 (West, WESTLAW through 2003 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 272, § 4B (West, WESTLAW through 2003 1st Sess.).

71. 603 N.W.2d 250, 254-56 (Mich. 1999) ("It is reasonable to presume that the Legislature intended to punish separately and more severely those individuals who persuade or attempt to persuade a female to begin performing acts of prostitution.").

an individual act of prostitution. However, not all states share this view.⁷² In *People v. Patton*,⁷³ the state was not required to prove that the complaining witness would not have engaged in prostitution except for the encouragement or inducement of the defendant.

The specific intent to entice an individual to become a prostitute is required under a pandering statute.⁷⁴ The “intent” or “knowing” requirement translates to a “high probability” that the defendant is procuring a prostitute for another person.⁷⁵

An act of prostitution is not an element of the offense of pandering. An individual may be convicted for pandering even if no act of prostitution actually takes place.⁷⁶ A charge for pandering may suffice if the person arranges or offers to arrange a situation in which prostitution will occur.⁷⁷

2. Regarding Minors

Nearly every state has enacted statutory prohibitions against the exploitation of minors for the purposes of prostitution. These statutes have stricter consequences for pandering than if the prostitute is an adult. If the prostitute is less than the stipulated age, the individual will be charged for pandering in the first degree or advanced exploitation of a minor, typically a felony. However, states vary according to the age the child must be in order to qualify for purposes of the statute. Some statutes stipulate that the child be less than sixteen years of age,⁷⁸

72. See *People v. Bradshaw*, 107 Cal. Rptr. 256, 259 (Cal. Ct. App. 1973) (“Offense of causing, inducing, persuading, and encouraging another to become a prostitute does not require that defendant either know or believe that solicitee has not been a prostitute before.”).

73. 133 Cal. Rptr. 533, 536 (Cal. Ct. App. 1976) (statute covers behavior by an “innocent or experienced” woman).

74. Without the element of intent, the individual has committed the offense of aiding and abetting the act of prostitution, rather than the offense of pandering. See *People v. Mathis*, 219 Cal. Rptr. 693, 696 (Cal. Ct. App. 1985).

75. *Jones v. State*, 766 N.E.2d 1258, 1263-64 (Ind. Ct. App. 2002) (“[S]tatutory intent was not to require a showing of conduct designed to effectuate the act of prostitution to show a defendant’s guilt [P]rocurement includes a broad range of prohibited behaviors that involve initiating, continuing, bringing about, effecting, or causing.” The evidence that defendant told the officer that she would be able to get him oral sex for sixty-five dollars, and that the prostitute immediately began performing an act of prostitution upon entering the room provided the basis for a reasonable inference that the defendant knew the prostitute would commit the act and prevailed upon her to engage in the prohibited conduct.)

76. *State v. Clark*, 406 N.W.2d 802, 805 (Iowa Ct. App. 1987) (conviction for pandering when defendant arranged for decoy to become prostitute even though no act of prostitution was actually committed).

77. *Id.*

78. ALA. CODE 1975 § 13A-12-111 (WESTLAW through 2003 Org. Sess.); ALASKA STAT. § 11.66.110(2) (Michie, WESTLAW through 2003 1st Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-86(a)(2) (West, WESTLAW through 2003 Jan. Reg. Sess., June 30 Spec. Sess., & Sept. 8 Spec. Sess.); DEL. CODE ANN. tit. 11, § 1353(2) (WESTLAW through 2003 1st Reg. Sess.); D.C. CODE ANN. § 22-2704 (WESTLAW through Dec. 2, 2003); HAW. REV. STAT. ANN. § 712-1202(1)(b) (Michie, WESTLAW through 2003 Reg. and Spec. Sess.); 720 ILL. COMP. STAT. ANN. 5/11-19.1 and 19.2 (West, WESTLAW through 2003 Reg. Sess.); KAN. STAT. ANN. § 21-3513(3) (WESTLAW through 2002 Reg. Sess.); MD.

some statutes mandate less than seventeen years of age,⁷⁹ other states will charge under stricter standards if the child is less than eighteen years of age⁸⁰ and some statutes make twenty-one years of age the standard.⁸¹ Mississippi uses age fourteen as the stricter standard for procuring a prostitute.⁸²

No actual act of prostitution is needed in order to prove charge for pandering a minor.⁸³ Additionally, knowledge of the minor's age may not be an essential element for the crime of exploitation of a minor.⁸⁴ Intent to commit the crime is required, even if the individual promoting the prostitution of a minor is not physically present when the act occurs.⁸⁵

CODE ANN., CRIMINAL § 11-305 (WESTLAW through 2003 Reg. Sess.); MICH. COMP. LAWS ANN. § 750.462 (West, WESTLAW through 2003 Reg. Sess.); MO. ANN. STAT. § 567.050 (1)(2) (West, WESTLAW through 2003 1st Reg. & 2d Extra Sess.); N.M. STAT. ANN. § 30-6A-4(a) (Michie, WESTLAW through 2003 1st Reg. Sess.); N.D. CENT. CODE § 12.1-29-02(2) (WESTLAW through 2003 Gen. & Spec. Sess.); OKLA. STAT. ANN. tit. 21, § 1029(B) (West, WESTLAW through 2003 2d Reg. Sess.); R.I. GEN. LAWS § 11-9-1(a) (WESTLAW through 2002 Jan. Sess.).

79. NEB. REV. STAT. § 28-805 (WESTLAW through 2003 1st Reg. Sess.); N.Y. PENAL LAW § 230.04 (McKinney, WESTLAW through 2003 Leg. Sess.); TEX. PENAL CODE ANN. § 43.05(a)(2) (Vernon, WESTLAW through 2003 3d Called Sess.).

80. ARIZ. REV. STAT. ANN. § 13-3212 (West, WESTLAW through Dec. 2, 2003); ARK. CODE ANN. § 5-70-104(a)(2) (Michie, WESTLAW through 2003 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-402 (West, WESTLAW through 2003 1st Reg. Sess.); FLA. STAT. ANN. § 796.03 (West, WESTLAW through 2003 Reg. Sess. & Spec. "A" Sess.); GA. CODE ANN. § 16-6-13(b) (WESTLAW through 2003 Reg. Sess.); IDAHO CODE § 18-5609 (Michie, WESTLAW through 2003 1st Reg. Sess.); IND. CODE ANN. § 35-45-4-4(5) (West, WESTLAW through 2003 1st Reg. Sess.); IOWA CODE ANN. § 725.3(2) (West, WESTLAW through 2003 Reg. Sess.); KY. REV. STAT. ANN. § 529.030(1)(b) (Banks-Baldwin, WESTLAW through 2003 Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 855-1 (West, WESTLAW through 2003 1st Spec. Sess.); MASS. GEN. LAWS ANN. ch. 272, § 4A (West, WESTLAW through Ch. 172 of the 2003 1st Annual Sess.); MINN. STAT. ANN. § 609.322(1) (West, WESTLAW through 2003 1st Sp. Sess.); MONT. CODE ANN. § 45-5-603(1)(b) (WESTLAW through 2003 Reg. Sess. of the 58th Leg.); N.H. REV. STAT. ANN. § 645:2(II)(a) (WESTLAW through 2003 Reg. Sess.); N.J. STAT. ANN. § 2C:34-1(b)(3) (West, WESTLAW through 2002 2d Ann. Sess.); N.C. GEN. STAT. § 14-190.18 (WESTLAW through 2003 Reg. Sess.); OHIO REV. CODE ANN. § 2907.21(A)(2) (West, WESTLAW through Dec. 2, 2003); OR. REV. STAT. § 167.017(1)(b) (WESTLAW through 2001 Reg. Sess.); 18 PA. CONS. STAT. ANN. § 6318(a)(3) (West, WESTLAW through Act 2003-25); S.C. CODE ANN. § 16-15-415 (Law. Co-op., WESTLAW through 2003 Reg. Sess.); S.D. CODIFIED LAWS § 22-23-2(2) (Michie, WESTLAW through 2003 Reg. Sess.); UTAH CODE ANN. § 76-10-1306(1)(b) (WESTLAW through 2003 1st Spec. Sess.); WASH. REV. CODE ANN. § 9A.88.070(1)(b) (West, WESTLAW through 2003 Reg. Sess.); W. VA. CODE § 61-8-7 (WESTLAW through 2003 2d Extra. Sess.); WIS. STAT. ANN. § 948.07 (West, WESTLAW through 2003 Act 55); WYO. STAT. ANN. 1977 § 6-4-103(b) (Michie, WESTLAW through 2003 Reg. Sess.).

81. LA. REV. STAT. ANN. § 14:86 (West, WESTLAW through 2002 1st Extra. & Reg. Sess.).

82. MISS. CODE ANN. § 97-5-5 (WESTLAW through 2003 Reg. Sess.).

83. *Horde v. State*, 494 So. 2d 162, 164 (Ala. Crim. App. 1986) (state was not required to show that an act of prostitution was consummated in order to sustain its burden of proof in prosecution for promoting prostitution of a minor).

84. *State v. Gilmour*, 522 N.W.2d 595, 597 (Iowa 1994).

85. *State v. Modest*, 944 P.2d 417, 423 (Wash. Ct. App. 1997) (evidence was sufficient to sustain convictions for being an accomplice to rape of a child and promoting prostitution, despite defendant's contention that because he was in jail at time of charged crimes it was impossible for him to be an accomplice; defendant could be an accomplice if he knowingly participated in the crime by soliciting, commanding or encouraging another to commit it, and numerous witnesses testified that defendant frequently called on the telephone and directed the running of prostitution ring out of his wife's home, he

Pandering a minor for the purposes of prostitution can be distinguished from the solicitation of a minor. An adult who attempts to induce a minor to have sex with him or her commits solicitation; in contrast, pandering specifically requires that the adult procure the minor to have sexual activity for a fee with a third person.⁸⁶

IV. DEFENSES TO THE CHARGE OF PROSTITUTION

A. VALID DEFENSES

Four defenses to prostitution are accepted by courts: Lack of knowledge that the man or woman with whom the defendant engaged in sex with was a prostitute, entrapment, ignorance of age of the prostitute and a marital exemption. However, all four of these defenses are limited in scope to prevent overt abuses and may not be accepted by all jurisdictions.

1. Lack of Knowledge

Lack of knowledge may be an affirmative defense to a charge of prostitution,⁸⁷ but the State need not prove that the defendant had knowledge that the woman was a prostitute. The defense may be used against a charge of patronizing or pimping a prostitute.⁸⁸ However, while the defendant may be able to claim he or she lacked knowledge that the individual from whom he or she accepted money or with whom he or she had a sexual encounter was a prostitute, the thrust of the defense may be weak.

2. Entrapment

The defense of entrapment may be available for the offenses of prostitution, pimping and pandering, but the individual charged must show that he or she was induced by a law enforcement officer to commit the offense which he or she would not have committed without such inducement and had no intention of committing.⁸⁹ In *People v. West*,⁹⁰ the California Superior Court validated the use of the defense of entrapment in the prosecution of a motel manager for procuring

ordered teenage prostitutes to go to the mall to recruit more young women, he directed them to charge certain fees for certain acts, he told wife how much money to deposit in his jail account from proceeds of prostitution and he directed sexual abuse punishment).

86. *Kobel v. State*, 745 So. 2d 979, 982 (Fla. 1999) (defendant committed either solicitation or child abuse, rather than procurement, when he attempted to induce boy to perform oral sex on him).

87. *State v. Cashaw*, 480 P.2d 528, 533 (Wash. Ct. App. 1971) (lack of knowledge as an affirmative defense validated) (*citing State v. Zenner*, 77 P. 191 (Wash. 1904)).

88. Courts may allow the defense of lack of knowledge to be used for other related prostitution crimes; however, the defense would lack merit in a claim of lack of knowledge of procuring a prostitute, which indicates willful activity on the part of the individual, or if the defense was used by the prostitute in a charge for exchanging sexual activity for a fee. To this end, there is no ready affirmative defense available to an unmarried woman or man charged as a prostitute.

89. *Thomas v. State*, 290 S.W.2d 680, 681 (Tex. Crim. App. 1956) (where officers on information went to an address and there met defendant who introduced officers to a woman who agreed to sexual

another to patronize prostitutes. The issue of entrapment was raised by evidence that the officer, posing as a student, repeatedly, over a period of more than a month, requested defendant to procure a prostitute for him and that she finally referred him to a prostitute in effort to get rid of him.⁹¹

3. Ignorance of Age

A state may offer the defense of ignorance of age to an individual charged with patronizing a minor prostitute, if the patron had no reason to know the person was less than the age specified. New York allows defendants to use this defense,⁹² which lessens the consequences of patronizing a minor if the defendant is convicted.

4. Marriage

A marital exemption exists for the crime of prostitution. A husband who pays his wife a fee for sex has not committed a crime. An expanded zone of privacy attaches to the marital relationship, and interference by the state into the intimacies of this relationship would violate this right to privacy.⁹³ Sexual acts between married persons in consideration of money or other things of value are excluded from the definition of the offense of prostitution.⁹⁴

The defense of marriage is limited in some contexts. The marital exemption cannot be used as a shield when used to promote indiscriminate commercial sex.⁹⁵ Additionally, some states have declared marriage to be no defense to a

intercourse for a specified price, defendant could not claim that she was entrapped into the act of procuring by the officers).

90. 293 P.2d 166, 166 (Cal. Super. Ct. 1956).

91. *Id.* at 167-68.

92. In New York, there are differing degrees of severity regarding patronizing a prostitute. A person patronizes a prostitute in the fourth degree when he patronizes a prostitute. Patronizing a prostitute in the fourth degree is a Class B misdemeanor. N.Y. PENAL LAW § 230.03 (McKinney, WESTLAW through 2003 Leg. Sess.). A person is guilty of patronizing a prostitute in the third degree when, being over twenty-one years of age, he patronizes a prostitute and the person patronized is less than seventeen years of age. Patronizing a prostitute in the third degree is a Class A misdemeanor. N.Y. PENAL LAW § 230.04 (McKinney, WESTLAW through 2003 Leg. Sess.). A person is guilty of patronizing a prostitute in the second degree when, being over eighteen years of age, he patronizes a prostitute and the person patronized is less than fourteen years of age. Patronizing a prostitute in the second degree is a Class E felony. N.Y. PENAL LAW § 230.05 (McKinney, WESTLAW through 2003 Leg. Sess.). A person is guilty of patronizing a prostitute in the first degree when he patronizes a prostitute and the person patronized is less than eleven years of age. Patronizing a prostitute in the first degree is a Class D felony. N.Y. PENAL LAW § 230.06 (McKinney, WESTLAW through 2003 Leg. Sess.). The defense applies to the first, second, and third degrees. N.Y. PENAL LAW § 230.07 (McKinney, WESTLAW through 2003 Leg. Sess.).

93. *Cherry v. Koch*, 491 N.Y.S.2d 934, 945 (Sup. Ct. 1985).

94. *People v. Mason*, 642 P.2d 8, 12 (Colo. 1982) (statute that distinguishes between married and unmarried persons does not violate equal protection or due process because the privacy interest of married persons in their sexual relations as well as the health and safety hazard associated with commercial sexual activity between unmarried persons provide a rational basis for the statutory difference).

95. *Cherry*, 491 N.Y.S.2d at 945.

charge of prostitution,⁹⁶ or have developed statutes opposing a husband placing his wife in a house of prostitution.⁹⁷

B. INVALID DEFENSES

1. Impossibility

In many states, the defendant may not raise the defense of impossibility. In *Files v. Bernal*,⁹⁸ the defendant solicited an undercover police officer for sex in exchange for “at least forty dollars,”⁹⁹ and was arrested. The defendant argued that because the officer “was not a true prostitute,” the common law defense of impossibility precluded his prosecution. The court rejected his argument, noting that defense of impossibility “no longer exists in Arizona,”¹⁰⁰ and holding that the defendant violated the statute by offering to engage in an act of prostitution with the officer.

2. Reliance on Outdated Version of Statute

Reliance on an outdated version of a statute does not negate intent to commit crime of prostitution. In *Commonwealth v. Cohen*,¹⁰¹ the defendant relied on a previous case, *Commonwealth v. Jayne Dougan*,¹⁰² which ruled that masturbation for hire did not constitute “sexual activity” so as to be covered by the prostitution statute. The defendant’s reliance on the overruled statute did not negate his intent to commit the crime of prostitution. The court held that the statute gave reasonable notice of the conduct which it proscribed, and therefore did not violate the “fair warning”¹⁰³ requirement of the Due Process clause. The court further noted “all that is required [by the Constitution] is that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.”¹⁰⁴ When the court examined the “common and approved usage” of the term “sexual activity,” it found that “there is no doubt that masturbation for hire falls within the statute’s proscription.”¹⁰⁵

3. Privacy Rights

Courts—including the Supreme Court—have recognized some privacy rights for unmarried individuals to engage in acts of sexual inti-

96. See, e.g., CAL. PENAL CODE § 266g (West, WESTLAW through 2003-4 Reg. Sess., 1st Extra. Sess., through 2d Extra. Sess.); W.VA. CODE § 61-8-7 (WESTLAW through 2003 2d Extra. Sess.).

97. See ARIZ. REV. STAT. ANN. § 13-3205 (West, WESTLAW through Dec. 2, 2003).

98. 22 P.3d 57 (Ariz. Ct. App. 2001).

99. *Id.* at 58.

100. *Id.* at 59.

101. 538 A.2d 582 (Pa. Super. Ct. 1988).

102. 5 Pa.D. & C.3d 406 (Pa. Commw. Ct. 1977).

103. The “fair warning” requirement prohibits the States from holding an individual criminally responsible for conduct that could not reasonably understand to be proscribed. *Cohen*, 538 A.2d at 583.

104. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)).

105. *Id.* at 584.

macy,¹⁰⁶ but have qualified these rights to exist only in a noncommercial, private setting.¹⁰⁷ The privacy rights, which might be recognized with regard to sexual conduct of consenting adults in private, cannot be raised in defense of the commission of prostitution on premises to which the public has access.¹⁰⁸ The constitutional right of privacy under the federal and state constitutions has never been intended to encompass “prostitutes plying their trade on the street.”¹⁰⁹

4. Payment by Third Party

Nothing in case law or statute negates the crime of prostitution if paid for by a third party.¹¹⁰ The rationale for the rejection of this defense stems from an unwillingness of courts to allow defendants to use uninvolved third parties as a shield against prosecution under the various prostitution statutes.

5. Sex of the Parties

Several state legislatures have promulgated statutes prohibiting the defense of sex of the parties in a prosecution for prostitution.¹¹¹ These statutes reflect both a desire for states to regulate the commercialization of sex without regard to the gender of the parties¹¹² and to eradicate the sex discrimination that the language of prostitution statutes, as applied only to women, endorsed.¹¹³

6. Gainful Employment

Gainful employment is not a defense to a charge of pimping and pandering, by either a female or male.¹¹⁴ Defendants to prostitution charges have claimed that

106. *Lawrence v. Texas*, 539 U.S. ___, 123 S.Ct. 2472, 2477 (2003).

107. *See State v. Mueller*, 671 P.2d 1351, 1360 (Haw. 1983); *State v. Eighth Jud. Dist. Ct. of the State of Nevada*, 668 P.2d 282, 283 (Nev. 1983); *People v. Onofre*, 434 N.Y.S.2d 947, 949 (1980).

108. *Com. v. Bucaulis*, 373 N.E. 2d 221, 226 (Mass. Ct. App. 1978).

109. *State v. Allen*, 424 A.2d 651, 655 (Conn. Super. Ct. 1980).

110. *People v. Fixler*, 128 Cal. Rptr. 363, 365 (Ct. App. 1976) (prosecution of a photographer and a “photo editor” for a publisher of various magazines devoted to the depiction of sexual activity was not precluded by fact that money paid to 14-year-old girl who engaged in lewd acts and sexual intercourse while “modeling” for photographs was provided by nonparticipants in the sexual activity).

111. CONN. GEN. STAT. ANN. § 53a-84 (West, WESTLAW through 2003 Jan. Reg. Sess., June Spec. Sess. & Sept. 8 Spec. Sess.); DEL. CODE ANN. tit. 11, § 1344 (WESTLAW through 2003 1st Reg. Sess.); N.Y. PENAL LAW § 230.10 (McKinney, WESTLAW through 2003 Leg. Sess.); WASH. REV. CODE ANN. § 9A.88.050 (West, WESTLAW through 2003 Reg. Sess.).

112. *People v. Medina*, 685 N.Y.S.2d 599, 601 (Crim. Ct. 1999) (term “sexual conduct” in prostitution statute may encompass acts between two males because the purpose of the statute is to prohibit the commercial exploitation of sexual gratification).

113. *Holloway v. Birmingham*, 317 So. 2d 535, 540 (Ala. Crim. App. 1975) (“The penalization of a female who offers her body to indiscriminate sexual activity for hire—to the exclusion of the male who offers to pay for a female’s participation in sexual activity or the male who offers his body to indiscriminate lewdness—must, at first glance, be characterized as a most blatant manifestation of the legal oppression of women.”) (*quoting* Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373, 381-411 (1973)).

114. *People v. Courtney*, 1 Cal. Rptr. 789, 793 (Ct. App. 1960).

they had sufficient income from other sources to prove that they were not involved in the crime of prostitution, pimping, or pandering. However, courts reject the use of this defense¹¹⁵ and state that if earnings from prostitution are received knowingly and applied to the support of the accused person, the individual will be guilty regardless of his or her wealth, possessions or legitimate income from other sources.¹¹⁶

V. THE FEDERAL GOVERNMENT AND PROSTITUTION

Under the Mann Act,¹¹⁷ no individual may transport¹¹⁸ or persuade, induce, entice or coerce any individual to travel in interstate or foreign commerce to engage in prostitution.¹¹⁹ It is not necessary for the individual who is intended to engage in prostitution to know of the purpose of the travel.¹²⁰ However, an owner of a house of prostitution cannot be convicted of causing transportation in interstate commerce for immoral purposes merely because women travel to the house from other states for employment.¹²¹ Both males and females may be prosecuted under the Act.¹²²

Federal law prohibits the transportation of minors for illegal sexual activity.¹²³ The defendant must “knowingly transport an individual who has not attained the age of 18 years” to fall under the confines of the statute. Ignorance of the victim’s age is no defense to the statute,¹²⁴ regardless of what the victim says or how the victim appears. The transporter assumes the risk that the victim is a minor even without the specific knowledge of the victim’s age.¹²⁵ Intent is an element of the offense of transporting a minor in interstate commerce with the intent that she engage in prostitution.¹²⁶ The statute also applies at the state level due to the compelling interest in protecting underage persons from being abused or exploited.¹²⁷

115. *People v. Jackson*, 275 P.2d 802, 804 (Cal. Ct. App. 1954).

116. *People v. Coronado*, 203 P.2d 862, 865 (Cal. Ct. App. 1949).

117. Also known as the “White Slave Traffic Act.”

118. 18 U.S.C.A. § 2421 (West, WESTLAW through Dec. 2, 2003).

119. 18 U.S.C.A. § 2422 (West, WESTLAW through Dec. 2, 2003).

120. *Prdjun v. United States*, 237 F. 799, 799 (6th Cir. 1916).

121. *McGuire v. United States*, 152 F.2d 577, 579 (8th Cir. 1946).

122. *United States v. Prater*, 518 F.2d 817, 819 (7th Cir. 1975).

123. 18 U.S.C.A. § 2423 (West, WESTLAW through Dec. 2, 2003).

124. *United States v. Griffith*, 284 F.3d 338, 349 (2d Cir. 2002) (statute setting forth offense of transporting a minor with intent that the minor engage in prostitution did not require proof that defendants knew their victims were under the age of eighteen); *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001) (conviction for transporting a minor for the purposes of prostitution does not require proof that the defendant was aware that the person being transported was a minor).

125. *Taylor*, 239 F.3d at 997.

126. *United States v. Starks*, 17 Fed. Appx. 530, 533 (9th Cir. 2001); *United States v. Cole*, 262 F.3d 704, 708 (8th Cir. 2001) (defendant must develop illicit intent that minor engage in illegal sexual activity before the conclusion of the interstate journey); *United States v. Scisum*, 32 F.3d 1479, 1485 (10th Cir. 1994).

127. 701 So. 2d 1181, 1181 (Fla. Dist. Ct. App. 1997) (“While the general rule is that every crime must include a specific intent, our legislature and courts recognize an exception to the specific intent requirement where the state has a compelling interest in protecting underage persons from being sexually abused or exploited.”).

In 2000, President Clinton signed into law the "Trafficking Victims Protection Act of 2000."¹²⁸ The law establishes harsh penalties for traffickers who trade in human beings and seeks to protect their victims.¹²⁹ Under the Act, the United States offers support to foreign countries for programs that provide assistance to trafficked individuals.¹³⁰ Additionally, the Act states that it is the policy of the United States not to provide non-humanitarian, non-trade-related foreign assistance to any country that does not comply with the minimum standards for the elimination of trafficking and is not making significant efforts to bring itself into compliance with such standards.¹³¹

VI. REALITIES OF PROSTITUTION¹³²

Like much else in our society, prostitution can be divided on economic and racial lines. At the lowest strata, one finds "streetwalkers," women and men openly soliciting sex in exchange of money or drugs on the street.¹³³ As the "most marginalized class of prostitutes," streetwalkers are more likely to be controlled by a pimp and subjected to violence (both at the hands of their pimps and their customers).¹³⁴

The next class of prostitutes includes those in "off-street settings," such as brothels, massage parlors, bars, etc.¹³⁵ Less visible than streetwalkers, these women generally earn more money and are less likely to be subjected to violence; however, they have considerably less discretion than the last and largest group of prostitutes, known as "high-class call girls" or "escorts."¹³⁶ These women tend to come from middle-classed or privileged backgrounds, often achieving higher levels of education.¹³⁷ Unlike streetwalkers, who will often trade sexual favors for drugs, call girls generally exercise more control over their lives and focus on the sex-for-money transaction.¹³⁸

A. RACIAL INEQUALITIES

Although the images of streetwalkers often come to mind when someone mentions the word "prostitute," streetwalkers actually only make up about ten to

128. 22 U.S.C.A. § 7101-7110 (2000) (West, WESTLAW through Dec. 2, 2003).

129. Susan Tiefenbrun, *The Saga of Susannah, A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 114 (2002).

130. 22 U.S.C.A. § 7105(a) (2000) (West, WESTLAW through Dec. 2, 2003).

131. 22 U.S.C.A. § 7107(a)(1)-(2) (2000) (West, WESTLAW through Dec. 2, 2003).

132. Although prostitutes include both women and men, this section will focus on the most common situation of female prostitutes and male customers or "johns."

133. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 528-9, 572 (2000).

134. *Id.* at 529.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*; see also Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 459, 473 (1999).

twenty percent of all prostitutes.¹³⁹ However, they represent eighty-five percent of the women incarcerated for prostitution.¹⁴⁰ Many critics argue that racial prejudice accounts for the fact that most of the women arrested and prosecuted for prostitution are poorer women of color, even though Caucasian call girls from middle-class backgrounds make up the largest group of prostitutes.¹⁴¹

This disparate impact, however, also stems from a desire by other women's activist groups, including minority women's groups, to disassociate themselves from the lives and "plight" of the prostitute. In their article, Beverly Balos and Mary Louise Fellows describe Regina Austin's analysis of the "black community's" fear of losing respectability and subsequent repudiation of black women prostitutes:

The repudiation permits the community to 'proclaim[] the distinctiveness and the worthiness of those [women] who do not engage in such conduct. . . . 'The reality is that the stereotype of the loose black woman, or Jezebel, is so pervasive, black women who consider themselves respectable are especially likely to be inhibited from identifying with black prostitutes.'¹⁴²

B. EQUAL PROTECTION ISSUES AND GENDER INEQUALITY

1. Inequality in the Laws Themselves

While the differences between women prosecuted and incarcerated for prostitution can be seen along racial and economic lines, the line differentiating female and male involvement in prostitution is even more skewed. Up until this century, many states did not consider patronizing a prostitute to be a crime at all. "While the female prostitute is vilified, her clients are seen as men who simply make mistakes, if they are seen at all."¹⁴³ One explanation for this unequal treatment of female prostitutes and male customers stems from the Victorian myth that men could not control their sexual desires, while women's sexuality was nonexistent.¹⁴⁴ For this reason, female sexual deviance signified unlimited criminal potential, while men could not be blamed for acting upon their "irrepressible drives."¹⁴⁵

Now, most states,¹⁴⁶ although not all,¹⁴⁷ impose penalties for patronizing

139. Law, *supra* note 133, at 529.

140. Jacobs, *supra* note 138, at 468; *see also* Law, *supra* note 133, at 529.

141. Law, *supra* note 133 at 529.

142. Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1294 (1999). *See also* Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1773-4, 1793-4 (1992).

143. Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 11 (1999).

144. *Id.* at 14-5.

145. *Id.*

146. *See supra* Part II.B.

prostitutes, however, many of these statutes tend to punish the patron less harshly than the prostitute.¹⁴⁸ For example, the Model Penal Code still classifies prostitution as a misdemeanor, but patronizing as only an infraction.¹⁴⁹ This means that a patron will only be fined, never imprisoned. The explanatory notes for this section of the Model Penal Code state that the underlying rationale and purpose of the provision is the suppression of commercial sex, but it only attempts to address the unequal treatment of customers and prostitutes by referencing “the actor’s place in the business organization of commercialized sex.”¹⁵⁰ However, this explanation ignores the economics of supply and demand. Although prostitutes receive money, and are thus more ingrained in the business organization, their positions there would not exist if it were not for the presence and demand of the johns that come to be serviced.

Realizing the underlying economic principles that exist with regard to prostitution, many states now have laws on the books treating prostitutes and johns more equally. Starting in the 1990s, a few communities began imposing even harsher penalties for men that frequent prostitutes, such as vehicle forfeitures, publicity, revocation of licenses, and required attendance at “johns’ school.”¹⁵¹ However, many in the public view these punishments as excessive, leading to few convictions. Similarly, prostitute activist groups (which will be discussed further below) oppose these new programs, arguing that these laws discourage a certain type of man from seeking out streetwalker—i.e. married men with careers and reputations to protect—while not deterring those already criminally inclined toward prostitutes.¹⁵² These activists feel that by discouraging the former group, women engaged in prostitution will likely be more subjected to violence and disease as they “compete more vigorously for johns and screen less rigorously” those men undeterred by potential penalties.¹⁵³

2. Inequality in the Enforcement of the Laws and Questions of Equal Protection

Although most states’ statutes now include equal punishment for both prostitutes and johns, evidence regarding the enforcement of these laws still shows a significant difference in treatment. At the enforcement level, for

147. KY. REV. STAT. ANN. § 529.020 (Banks-Baldwin, WESTLAW through 2003 Reg. Sess.) (patronizing a prostitute is not a criminal offense under this statute); *see* *Eisner v. Commonwealth*, 375 S.W.2d. 825 (Ky. 1964) (one indulging in sexual intercourse with a prostitute, in the Commonwealth of Kentucky, does not himself commit prostitution and does not become an “accomplice” of the prostitute). *But see* KY. REV. STAT. ANN. § 506.030 (Banks-Baldwin, WESTLAW through 2003 Reg. Sess.) (solicitation of a prostitute is a criminal offense under this statute because the “john” is soliciting the prostitute to commit the crime of prostitution).

148. Lefler, *supra* note 143, at 17.

149. MODEL PENAL CODE § 251.2 (WESTLAW through May 2002 Annual Meeting of American Law Institute).

150. *Id.* (Explanatory Note §§ 251.1-251.4); *see also Id.*, cmt. 2, cmt. 6.

151. Law, *supra* note 133, at 567.

152. *Id.* at 568-9.

153. *Id.* at 569.

example, police officers have wide discretion in determining whether to detain, arrest, or release someone suspected of violating the law.¹⁵⁴ Statistical evidence suggests that gender discrimination at the law enforcement level does occur. In the 2001 Uniform Crime Report published by the FBI, only 32.7% of prostitution-related arrests made in cities nationwide were men, while 67.3% of those arrested were women.¹⁵⁵ This disparity becomes even more startling when one considers that men participate in “prostitution and commercialized vice” as both patrons of prostitutes and prostitutes themselves, while women do not generally patronize prostitutes.¹⁵⁶

Many within the law enforcement community attribute these differences to the fact that police generally use male decoys posing as potential customers, rather than female decoys posing as prostitutes. However, this raises constitutional questions regarding the discriminatory pattern of law enforcement. Some sex workers, for example, have gone as far as to challenge these practices as violations of “constitutional gender equality norms,” but courts have repeatedly refused to find equal protection violations.¹⁵⁷

Others point to the fact that patronizing prostitutes and prostitution itself are different offenses with different elements and evidentiary requirements. However, even a look at the judicial system seems to reveal differential treatment based on gender, not the offense. According to a Boston study, judges dismissed 43% of cases involving male prostitutes, but only 19% of cases for female prostitute.¹⁵⁸ Reasons for this difference have not been provided, and while unknown factors might explain some of the differential treatment, it is likely at least somewhat related to gender.

One reason for the differential enforcement of the law against females, is that women are considered “expendable.” Whereas no one, except maybe her pimp, will miss her, imprisoning or somehow stigmatizing “the average male patron . . . usually involves disrupting a man’s ‘respectable’ employment, standing in the community, and even his marriage.”¹⁵⁹ One of the most poignant examples of this could be seen during the notorious Heidi Fleiss case. Although the “Hollywood Madam” received much media attention, the identities of almost all of her male clients remained anonymous.¹⁶⁰

Due to the present realities and state of the law regarding prostitution,

154. See Lefler, *supra* note 143, at 19.

155. Dep’t of Justice, Federal Bureau of Investigation, Crime in the United States 2001, Uniform Crime Reports, 260 (2001) available at <http://www.fbi.gov/ucr/01cius.htm> (last visited Dec. 2, 2003).

156. Law, *supra* note 133, at 529.

157. *Id.* at 566. See also *People v. Superior Ct.*, 562 P.2d 1315, 1321-22 (Cal. 1977); *State v. Tookes*, 699 P.2d 983, 988 (Haw. 1985); *Young v. State*, 446 N.E.2d 624, 626 (Ind. Ct. App. 1983) (all rejecting equal protection claims of discrimination in law enforcement, although accepting the factual allegations that enforcement efforts were targeted at women that sold, rather than at men that purchased sex for money).

158. See Lefler, *supra* note 143, at 20.

159. Stremler, *supra* note 1, at 194-5.

160. *Id.* at 195.

particularly the unequal treatment of women in the present system, many feminist legal theorists have advocated the legalization or decriminalization of prostitution and prostitution-related activities. However, the underlying motivations and theories behind these legalization/decriminalization movements divide feminists, as well as prostitution rights groups, among serious lines. Part VII of this section will look at the competing feminist theories regarding this issue.

VII. DICHOTOMOUS FEMINIST PERSPECTIVES

Before analyzing the various feminist theories regarding prostitution, it is important to understand the distinction between criminalization, legalization and decriminalization. Criminalization, the current situation within most of the United States, makes all aspect of prostitution and prostitution-related activities illegal. The most likely explanation for the current prohibitions on prostitution is the conservative moral approach,¹⁶¹ which created the basis for most of the laws still on the books today. Based on a belief that society needed protection from women engaged in commercial sex, whom they blamed for the spread of diseases, drug use and other related crimes, legislators passed laws prohibiting all activity related to prostitution.¹⁶² The reasons underlying most states' prohibitions on prostitution today still include concerns for health, safety, economics, ancillary crime prevention and community morals. However, (as will be discussed further below) many feminist legal theorists argue that most of these policy objectives can more readily be achieved through the legalization or decriminalization of prostitution.

Legalization, on the other hand, would allow the government to regulate particular activities regarding prostitution. These regulations could include for example: establishing red-light districts, controlling public solicitation, licensing individual workers, restricting the ability to benefit from the earnings of commercial sex workers, and regulating the places in which commercial sex is practiced.¹⁶³ Decriminalization, however, takes a much more hands off approach, by accepting all forms of an activity, which was previously illegal, as now legitimate. In the present context, decriminalization "refers to elimination of all laws against prostitution, including laws against those who associate with whores: i.e. madams, pimps, and johns."¹⁶⁴

The following sections will compare the two competing feminist theories regarding prostitution. Note, however, that although each views prostitution very differently, both generally advocate either legalization or decriminalization.

161. *See supra* note 4.

162. Stremler, *supra* note 1, at 192.

163. Law, *supra* note 133, at 553.

164. *Id.* Law argues that prostitution rights movements call for the decriminalization of all aspects of prostitution, however, as will be discussed below, this is questionable.

A. PROSTITUTION AS LEGITIMATE WORK AND A SOURCE
OF INDEPENDENCE FOR WOMEN

Feminist legal theorists are not the only advocates of legalizing/decriminalizing prostitution; however, their emphasis focuses more on a woman's self-employment, rather than the general ideas of freedom of contract or individual rights to privacy, often advocated by the "liberal individual approach."¹⁶⁵ This feminist perspective hopes to eliminate societal stereotypes through legalization, by shifting the view of prostitution from an immoral practice to a dignified work, worthy of protection and equality. These groups see prostitution as a means of achieving both economic independence and sexual freedom.

1. Economic Independence

In emphasizing economic independence, supporters focus on real consent, absent any coercion. Although they acknowledge that some women have been coerced into prostitution, they generally view prostitution as a deliberate choice available from a variety of career options.¹⁶⁶ As a means of ensuring that women freely choose prostitution and are not forced by economic necessity, these groups also advocate general pay equity for all work traditionally done by women.¹⁶⁷ COYOTE,¹⁶⁸ one of the leading prostitute's rights organizations, asserts that "most women who work as prostitutes have made a conscious decision to do so, having looked at a number of work alternatives."¹⁶⁹ It goes on to assert that only about 15 percent of prostitutes are coerced.¹⁷⁰ Characterizing prostitutes as liberated women rather than victims,¹⁷¹ feminists advocating prostitution as legitimate work argue that economic independence is usually what attracts women to prostitution in the first place, and that no matter what causes led to prostitution, most of the women remain prostitutes because of job flexibility and high pay.¹⁷² To emphasize this independent choice and notion of work, prostitutes' rights groups often use language such as "sex industry worker," when referring to exotic dancers, pornographers, prostitutes, etc.¹⁷³ These groups use

165. Stremler, *supra* note 1, at 193.

166. Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 78 (1998).

167. Stremler, *supra* note 1, at 197.

168. COYOTE, an acronym for "Call Off Your Old Tired Ethics," began its movement 1973. It advocates the repeal of all laws prohibiting prostitution, pimping, pandering, and patronizing. COYOTE works in conjunction with a variety of national and international sex workers' rights organizations, such as Sex Workers' Action Coalition (SWAC), North American Task Force on Prostitution (NTFP), Hooking is Real Employment (HIRE), and Prostitutes of New York (PONY). See Call Off Your Old Tired Ethics, available at <http://www.walnet.org/csis/groups/coyote.html> (last visited Dec. 2, 2003).

169. Law, *supra* note 133, at 535.

170. *Id.*

171. Bingham, *supra* note 166, at 78.

172. Belinda Cheney, *Prostitution—A Feminist Jurisprudential Perspective*, 18 VICTORIA U. OF WELLINGTON L. REV. 251, 252 (1988).

173. Bingham, *supra* note 166, at 78.

this new label as a form of public education,¹⁷⁴ arguing that the term “prostitute” often “conflates work and identity,”¹⁷⁵ and that “women who sell sex for money typically have other identities, [such as], daughter, mother, athlete, musician, et cetera.”¹⁷⁶

COYOTE and other prostitutes’ right organizations also lobby for the replacement of laws outlawing prostitution with labor laws addressing the working conditions of prostitution businesses.¹⁷⁷ Both COYOTE and the North American Task Force on Prostitution (NTFP) advocate the right of prostitutes and other sex workers to form unions and professional associations, as a way of engaging in collective bargaining with employers to ensure health and safety standards and ethical codes.¹⁷⁸

2. Sexual Freedom

Many feminists favoring the legalization/decriminalization of prostitution as a means of economic independence also emphasize the right of women to explore their own sexuality. Their goal is to begin to eliminate the social stigma associated with commercial sex, by severing sex “from its reproduction function and from romance, affection and long-term relationships.”¹⁷⁹ By bringing sex into the labor market, these advocates are attempting to create a “fresh image of the female body” reorganized from the previous conceptions of a choice only between criminalized or maternalized sex.¹⁸⁰ In advocating this position, the International Committee on Prostitutes’ Rights (ICPR) Charter “affirms the right of all women to determine their own sexual behavior, including commercial exchange, without stigmatization or punishment.”¹⁸¹

B. PROSTITUTION AS VIOLENCE AGAINST WOMEN

Women espousing the “prostitution as violence and exploitation” movement reject the idea that women would freely and independently choose sex work. Unlike the prostitution-as-work theorists who focus on the individual woman and her choice to do what she likes with her own body, the prostitution-as-exploitation movement looks at women as a class.¹⁸² Although they might concede that a woman should have the theoretical right to earn a wage through the sale of her body, these feminists argue that the prostitution-as-

174. *Id.*

175. Law, *supra* note 133, at 525.

176. *Id.*

177. See Call Off Your Old Tired Ethics, *supra* note 168.

178. *Id.* See also North American Task Force on Prostitution, available at <http://www.walnet.org/csis/groups/ntfp> (last visited Dec. 2, 2003).

179. Law, *supra* note 133, at 541.

180. *Id.*

181. *Id.* See also World Charter for Prostitutes’ Rights, available at http://www.walnet.org/csis/groups/icpr_charter.html (last visited Dec. 2, 2003).

182. Bingham, *supra* note 166, at 83.

work theory ignores the realities of violence and coercion that are associated with prostitution.¹⁸³ These feminists fear the objectification of women and perpetuation of patriarchal social structure, arguing “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.”¹⁸⁴

Although these feminists do not advocate the complete decriminalization of prostitution, they do favor legalization and regulation of some activities related to it. Viewing prostitution as “sexual slavery”¹⁸⁵ and “an intractable form of violence against women,” these groups endorse the repeal of all laws criminalizing prostitution itself, but call for the enhancement of criminal penalties for pimps and johns.¹⁸⁶ Even those feminist critics like Catherine MacKinnon that view all forms of commercial sex as forced and therefore illegitimate still oppose laws penalizing women who offer sex for money.¹⁸⁷ Although they do not agree with the ‘patriarchal’ institution of prostitution, they acknowledge that too few prostitutes now receive legal protection or access to justice, as a result of “discrimination, fear of prosecution, and physical coercion.”¹⁸⁸ In this context, they see legalization as a way to protect prostitutes from both violence and disease.

In order to achieve political and societal change, these feminist theorists along with groups like WHISPER,¹⁸⁹ attempt to place prostitution on the continuum of violence against women, along with domestic violence, sexual abuse, rape, etc., to “invoke the discourse of the ‘worthy victim.’”¹⁹⁰ By presenting prostitutes as victims, these groups hope to change societal norms by promoting an understanding of the realities, which force some women into prostitution.¹⁹¹ Rather than prosecuting those “persons used in prostitution,” they advocate harsher criminal penalties for those who “purchase sex, procure others for use in prostitution, or knowingly derive financial benefit from the proceeds of a person used in prostitution.”¹⁹² Proponents of the prostitution-as-exploitation theory argue that

183. Jacobs, *supra* note 138, at 466-7.

184. Stremler, *supra* note 1, at 196. See also Catherine A. MacKinnon, *Feminism Unmodified* 5, 64 (1987).

185. Bingham, *supra* note 166, at 82.

186. Balos, *supra* note 142, at 1292. See also Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth"*, 4 COLUM. J. GENDER & L. 26, 48 (1994).

187. Law, *supra* note 133, at 536. See also Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 20 (1993).

188. Stremler, *supra* note 1, at 199.

189. WHISPER (Women Hurt In Systems of Prostitution Engaged in Revolt), a grassroots organization based in Minnesota that rejects “the lie that women freely choose prostitution,” and assert that “[p]rostitution is founded on enforced sexual abuse under a system of male supremacy that is itself built along a continuum of coercion.” Law, *supra* note 133, at 534 n.59.

190. Balos, *supra* note 142, at 1292.

191. Stremler, *supra* note 1, at 197.

192. Balos, *supra* note 142, at 1296 (emphasis added).

all women participating in prostitution are coerced because their ability to consent is “always socially constrained,” and that women who feel prostitution is good are really just suffering from a false consciousness and misleading themselves.¹⁹³ Supporters of the prostitution-as-work perspective, however, criticize this assertion as patronizing and close-minded.¹⁹⁴

It is in these different ideas and policy initiatives where one sees the divergent goals and theories underlying groups such as WHISPER and COYOTE. Although WHISPER’s two main legislative reform priorities, the creation of civil causes of action for individuals coerced into prostitution and the elimination of “mistake of age” defenses, are supported by most prostitutes’ rights groups (including COYOTE), its other policy initiatives have sparked heated debate.¹⁹⁵ WHISPER, for example, applauds and lobbies for the imposition of harsher penalties against johns, while COYOTE fears that these penalties will unduly endanger prostitutes by only keeping criminally inclined customers on the streets. Similarly, WHISPER advocates stronger penalties for pimping, particularly laws making it a crime to live “off the earnings of prostitution.”¹⁹⁶ COYOTE, on the other hand, argues that many women choose prostitution precisely because of the financial support it can give their children, parents, friends, etc. Although these laws are meant to protect against violent and coercive pimps, their broad wording can make children or parents (i.e. any person deriving financial benefit from the commercial sex transaction) a criminal.¹⁹⁷

VIII. THE UNUSUAL STATE OF NEVADA AND ITS LEGALIZATION SCHEME

A. BRIEF HISTORY

Known for its wild casinos and crazy nightlife, Nevada is currently the only state in the United States that has legalized and regulated prostitution.¹⁹⁸ However, this general tolerance stems more from a sense of tradition than any new-found libertarianism.¹⁹⁹ As one of the frontier states during the Gold Rush of the mid-1800s, Nevada and its population grew rapidly.²⁰⁰ This new population, included prostitutes that established brothels and bordellos around mining camps, railroads and developing cattle towns.²⁰¹ Although prostitution existed and

193. Bingham, *supra* note 166, at 83.

194. *Id.*

195. Balos, *supra* note 142, at 1222 n.9.

196. Law, *supra* note 133, at 571.

197. *Id.* at 571-2.

198. *See supra* note 2.

199. Bingham, *supra* note 166, at 85 (quoting Helen Reynolds, *The Economics of Prostitution*, 98 (1986)).

200. Susan E. Thompson, *Prostitution—A Choice Ignored*, 21 WOMEN’S RTS. L. REP. 217, 223 (2000).

201. Bingham, *supra* note 166, at 85.

flourished at this time, the end of the Gold Rush would eventually also signify the beginning of hostilities towards brothels and prostitution in general. During the turn of the century, federal and state governments began instituting criminal sanctions and statutes prohibiting prostitution, and by 1925 every state had passed some sort of measure outlawing the practice.²⁰²

After World War II, regulation again returned to the local entities, and with that, Nevada brothels again began to open. These new brothels did not go unregulated, however. To maintain “public morals,” for example, the Nevada legislature passed a statute limiting the location of “houses of ill fame” by prohibiting brothels within 400 yards of schools, churches or other religious buildings.²⁰³ By the late 1940s even these regulations were not enough, and the strong casino-lobby began to fear that prostitution, which was often equated with organized crime and violence, would hinder tourism²⁰⁴ or bring about federal regulation of the newly legalized gambling industry. To avoid this, the lobby advocated the closure of all brothels, relying on the common law that characterized houses of prostitution as per se public nuisances.²⁰⁵ Following these closures, courts repeatedly rejected appeals by former madams and brothel owners arguing that the Nevada statutes had replaced the common law. The courts maintained that a county had the right to close a brothel as a public nuisance, if it was found to be “injurious to health, or indecent and offensive to the sense.”²⁰⁶

Wanting to create a “family friendly” and respectable image, the casino owners of Las Vegas eventually lobbied for new legislation that would eliminate all possibilities of brothels nearby. In 1971 they succeeded in amending the Nevada law regulating casinos and dance halls to prohibit counties with populations of 250,000 or more residents from granting licenses

202. Jessica Drexler, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L. L. 201, 204-205 (1996).

203. NEV. REV. STAT. ANN. 201.380 (WESTLAW through 2002 18th Spec. Sess.)

Pertinent section states:

- (1) It shall be unlawful for any owner, or agent of any owner, or any other person to keep any house of ill fame, or to let or rent to any person whatever, for any length of time whatever, to be kept or used as a house of ill fame, or resort for the purposes of prostitution, any house, room or structure situated within 400 yards of any schoolhouse or schoolroom used by any public or common school in the State of Nevada, or within 400 yards of any church, edifice, building or structure erected for and used for devotional services or religious worship in this state.

204. Drexler, *supra* note 202, at 224.

205. *See* *Cunningham v. Washoe County*, 203 P.2d 611, 613 (Nev. 1949) (Mae Cunningham, a Reno madam, was enjoined from using her premises as a house of prostitution).

206. *Id.* at 613. (court rejected Cunningham's argument that Nevada's statute prohibiting the location of brothels within 400 yards of a school or church repudiated the common law prohibition on houses of prostitution, thus making them lawful, when conducted in a manner not forbidden by the law and not located near a school or a church).

to petitioners “for the purpose of operating a house of ill fame or repute or any other business employing any person for the purpose of prostitution.”²⁰⁷ Interestingly, this law was subsequently interpreted as allowing the operation of licensed brothels in the less populated counties of the state.²⁰⁸ In 1978, the Supreme Court of Nevada confirmed this interpretation, finding that Nevada’s statutes had created a licensing and regulatory scheme that did implicate the repeal of the common law rule that a house of prostitution constituted a nuisance *per se*.²⁰⁹

B. NEVADA’S CURRENT STATUTORY SCHEME

Because the counties are given complete control in deciding whether or not to allow brothel prostitution within their borders, the ordinances concerning brothels are quite varied.²¹⁰ Of the state’s seventeen counties, the four largest (Carson City, Clark, Douglas, and Lincoln)²¹¹ ban prostitution completely, while six ban it only in unincorporated areas of the county (Elko, Eureka, Humboldt, Pershing, Washoe, and White Pine),²¹² and seven (Churchill, Esmeralda, Lander, Lyon, Mineral, Nye, and Storey)²¹³ permit prostitution throughout the whole

207. NEV. REV. STAT. ANN. 244.345 (Michie, WESTLAW through 2002 18th Spec. Sess.) (the population limit was amended from 250,000 to 400,000).

208. Law, *supra* note 133, at 559.

209. *Nye County v. Plankinton*, 587 P.2d 421, 423 (Nev. 1978) (court invalidated the County Commission abatement order that categorized the “Chicken Ranch” brothel a *per se* nuisance); *see also* *Kuban v. McGimsey*, 605 P.2d 623, 625-26, 627 (Nev. 1980) (county prohibition on prostitution did not violate due process or constitute a taking; although the court was upholding a county ordinance prohibiting prostitution, it reiterated that the right to decide whether to grant licenses for brothels was up to the county).

210. Bingham, *supra* note 166, at 88.

211. County ordinances prohibiting prostitution are: CARSON CITY, NEV., CARSON CITY CODE ch. 8, § 8.04.110 (1980); CLARK COUNTY, NEV., CLARK COUNTY CODE; ch. 6.140, § 6.140.150 (1992), ch. 7.54, § 7.54.160 (1994), ch.8.50, § 8.50.010 (1992), ch. 12.08, § 12.08.015 (1996)); DOUGLAS COUNTY, NEV., DOUGLAS COUNTY CODE ch. 9.20, § 9.20.010-9.20.050 (1996); and LINCOLN COUNTY, NEV., LINCOLN COUNTY CODE ch. 9.08, § 9.08.010 (1991). Bingham, *supra* note 166, at 88 n.122.

212. County ordinances prohibiting prostitution in unincorporated areas of the county are: ELKO COUNTY, NEV., ELKO COUNTY CODE ch. 7, § 7-1-6 (1994); EUREKA COUNTY, NEV., EUREKA COUNTY CODE ch. 9.16, § 9.16.010 (1988); HUMBOLDT COUNTY, NEV., HUMBOLDT COUNTY CODE ch. 5.08, § 5.08.030 (1994); PERSHING COUNTY, NEV., PERSHING COUNTY ORDINANCE 53 (1972); WASHOE COUNTY, NEV., WASHOE COUNTY CODE 50.238-50.242 (1995); and WHITE PINE COUNTY, NEV., WHITE PINE COUNTY ORDINANCE 106 (1980) (amending the code by adding a new chapter, ch. 10.28, on prostitution). *But see* HUMBOLDT COUNTY CODE ch. 17.30 (General Commercial District) & ch. 17.68 (Conditional Use Permits). Bingham, *supra* note 166, at 88 n.123.

213. County ordinances permitting prostitution in the county are: CHURCHILL COUNTY, NEV., CHURCHILL COUNTY CODE ch. 5.20, § 5.20.010-5.20.280 (1997); *see also* CHURCHILL COUNTY ORDINANCE 34 (1978) and (1974); ESMERALDA COUNTY, NEV., ESMERALDA COUNTY ORDINANCE 124 (1972); LANDER COUNTY, NEV., LANDER COUNTY CODE ch. 5.16, § 5.16.010-5.16.140 (1994); LYON COUNTY, NEV., LYON COUNTY CODE ch. 3, § 5.03.01- 5.03.17 (1992); MINERAL COUNTY, NEV., MINERAL COUNTY CODE ch. 5.12, § 5.12.010- 5.12.500 (1980); NYE COUNTY, NYE COUNTY CODE ch. 9.20, § 9.20.010-9.20.290; *see also* NYE COUNTY ORDINANCES 157 (1994), 175 (1995), 183 (1996), and 187 (1995) (amending the Nye County Code ch. 9.20); and STOREY COUNTY,

jurisdiction.²¹⁴ Because most of the regulations take place at the county level, the Board of County Commissioners and local sheriffs controlling unincorporated parts of counties have large discretion in granting or revoking licenses.²¹⁵ With this decentralization come many variations in language and enforcement of the ordinances throughout the different counties. For example, Nye County has the only code that mentions male prostitutes, while two other counties, Mineral and Churchill, specifically prohibit male brothel employees, unless used for maintenance or repair work.²¹⁶ Even while allowing counties to license brothels, Nevada's state regulations still try to preserve the state objectives of morals, health and safety.

1. Preservation of Morals

Even under Nevada's legalization scheme, an element of morality is still infused within the statutes. Using terms such as "house of ill fame or repute," the Nevada legislature enacted laws regulating the licensing, location and advertising of brothels. To protect the general public from exposure to the brothels, regulations were passed prohibiting the location of any brothel within 400 yards of a school or religious organization.²¹⁷ Similarly, statutes prohibiting house of prostitution on "principal business street[s] and thoroughfares," also helped lessen the visibility of the brothels.²¹⁸ Realizing that proscriptions on the locations of brothels would not alone eliminate exposure of the public, particularly children, to the brothels, the legislature also enacted statutes making it unlawful to advertise the names or locations of houses of prostitution in any public area.²¹⁹ The Supreme Court of Nevada upheld the constitutionality of these advertising restrictions, stating that the legislative enactments did not contravene First Amendment principles protecting commercial speech as established by the United States Supreme

NEV., STOREY COUNTY CODE ch. 5.16, § 5.16.010-5.16.200 (1991). Bingham, *supra* note 166, at 88 n.124.

214. Bingham, *supra* note 166, at 88; *see also* Thompson, *supra* note 200, at 242.

215. *Id.* at 89.

216. *Id.* 88-89.

217. NEV. REV. STAT. ANN. 201.380 (WESTLAW through 2002 18th Spec. Sess.).

218. NEV. REV. STAT. ANN. 201.390 (WESTLAW through 2002 18th Spec. Sess.).

Pertinent sections state:

- (1) It is unlawful for any owner or agent of any owner or any other person to keep, let or rent for any length of time, or at all, any house fronting on the principal business street or thoroughfare of any of the towns of this state, for the purpose of prostitution or to make or use any entrance or exit way to any house of prostitution from the principal business street or thoroughfare of any of the towns of this state.
- (2) Any person violating the provisions of subsection 1 shall be punished by a fine of not more than \$500.

219. NEV. REV. STAT. ANN. 201.430 (WESTLAW through 2002 18th Spec. Sess.)

Pertinent sections state:

Court.²²⁰

2. Health and Safety Concerns

Although individual counties may decide whether to permit brothels within their jurisdictions, prostitution outside of a licensed house of prostitution still remains illegal throughout the state.²²¹ It is with this backdrop that the Nevada legislature also enacted statutes to protect women and minors from forced prostitution. To better ensure that the decision of adult women entering into brothel prostitution is freely chosen, the state passed laws prohibiting pimping and pandering.²²² More importantly, however, is the statutory language imposing harsher penalties for pandering offenses involving minors or the use or perceived threat of violence (whether on adults or minors).²²³

Apart from protecting women and minors from possible violence, the state's largest objective in legalizing prostitution centers on preventing the

- (1) It is unlawful for any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise the unlawful conduct or any house of prostitution:
 - (a) In any public theater, on the public streets of any city or town, or on any public highway; or
 - (b) In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.
- (2) It is unlawful for any person knowingly to prepare or print an advertisement concerning a house of prostitution not licensed for that purpose pursuant to NRS 244.345, or conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, in any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.
- (3) Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

220. *Princess Sea Indus., Inc. v. Clark County*, 635 P.2d. 281, 283 (Nev. 1981) (Supreme Court of Nevada dismissed the First Amendment claims brought by a Nye County brothel owner and two newspaper publishers challenging the constitutionality of the advertisement restrictions).

221. NEV. REV. STAT. ANN. 201.354 (WESTLAW through 2002 18th Spec. Sess.).
Pertinent sections state:

- (1) It is unlawful for any person to engage in prostitution or solicitation therefore, except in a licensed house of prostitution.
- (2) Any person who violates subsection 1 is guilty of a misdemeanor.

222. NEV. REV. STAT. ANN. 201.300-201.400 (Michie, WESTLAW through 2002 18th Spec. Sess.). NEV. REV. STAT. ANN. 201.330 (WESTLAW through 2002 18th Spec. Sess.), for example, states that a person shall be guilty of pander if that person "attempts to detain another person in a disorderly house or house of prostitution because of any debt or debts the other person has contracted or is said to have contracted while living in the house."

223. See Nev. Rev. Stat. Ann. 201.360 (WESTLAW through 2002 18th Spec. Sess.); Nev. Rev. Stat. Ann. 609.210 (WESTLAW through 2002 18th Spec. Sess.); Nev. Rev. Stat. Ann. 201.300 (WESTLAW through 2002 18th Spec. Sess.).

spread of sexually transmitted diseases, especially HIV and AIDS.²²⁴ Easily the most regulated area of prostitution, health issues are found in most of the statutes pertaining to the general licensing scheme. For example, anyone seeking employment as a prostitute in a licensed brothel must submit to medical exams, which include tests for HIV, syphilis, gonorrhea and chlamydia.²²⁵ Once employed, licensed prostitutes must also agree to submit to monthly HIV and syphilis tests as well as weekly exams for gonorrhea and Chlamydia.²²⁶ The Nevada Administrative Code even regulates the sexual act itself, by requiring licensed prostitutes to insist that their patrons use condoms while engaged in sexual intercourse or contact.²²⁷

Although most of the regulations focus on the prostitute, brothel owners and management must also comply with codes aimed at preventing the spread of STDs. Brothel owners, for example, must post health notices,²²⁸ as well as

224. Thompson, *supra* note 200, at 242.

225. NEV. ADMIN. CODE ch. 441A § 800 (WESTLAW through 2003-2004 Supp.).

Pertinent sections state:

- (1) A person seeking employment as a prostitute in a licensed house of prostitution shall submit to the state hygienic laboratory in the division or a medical laboratory licensed pursuant to chapter 652 NRS and certified by the Health Care Financing Administration of the Department of Health and Human Services:
 - (a) A sample of blood for a test to confirm the presence or absence of human immunodeficiency virus infection (HIV) and syphilis; and
 - (b) A cervical specimen for a test to confirm the presence or absence of gonorrhea and Chlamydia trachomatis by culture or antigen detection or DNA probe.

226. NEV. ADMIN. CODE ch. 441A § 800 (WESTLAW through 2003-2004 Supp.).

Pertinent sections state:

- (3) A person employed as a prostitute in a licensed house of prostitution shall submit to the state hygienic laboratory in the division or a medical laboratory licensed pursuant to chapter 652 NRS and certified by the Health Care Financing Administration of the Department of Health and Human Services:
 - (a) Once each month, a sample of blood, identified by the name of the prostitute as it appears on her local work permit card, for a test to confirm the presence or absence of:
 1. Infection with the human immunodeficiency virus (HIV); and
 2. Syphilis.
 - (b) Once each week, a cervical specimen, identified by the name of the prostitute as it appears on her local work permit card, for a test to confirm the presence or absence of gonorrhea and Chlamydia trachomatis by culture or antigen detection or DNA probe.

227. NEV. ADMIN. CODE ch. 441A § 805 (WESTLAW through 2003-2004 Supp.).

Pertinent section states:

A person employed as a prostitute in a licensed house of prostitution shall require each patron to wear and use a latex prophylactic while engaging in sexual intercourse, oral-genital contact, or any touching of the sexual organs or other intimate parts of a person.

228. NEV. ADMIN. CODE ch. 441A § 810 (WESTLAW through 2003-2004 Supp.).

Pertinent section states:

The person in charge of a licensed house of prostitution shall post a health notice provided by the division. The costs and mounting of the notice is the responsibility of the house of

report any incidence or suspicion of a communicable disease within the brothel to health authorities in the jurisdiction.²²⁹ To strengthen compliance with these notice and reporting requirements, the state passed a statute allowing civil torts claims against brothel owners by patrons exposed to HIV.²³⁰ This statute provides in pertinent part that any owner who “employs or continues to employ a prostitute after he knows or should know that the prostitute has tested positive . . . for exposure to [HIV], is liable for any damages caused to a person exposed to the virus as a result of the employment.”²³¹

Since the enactment of these regulations, particularly the mandatory condom and health notice codes, the rate of infection of legal prostitutes in Nevada from AIDS and other STDs has been zero.²³² Although these laws have been successful in preventing the spread of HIV and AIDS, other regulations have sparked criticism that the government might be overstepping its bounds. The most controversial of these statutes requires that any person arrested for illegal prostitution (prostitution outside of a licensed brothel) submit to mandatory HIV testing.²³³ Opponents of the statute assert that mandatory testing upon arrest, as compared to conviction, violates both the constitutional protections against unreasonable searches and seizures, as well as the right to privacy. The Nevada State Attorney General also voiced concern about whether a magistrate judge would have the authority to order such blood tests.²³⁴ The state has defended its test-upon-arrest policy, stating that it is necessary in applying other statutes, such as the one imposing class B felony sentences for individuals convicted for engaged in prostitution after testing positive for HIV or AIDS.²³⁵ Compared to the misdemeanor sentence of the regular prostitution statute, this statute is much harsher, requiring a minimum of two years in prison, a fine of not more than \$10,000

prostitution. The notice must be posted in a prominent location, which is readily noticeable by patrons of the establishment and is approved by the division.

229. NEV. ADMIN. CODE ch.441A § 815 (WESTLAW through 2003-2004 Supp.).

Pertinent sections state:

- (1) The person in charge of a licensed house of prostitution who knows of or suspects the presence of a communicable disease within the house of prostitution shall report the disease to a health authority having jurisdiction where the house of prostitution is located.
- (2) A report of a communicable disease must be made to the health authority in accordance with the provisions set forth in NAC 441A.225.

230. NEV. REV. STAT. ANN. 41.1397 (Michie, WESTLAW through 2002 18th Spec. Sess.).

231. *Id.*

232. Thompson, *supra* note 200, at 242 (“Of the 41,000 tests taken of 350 legal prostitutes, only one returned positive, and that was later found to be negative.”).

233. NEV. REV. STAT. ANN. 201.356 (Michie, WESTLAW through 2002 18th Spec. Sess.).

234. Op. Att’y Gen. No. 93-15 (June 24, 1993).

235. NEV. REV. STAT. ANN. 201.358 (Michie, WESTLAW through 2002 18th Spec. Sess.).

Pertinent sections state:

or both.²³⁶

C. THE NEVADA MODEL WITHIN THE FEMINIST DEBATE

Feminist theorists on both sides of the debate, while acknowledging the success in preventing the spread of disease, criticize the Nevada legalization scheme as serving “the interests of men, of brothel keepers, and of tax collectors . . . while imposing heavy, and seemingly unjustified burdens on working women.”²³⁷ They question the effectiveness of these regulations, pointing to the fact that illegal prostitutes in the large cities of Las Vegas and Reno (where all forms of prostitution are prohibited) still outnumber the legal prostitutes working in brothels throughout the rest of the state.²³⁸ Their strongest criticisms, however, focus on what they perceive as a loss of independence faced by the women within the brothel system and the inherent patriarchy of the labor relationship.

The first issue of much criticism involves institutionalization of brothel-prostitution. Unlike decriminalization that would permit all forms of prostitution, the Nevada system only allows and protects prostitution within a licensed brothel. This policy initiative in and of itself eliminates the option of women to work on their own where they would keep their earnings rather than share them with a brothel’s management. Many view this institutionalization of brothels as a redefinition of the “pimp-prostitute” relationship, replacing individual pimps with a limited number of brothel owners directly linked to the government.²³⁹ These critics go as far as to say that the government is now the pimp, controlling “with whom, when, and where the prostitute engages in prostitution through a rigid series of time, place, and manner restrictions.”²⁴⁰

Once a prostitute is licensed, she is subject to state and county regulations, as well as brothel “house rules” that all involve the surrender of certain rights. In many counties, for example, women cannot “have their children live in the community in which they work, they cannot drive a car in the city limits, and they

-
- (1) A person who:
 - (a) Violates NRS 201.354; or
 - (b) Works as a prostitute in a licensed house of prostitution, after testing positive in a test approved by the state board of health for exposure to the human immunodeficiency virus and receiving notice of that fact is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment
 - (2) As used in this section, “notice” means:
 - (a) Actual notice; or
 - (b) Notice received pursuant to NRS 201.356.

236. *Id.*

237. Law, *supra* note 133, at 562.

238. Bingham, *supra* note 166, at 93.

239. Bingham, *supra* note 166, at 93.

240. Thompson, *supra* note 200, at 243.

must be off the streets by 5 p.m.”²⁴¹ Apart from these restrictions, a brothel prostitute has little to no options in choosing her clients or work hours.²⁴² A typical working shift for a brothel prostitute involves twelve to fourteen hour days, every day for three weeks straight.²⁴³

Even faced with these restrictions on liberty, many women still choose to enter into the brothel system because of the possibility of substantial income. However, once a prostitute has finished paying expenses, such as room and board, maid services, condoms, mandatory tipping of employees, and the weekly venereal disease checkups, she nets only about fifty percent of her gross earnings.²⁴⁴ As a result, many women rather risk violence and arrest in illegal prostitution than surrender many of their rights and half of their income.²⁴⁵ Similarly, many prostitutes do not want to incur further stigmatization by going public as a prostitute through the licensing process.²⁴⁶ Critics of this licensing scheme assert that even if “prostitutes are no longer stigmatized as criminals,” they still suffer stigmatization as “bad girls.”²⁴⁷ These critics emphasize the disparate treatment of prostitutes and customers, arguing that, unlike the prostitutes that must first obtain public licenses, patrons “do not face registration or risk friends and family finding out about their activities.”²⁴⁸

The last major criticism made by feminists involves the labor classifications of women within the brothel system. Presently, prostitutes within the brothels are considered independent contractors rather than employees. This classification has a significant impact on benefits and social safety nets that a prostitute would enjoy if categorized as an employee. Since prostitutes are regarded as independent contractors, brothel owners are not required to, and thus do not, provide health insurance, workers’ compensation, unemployment insurance, vacation pay, sick leave or retirement benefits.²⁴⁹

CONCLUSION

Although some variations exist, the present state of prostitution law within the United States criminalizes prostitution, as well as activities related to it, such as solicitation, pimping, and pandering. Both state and federal statutes and accompanying cases are aimed at eliminating prostitution, and most particularly

241. Law, *supra* note 133, at 560 (quoting Ellen Pillard, *Rethinking Prostitution: A Case for Uniform Regulation*, 1 NEV. PUB. AFF. REV. 45, 47 (1991))

242. Thompson, *supra* note 200, at 243.

243. Bingham, *supra* note 166, at 94.

244. *Id.*

245. *Id.*

246. *Id.*

247. Thompson, *supra* note 200, at 243.

248. *Id.* at 243-4.

249. Law, *supra* note 133, at 561. See also Carrie Benson Fischer, *Employee Rights in Sex Work: The Struggle for Dancers’ Rights as Employees*, 14 LAW & INEQ. 521, 523 (1996) (discussing the related issue of labor classifications of exotic dancers).

coerced prostitution of minors. Even in Nevada, the only state to allow and regulate brothel-prostitution, statutes still try to eliminate street prostitution, viewing it as a catalyst for violence and drugs in an area. Although the statutes on the books criminalizing prostitution and prostitution-related activities now generally disregard the gender of participants, the disparate impact in enforcement and prosecution of the laws, along gender lines, still worry many critics that advocate legalization or decriminalization. However, even among these critics, there exists much dichotomy regarding the structure and, more importantly, the underlying goals of any legalization regime. The unique brothel-system of Nevada, for example, still raises important concerns regarding stigmatization and losses of power and autonomy.